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# STANDARD ENCYCLOPÆDIA *of* PROCEDURE

---

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SUPERVISING EDITOR

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VOL. XV

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By the Editorial Staff.

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## XI. FORM AND SUFFICIENCY.<sup>1</sup>—A. WHAT LAW GOVERNS.

The form and sufficiency of a judgment are governed entirely by the law of the jurisdiction rendering the same.<sup>2</sup> If sufficient there, it is sufficient in any court, even though it would be insufficient if rendered in the court where it is offered.<sup>3</sup>

B. FORMAL REQUISITES.—1. In General.—Unless prescribed by statute, no particular form of words is necessary to a valid judgment,<sup>4</sup> though it is necessary such words be used as to show that a judicial determination has been made and entered.<sup>5</sup> Especially is

1. Form and sufficiency of judgments by confession, see 14 STANDARD PROC. 811, 834; of judgments by default, see 14 STANDARD PROC. 900, et seq.; of judgments by consent, see 14 STANDARD PROC. 919; of judgments on the pleadings, see 14 STANDARD PROC. 957; of judgments in particular actions or proceedings, see the specific titles throughout this work.

2. U. S.—Cline v. Southern Ry. Co., 231 Fed. 238; Woodbridge, etc. Engineering Co. v. Ritter, 70 Fed. 677. Ill. McMillan v. Lovejoy, 115 Ill. 498, 4 N. E. 772; Kimmel v. Shultz, 1 Ill. 169; Kopperl v. Nagy, 37 Ill. App. 23. Ia. Taylor v. Runyon, 3 Iowa 474. S. C. Morrow v. Atlanta, etc. R. Co., 84 S. C. 224, 66 S. E. 186.

[a] Where it is manifest from the record that technicalities in forms of action have been abolished in the state rendering the judgment, the judgment will be treated as the courts of the state rendering it would treat it. Griffin v. Eaton, 27 Ill. 379.

[b] The form of a judgment record is regulated by the practice of the court in which it was rendered. Cline v. Diamond (Ga. App.), 87 S. E. 1101.

[c] Law and Practice of State Rendering May Be Shown.—Where the record does not conform to what would be necessary for a judgment in the state where the issue is raised, the laws and practice of the state in which it was rendered may be introduced to show its sufficiency. Taylor v. Runyon, 3 Iowa 474.

3. U. S.—Woodbridge, etc. Engineering Co. v. Ritter, 70 Fed. 677. Ga. Cline v. Diamond (Ga. App.), 87 S. E. 1101. Ill.—Schertz v. Chester First Nat. Bank, 47 Ill. App. 124.

4. Cal.—McGarrahan v. Maxwell, 28 Cal. 75, 85. Ill.—Guild v. Hall, 91 Ill. 223; Johnson v. Gillett, 52 Ill. 358; Wells v. Hogan, 1 Ill. 337; Tisdale v.

Davis, etc. Mfg. Co., 182 Ill. App. 31; Hastings Co. v. Gray Dental Co., 108 Ill. App. 98; Kopperl v. Nagy, 37 Ill. App. 23; Schemerhorn v. Mitchell, 15 Ill. App. 418. Ia.—Church v. Crossman, 41 Iowa 373; Barrett v. Garragan, 16 Iowa 47; Taylor, etc. Co. v. Runyon, 3 Iowa 474, 480.

[a] "In 1 Black on Judgments, sec. 115, after discussing the form of a judgment the author says: 'It may, therefore, be stated as the modern rule that the form of the judgment is not material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated. In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.' " Newberry v. Dutton, 114 Va. 95, 75 S. E. 785.

[b] Litigants are not entitled to any particular form of a judgment order other than that which suffices to express the judgment of the court. Tisdale v. Davis, etc. Mfg. Co., 182 Ill. App. 31.

[c] A judgment will not be reversed because of the use of untechnical or inappropriate words. Minkhart v. Hankler, 19 Ill. 47.

Language of judgment, see *infra*, XI, B, 2.

5. Taylor, etc. Co. v. Runyon, 3 Iowa 474, 480; Dean v. Williams, 1 Chand. (Wis.) 22.

As to rendition and entry, see 14 STANDARD PROC. 971, et seq.

[a] Memorandum Is Not a Judgment.—The record returned by the clerk should be in due legal form, and not mere memorandums or minutes of the clerk. Wheeler v. Scott, 3 Wis. 362.

strict formality not essential to the validity of judgments of courts of inferior jurisdiction.<sup>6</sup>

**Importance and Necessity of Writing.** — Whatever is of sufficient importance to be the subject of judicial investigation is of sufficient importance when judicially determined, to have the decision preserved in some permanent and appropriate memorial. Hence all courts possessed of judicial functions are required to reduce their decisions to writing in some book or record kept for that purpose;<sup>7</sup> they are not to be entrusted to the memory of the officers of the court. This rule is universal.<sup>8</sup>

**2. Language.** — The language of a judgment usually is, "it is considered by the court that the plaintiff have and recover,"<sup>9</sup> or "that the defendant go hence without day,"<sup>10</sup> or that "the plaintiff take

6. *State ex rel. Attorney General v. Hasty* (Ala.), 63 So. 559. See also *Kimball v. Riter*, 25 Ill. 249, and generally the title "Justices of the Peace."

7. **U. S.** — *Boker v. Bronson*, 5 Blatchf. 5, 3 Fed. Cas. No. 1,606. **Conn.** *Davidson v. Murphy*, 13 Conn. 213. **Ia.** *Balm v. Nunn*, 63 Iowa 641, 19 N. W. 810. **N. Y.** — *Meeker v. Van Rensselaer*, 15 Wend. 397. **Ohio.** — *Willy v. Lewis*, 6 Ohio Dec. 242. **Tenn.** — *Jones v. Walker*, 5 Yerg. 427.

See generally the statutes.

[a] **An opinion (1) orally expressed** in a case not tried by a jury does not constitute a judgment and is subject to change or modification until it has become a written order of the court. *Judson v. Gage*, 98 Fed. 540, 39 C. C. A. 156. (2) Where the court at the end of a trial announced orally that it would make certain provisions in its decision and judgment and failed to insert such provisions the failure does not affect the correctness or validity of the judgment rendered. *Gates v. Green*, 151 Cal. 65, 90 Pac. 189.

[b] **Memorandum of Judge Not a Judgment.** — A memorandum on the minute book of the judge to the effect that an award of arbitrators in a certain sum is approved and accepted does not constitute a judgment. *Gage v. Judson*, 92 Fed. 545.

As to judgment records, see the title "Judgment Records."

8. **"A court speaks only by its record, memory may fail but the record remains."** *Skinner v. Sinsheimer*, 37 Ill. App. 467.

9. **Ala.** — *Bell v. Otts*, 101 Ala. 186, 13 So. 43. **Ark.** — *Baker v. State*, 3 Ark. 491. **Ill.** — *The People v. Sever-*

*son*, 113 Ill. App. 496. **Ind.** — *Needham v. Gillespy*, 49 Ind. 245. **Ia.** — *Taylor, etc. Co. v. Runyon*, 3 Iowa 474. **N. Y.** *Salsberg v. Tobias*, 84 N. Y. Supp. 151. **Wis.** — *Eaton v. Woydt*, 26 Wis. 383.

[a] "In 3 Bouvier's Institutes, par. 3298, it is said: 'The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but "it is considered" (consideratum est per curiam), that the plaintiff recover his debt, . . . or that the defendant do go quit. This implies that the judgment is not so much the decision of the court, as the sentence of the law, pronounced and decreed by the court, after due deliberation and inquiry.'" *Needham v. Gillespy*, 49 Ind. 245.

[b] The word "recover" should be used (*Needham v. Gillespy*, 49 Ind. 245. And see *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342, wherein the court said that "where a money judgment is rendered the word 'recover' is the most appropriate, and should be used.") The judgment is not invalid, however, because it does not say that the party should recover. *Bradley v. Clark*, 3 Day (Conn.) 502.

10. **Ala.** — *Bell v. Otts*, 101 Ala. 186, 13 So. 43. **Ill.** — *Olson v. Whiffen*, 175 Ill. App. 182; *People v. Severson*, 113 Ill. App. 496. **Mo.** — *Rogers v. Gosnell*, 51 Mo. 466; *Bogges v. Cox*, 48 Mo. 278; *Jones v. Hoppie*, 9 Mo. 173; *Lisle v. Rhea*, 9 Mo. 172. **Neb.** — *Sprick v. Washington County*, 3 Neb. 253.

[a] "The form of a final judgment for the defendant, whether upon verdict or upon demurrer to the declaration or replication, is, 'Therefore it is considered that the said (plaintiff) take nothing by his suit and that

nothing by his writ."<sup>11</sup> But strict formality in the language of a judgment is not essential.<sup>12</sup> If the language used shows that it expresses the determination of the court it will be sufficient in substance as a judgment.<sup>13</sup> Accordingly, equivalent expressions may be used without invalidating the judgment.<sup>14</sup> It is immaterial that in entering

the said (defendant) do go thereof without day." *People v. Severson*, 113 Ill. App. 496; *Spriek v. Washington County*, 3 Neb. 253.

[b] "The omission to insert in the judgment that the defendant go without day, or words to that effect, does not affect the substantial rights of the plaintiff, and must, therefore, be disregarded." *The Aetna Ins. Co. v. Swift*, 12 Minn. 437.

[c] Where a demurrer to a plaintiff's evidence is sustained and thereafter a judgment rendered in favor of the defendant for costs of action it will be deemed a final judgment even though the entry neither refers to the defendant's "going hence without day" or to the plaintiff's taking nothing by his action nor contains any equivalent expression. *White v. Atchison, etc. R. Co.*, 74 Kan. 778, 88 Pac. 54.

11. *French v. Olive*, 67 Tex. 400, 3 S. W. 568.

[a] A judgment that the defendant recover his costs without an order that the plaintiff take nothing by his suit or some other equivalent thereto is not a final judgment. *Scott v. Burton*, 6 Tex. 322.

12. *Melton v. St. Louis, etc. R. Co.*, 99 Ark. 433, 139 S. W. 289. See also cases in preceding note.

13. Ark.—*Melton v. St. Louis, etc. R. Co.*, 99 Ark. 433, 139 S. W. 289. N. D.—*Cameron v. G. N. Railway Co.*, 8 N. D. 124, 77 N. W. 1016. S. D.—*McTavish v. G. N. R. Co.*, 8 N. D. 333, 79 N. W. 443. Tex.—*Scott v. Burton*, 6 Tex. 322.

[a] Where the language used was, "The plaintiff's action is hereby dismissed. Done in open court this 8th day of December, 1897," it was held that while the same was irregular and highly improper in form, it nevertheless embodied the judicial determination of the court and was sufficient in substance. *McTavish v. Great Northern R. Co.*, 8 N. D. 333, 79 N. W. 443.

[b] "After hearing all the evidence the jurors returned a verdict for plaintiff for the sum of 48.05 and costs of

suit," was held to be a good judgment. *Overall v. Pero*, 7 Mich. 315.

[c] **Judgment for Costs.**—The expression "at the cost of the plaintiff" in the dismissal of an action is a final determination with reference to the costs as well as to the action itself and is in effect an order and judgment that the plaintiff shall pay the costs. *Houston v. Clark*, 36 Kan. 412, 13 Pac. 739.

[d] **The short entry** (1) usually made, "judgment on verdict," may in a scire facias upon it, be considered as the judgment which the plaintiff was entitled to have. *Shirtz v. Shirtz*, 5 Watts (Pa.) 255. (2) But where the language of a purported judgment was upon the verdict of the jury as follows: "Whereupon the court enters judgment upon the finding," it was held to be no judgment. *Faulk v. Kellums*, 54 Ill. 188.

14. See the following: U. S.—*Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526, holding that it cannot be regarded as a conclusive criterion whether a judgment has been rendered that the entry employs or omits the accustomed form of ("ides consideratum est"). Ark.—*Ware v. Pennington*, 15 Ark. 226. But see *Baker v. State*, 3 Ark. 491. Cal.—*Hentig v. Johnson*, 8 Cal. App. 221, 96 Pac. 390. Conn.—*Fox v. Hoyt*, 12 Conn. 491. Ill.—*Johnson v. Gillett*, 52 Ill. 358; *Henriksen v. Mudd*, 33 Ill. 477; *Johnson v. Miller*, 50 Ill. App. 60. Ind.—*City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342. Mo.—*Moody v. Deutsch*, 85 Mo. 237; *Black v. Rogers*, 75 Mo. 441; *Rogers v. Gosnell*, 51 Mo. 466. Neb.—*Black v. Cabon*, 24 Neb. 218, 38 N. W. 779; *Gatz v. Cabon*, 21 Neb. 591, 33 N. W. 260; *McNamara v. Cabon*, 21 Neb. 589, 33 N. W. 259; *Marsh v. Snyder*, 14 Neb. 8, 14 N. W. 804; *Lewis v. Watrus*, 7 Neb. 477. Ohio.—*Green v. Farrin*, 11 Ohio Cir. Ct. 294. Wis.—*Potter v. Eaton*, 26 Wis. 382.

[a] **Illustrations.**—(1) A judgment in the words "It is ordered, adjudged and decreed, etc.," has been held not



a judgment words are used in the past rather than the present tense.<sup>15</sup>

A judgment pronounced in English is not invalid because the other proceedings have been conducted in another language.<sup>16</sup>

**3. Date.**—The date of a judgment is a material part of it,<sup>17</sup> and should be recited therein.<sup>18</sup> A judgment is not rendered void, however, simply by an omission of the date,<sup>19</sup> or an error therein;<sup>20</sup> the omission or error may be supplied or rectified by reference to the records in the case.<sup>21</sup> In giving the date of the judgment, it is un-

a nullity. **Ark.**—Ware *v.* Pennington, 15 Ark. 226. **Cal.**—Hentig *v.* Johnson, 8 Cal. App. 221, 96 Pac. 390. **Ia.**—See Taylor, etc. Co. *v.* Runyon, 3 Iowa 474. (2) In Johnson *v.* Miller, 50 Ill. App. 60, the court said, "As to the form of these decrees, the modern rule is, the terms 'decreed,' 'resolved,' 'ordered,' 'judgment rendered,' etc., are fully equivalent to original technical terms, provided the entry shows an actual giving of judgment and exhibits what is required to be specified with clearness and precision." (3) But an order in the words "Ordered judgment in this action, etc.," is not a judgment even though signed by the judge. Lincoln *v.* Cross, 11 Wis. 91.

[b] The words "I give judgment" were held to include the technical and formal words of a judgment and to be sufficient. Deadrick *v.* Harrington, 1 Hempst. 50, 7 Fed. Cas. No. 3,694b. See also City of La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342; Marsh *v.* Snyder, 14 Neb. 8, 14 N. W. 804. So a judgment using the expression "the court renders judgment for the defendant" has been held sufficient. City of La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342.

[c] The words "have judgment" are equivalent to "hereby have judgment" or "recover" as found in ordinary forms of judgment. Potter *v.* Eaton, 26 Wis. 382.

[d] A judgment stating the sum of the judgment and costs and adding "whereof let execution issue," is equivalent to formally stating that the "plaintiff have and recover from the defendant" the amount found due. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124. See also Huntington *v.* Blakeney, 1 Wash. Ter. 111.

[e] Where the judgment was that "the defendant go hence and recover his costs," it was held to be "not very formal or full," but still "substantially a good and final judgment."

Rogers *v.* Gosnell, 51 Mo. 466.

[f] A judgment in the words, judgment in favor of defendant and against plaintiff, plaintiff is entitled to \$10, determines nothing and is no judgment. Salsberg *v.* Tobias, 84 N. Y. Supp. 151.

15. Tankersley *v.* Silburn, Minor (Ala.) 185.

16. Maxent *v.* Maxent, 1 La. (O. S.) 438.

17. Warrington *v.* Upham Mfg. Co., 18 Ohio Cir. Ct. 311.

18. Jones *v.* Acre, Minor (Ala.) 5; Bevington *v.* Buck, 18 Ind. 414. See also 14 STANDARD PROC. 1014.

[a] But where a warrant was dated a certain day and an execution was dated the same day, it was held that a judgment which was written on the same paper with them was thereby made sufficiently certain as to time of its rendition. Clayton *v.* Fulp, 52 N. C. 444.

19. **Ia.**—Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380. **Kan.**—Phillips *v.* Phillips, 69 Kan. 324, 76 Pac. 842. **La.**—Drake *v.* Drake, 7 La. Ann. 545. **S. C.**—Burwell, etc. Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423. **Tex.**—Eichman *v.* State, 22 Tex. App. 137, 2 S. W. 538.

20. Fish *v.* Emerson, 44 N. Y. 376.

[a] Where a mistake was made in the year whereby the judgment antedated the complaint it was held not to affect the validity. Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.

21. **Ind.**—Hopper *v.* Lucas, 86 Ind. 43. **La.**—Cooper *v.* Cooper, 14 La. Ann. 665. **Tex.**—Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.

[a] But see Wiley *v.* Southerland, 41 Ill. 25, which holds that the date of a judgment is as material as any other portion of it.

Reference to record to aid in construction of judgment, see generally *infra*, XII, B, 3.

necessary to specify the hour.<sup>22</sup> Nor is it necessary that the date should be expressed in words, figures alone being sufficient.<sup>23</sup> A judgment post dated is not valid, at least until the arrival of the date mentioned;<sup>24</sup> but it may be antedated to the time when the court directed judgment to be entered.<sup>25</sup> Where judgment is entered nunc pro tunc, it is proper to date the judgment as of the date when rendered and the fact that it is to take effect as of a certain earlier day should be mentioned therein.<sup>26</sup>

**Presumption as to Date.** — Under the common law all judgments were supposed to be entered as of the first day of the term at which they were rendered and in the absence of a date a presumption to that effect prevailed;<sup>27</sup> but this rule did not apply where a judgment was rendered during term in a case which was in such a condition that judgment could not have been rendered on the first day of the term.<sup>28</sup> Now, in many of the states, judgments are supposed to be entered as of the last day of the term and the presumption is in accordance therewith.<sup>29</sup>

**4. Signing and Sealing.** — a. *Necessity for.*<sup>30</sup> — It is sometimes required that the judgment should be signed by the judge or the court; the statutes of some states make this necessary to its validity;<sup>31</sup> though some authorities hold that such statutes are merely directory, and

22. **Del.**—Wilson v. Greenwood, 5 Houst. 519. **Ill.**—McVeagh v. Locke, 23 Ill. App. 606. **Pa.**—Cooke v. Shoemaker, 17 Pa. Co. Ct. 641.

23. Warder v. Willard, 8 Lea (Tenn.) 581; Chadwell v. Jones, 1 Tenn. Ch. 493.

24. Smith v. Coe, 7 Robt. (N. Y.) 477.

25. Clark v. Clark, 138 N. Y. 653, 34 N. E. 513; Starbird v. Moore, 21 Vt. 529.

26. McNamara v. New York, etc. R. Co., 56 N. J. L. 56, 28 Atl. 313.

[a] Where a judgment is entered nunc pro tunc as of a previous date it should always show the date upon which it was rendered. Barclay v. Brown, 7 Paige (N. Y.) 245.

**As to entry of judgment nunc pro tunc,** see 14 STANDARD PROC. 1017.

27. **N. C.**—Norwood v. Thorp, 64 N. C. 682; Farley v. Lea, 20 N. C. 169. **Ohio.**—Kimball v. Connally, 2 Ohio Dec. (Reprint) 113. **Va.**—Yates v. Robertson, 80 Va. 475; Withers v. Carter, 4 Gratt. (45 Va.) 407.

28. Yates v. Robertson, 80 Va. 475.

29. **Me.**—Chase v. Gilman, 15 Me. 64. **Mass.**—Herring v. Polley, 8 Mass. 113. **N. H.**—Goodall v. Harris, 20 N. H. 363. **Vt.**—Bradish v. State, 35 Vt. 452; Day v. Lamb, 7 Vt. 426.

30. *Necessity for signing decree,*

see 6 STANDARD PROC. 779; for signature of judge to judgment by confession, see 14 STANDARD PROC. 812, 835; for signature to judgment in justice's court, see the title "Justices of the Peace."

31. See the following: **Ga.**—Arrowwood v. McKee, 119 Ga. 623, 46 S. E. 871; Huckaby v. Sasser, 69 Ga. 603; Jones v. Word, 61 Ga. 26; Odom v. Causey, 59 Ga. 607. **Ky.**—Farris v. Matthews, 149 Ky. 455, 149 S. W. 896; Robertson v. Donelan, 138 Ky. 149, 127 S. W. 754; Montgomery v. Viers, 130 Ky. 694, 114 S. W. 251 (signature may be compelled); Ewell v. Jackson, 129 Ky. 214, 110 S. W. 860 (an unsigned judgment is no judgment); Raymond v. Smith, 1 Mete. 65. **La.**—State ex rel. Hartwell v. Jumel, 30 La. Ann. 421; Saloy v. Collins, 30 La. Ann. 63; Broussard v. Dupre, 29 La. Ann. 518; Marchal v. Hooker, 27 La. Ann. 454; Scott v. Goodrich, 24 La. Ann. 259; Bynum v. Gordon, 24 La. Ann. 160; Hatch v. Arnault, 3 La. Ann. 482; Gates v. Bell, 3 La. Ann. 62; Fox v. Tio, 1 La. Ann. 324; Succession of Asbridge, 1 La. Ann. 206. **Can.**—Guerin v. Fox, 15 Quebec Super. 199.

See generally the statutes.

[a] **Only final judgment, not interlocutory judgments, need be signed in Louisiana.** Wickman v. Nalty, 41 La.



that where the judge omits signing the judgment, its validity is not affected.<sup>32</sup> And in the absence of such a statute the failure of the judge to sign a judgment will not affect its validity;<sup>33</sup> the fact that

Ann. 284, 6 So. 123; *Saloy v. Collins*, 30 La. Ann. 63; *State v. Judge of Fifth Dist.*, 12 La. Ann. 455.

[b] **When any issue is not found for the prevailing party**, the judgment should be signed by the judge in order to make sure that it shows all that was in fact adjudicated. *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672.

[c] **Under an early California statute**, no process or execution could issue upon any judgment or decree of the court until signed by the judge. *Wells v. Stout*, 9 Cal. 479. For present rule in California, see *infra*, this section.

[d] **New York**.—"It is only where an interlocutory judgment is rendered, with a direction that the final judgment be settled by the court or referee, that the signature of the judge or referee to the final judgment, is required." *Clapp v. Hawley*, 97 N. Y. 610.

32. **Ala.**—*Bartlett v. Lang*, 2 Ala. 161. **Ark.**—*Ex parte Slocomb*, 9 Ark. 375. **Ia.**—*Childs v. McChesney*, 20 Iowa 431. **Neb.**—*Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46, 47 Am. St. Rep. 767; *Gallentine v. Cummings*, 4 Neb. (Unof.) 690, 96 N. W. 178; *Colony v. Billingsley*, 2 Neb. (Unof.) 670, 89 N. W. 744. **N. J.**—*Hillyer v. Schenck*, 15 N. J. Eq. 398. **N. C.**—*Bond v. Wool*, 113 N. C. 20, 18 S. E. 77; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Keener v. Goodson*, 89 N. C. 273; *Matthews v. Joyce*, 85 N. C. 258; *Rollins v. Henry*, 78 N. C. 342 (holding that the requirement that the judge shall sign all judgments is merely directory, and his omission to do so will not avoid the judgment as to strangers, although it might in connection with other evidence be a proof that the judgment was fraudulent, or had not in fact been rendered by him). **Ohio**.—*Simmons v. Brown*, 4 Ohio Dec. (Reprint) 33. **Tex.**—*Norwood v. Snell*, 95 Tex. 582, 68 S. W. 773; *Cannon v. Hemphill*, 7 Tex. 184.

[a] **Though (1) the Indiana statute** provides that "no process shall issue on any judgment or decree of the court until it shall have been so read and signed," it is held that a judgment

entered of record, but not signed, is not necessarily invalid or void for that reason, "depending on whether the judgment was in fact rendered by a court with jurisdiction and authority to render the same." *Pittsburgh, etc. R. Co. v. Johnson*, 52 Ind. App. 457, 468, 99 N. E. 508. (2) And see *Owen v. Harriott*, 47 Ind. App. 359, 94 N. E. 591, wherein the court said: "A judgment rendered, but not signed, is not void; the failure to sign the same being but an irregularity," citing *Griffith v. State*, 36 Ind. 406; *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. 720. (3) The court in *Pittsburgh, etc. R. Co. v. Johnson*, 52 Ind. App. 457, 468, 99 N. E. 508, further says that "under the law, the signature thereto of the judge of the court which rendered the judgment furnishes the evidence of its rendition and the authentication thereof necessary to support an execution issued thereon. . . . The legislature by passing §1451 Burns 1908, §1331 R. S. 1881, providing that a judgment may be signed at any subsequent term of court, after its rendition, recognized that an unsigned judgment was not void, because if void there was no necessity for such an act."

33. See the following: **U. S.**—*Connella v. Haskell*, 158 Fed. 285, 87 C. A. 111. **Cal.**—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *Estate of Cook*, 77 Cal. 220, 227, 17 Pac. 923, 19 Pac. 431; *California, etc. R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Clink v. Thurston*, 47 Cal. 21; *Hoover v. Lester*, 16 Cal. App. 151, 116 Pac. 382; *Darlington v. Butler*, 3 Cal. App. 448, 86 Pac. 194. **Colo.**—*Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092; *Hollingsworth v. Ring*, 26 Colo. App. 121, 141 Pac. 139. **Del.**—*Johnson v. State*, 6 Penne. 450, 67 Atl. 785. **N. Y.**—*Clapp v. Hawley*, 97 N. Y. 610; *De Laney v. Blizzard*, 7 Hun 66. **Okla.**—*Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869. **Wash.**—*Ritchie v. Carpenter*, 2 Wash. 512, 519, 28 Pac. 380.

[a] **Rendition of Judgment Controls**. It is a matter of no consequence whether the judge sign the judgment or not. Its rendition is the vital thing.

it was entered by the clerk will raise the presumption that it was authorized by the court.<sup>34</sup>

The clerk should attest the entry by his signature; but his failure so to do will not affect the validity of the judgment.<sup>35</sup>

**Seal.**—It is not necessary to the validity of a judgment that it should contain the seal of the court rendering the same.<sup>36</sup>

**b. Sufficiency of Signing.**—If the judgment is required to be signed, a delay in so doing does not invalidate it. It may be signed at any time before proceedings are taken on it, or before it is relied<sup>37</sup>

*Simpkin v. Snyder Island Drainage Dist.*, 223 Ill. 67, 79 N. E. 38.

[b] **The signature of the judge is merely** to give the clerk a surer means of correctly entering what has been adjudged, and is not necessary to the validity of the judgment. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *Estate of Cook*, 77 Cal. 220, 227, 17 Pac. 923, 19 Pac. 431.

[c] **Not Essential to Probate Decree.**—The signature of a judge is not essential to the validity of a judgment admitting a will to probate. *Beer v. Plant* (Neb.), 96 N. W. 348.

[d] **At Common Law.**—In *French v. Pease*, 10 Kan. 51, the court said: "It is claimed that at common law judgments were not valid unless they were signed; and authorities are cited to show the same. 'Signing judgment,' however, at common law did not mean such a signing of judgments as we have been considering. None of the authorities cited by counsel for plaintiff in error show that a complete judgment entry, after it was made, needed to be signed, or that it would be invalid if not signed. The words 'signing judgment,' and other similar words, as used at common law, meant a very different thing from signing the completed judgment entry. Such words simply meant the allowance or permission by the master, prothonotary, or other proper officer, to the plaintiff or defendant to have judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor. *Bouv. Law Diet.* tit. 'Signing Judgments;' also, tit. 'Postea;' 3 *Bouv. Inst.* 531, No. 3,313, §6. And the common-law authorities nearly always speak of one of the parties, generally the plaintiff, 'signing judgment,' and seldom speak of an officer 'signing judgment.' *Jac. Law Diet.* tit. 'Judgment;' 2 *Tidd*, Pr. 465, 469, 903. And

the judgment here spoken of as thus 'signed' is in fact no judgment at all. It is not a completed judgment. It has not yet been entered in full. It has not yet become a part of the permanent rolls of the court. It is really only a right and a permission to take judgment, and although an execution may in some cases be issued on it, yet it cannot be used as evidence in any court of justice. 1 *Bouv. Law Diet.* tit. 'Judgments;' 2 *Phil. Ev.* (3d Amer. ed.) 134."

34. **Cal.**—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *California, etc. R. R. Co. v. So. Pac. R. R. Co.*, 67 Cal. 59, 7 Pac. 123; *Los Angeles Co. Bank v. Raynor*, 61 Cal. 145. **Colo.**—*Eberville v. Leadville, etc. Co.*, 28 Colo. 241, 64 Pac. 200. **Ga.**—*Tift v. Keaton*, 78 Ga. 235, 2 S. E. 690. **Kan.**—*Gordon v. Bodwell*, 55 Kan. 131, 39 Pac. 1044; *French v. Pease*, 10 Kan. 51. **Minn.**—*Leyde v. Martin*, 16 Minn. 38; *Cathcart v. Peck*, 11 Minn. 45. **Mo.**—*Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515; *Platte County v. Marshall*, 10 Mo. 345. **Wis.**—*Egaard v. Dahlke*, 109 Wis. 366, 85 N. W. 369.

35. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537; *Jorgensen v. Griffin*, 14 Minn. 464. **N. H.**—*Folsom v. Blood*, 58 N. H. 11. **N. Y.**—*Lythgoe v. Lythgoe*, 145 N. Y. 641, 41 N. E. 89; *Goelet v. Spofford*, 55 N. Y. 647. **Wis.**—*Sexton v. Rhames*, 13 Wis. 99.

36. A judgment is neither a writ nor a process and need not contain the seal of the court. *Miller v. Natwick*, 110 Minn. 448, 125 N. W. 1022.

37. **Ill.**—*English v. The People*, 96 Ill. 566. **N. J.**—*Den v. Downam*, 13 N. J. L. 135. **N. Y.**—*Van Orman v. Phelps*, 9 Barb. 500. **Tex.**—*Lockhart v. State*, 32 Tex. Crim. 149, 22 S. W. 413. **Wis.**—*Landon v. Burke*, 33 Wis. 452.

[a] After an order in general

on in any way. But it must be signed in term time;<sup>38</sup> and in open court.<sup>39</sup> A premature signing of a judgment, though irregular, is not a fatal defect.<sup>40</sup> The signing of a judgment by the judge in another county than that in which the action is tried does not render it invalid,<sup>41</sup> especially when such signature is made with the consent of the parties to the action.<sup>42</sup>

The signature of the judge to the minutes of the court cannot be regarded as his signature to the final judgment.<sup>43</sup> But his signature appearing in the body of the judgment instead of at the end thereof, while irregular, will not vitiate the judgment.<sup>44</sup> It is irregular and improper for any officer to sign a judgment record in blank.<sup>45</sup>

terms granting a new trial in a cause, the court cannot afterwards, and before the new trial, sign the judgment as to one of the parties defendant. *Converse, etc. Co. v. Bloom, etc. Co.*, 20 La. Ann. 555.

38. *Culver, Simonds & Co. v. Leavy*, 21 La. Ann. 306, signature of judge placed to final judgment, out of term time, of no effect.

[a] **Signature may be made in vacation** with consent of parties, however. *Rust v. Faust*, 15 La. Ann. 477; *Heryey & Co. v. Edmunds*, 68 N. C. 243. And in Indiana, the fact that the signing was in vacation, though irregular, does not affect the validity of the judgment. *Catterlin v. City of Frankfort*, 87 Ind. 45, 56. See also *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. 720.

[b] **Nunc Pro Tunc**.—When the judgment has been duly entered by the clerk, the record may be signed by the judge nunc pro tunc. *Weatherman v. Com.*, 91 Va. 796, 22 S. E. 349. See also *Kent v. Fullenlove*, 38 Ind. 522; *Pittsburgh. C. C. & St. L. R. Co. v. Johnson*, 52 Ind. App. 457, 468, 99 N. E. 508; *State v. Wyatt*, 6 La. Ann. 701.

[c] **Signature at Subsequent Term**. Where a special judge fails to sign a judgment at the term at which it is rendered, he may sign it at a subsequent term. *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. 720.

39. *State v. Judges*, 48 La. Ann. 905, 19 So. 932, unless there is an agreement of the parties, or their counsel, that cause may be taken under advisement and judgment signed in chambers. *Compare, Cooper v. Cooper*, 14 La. Ann. 665.

40. Thus, where a motion for a new trial is made, a signing of the judgment before the motion is disposed of,

does not invalidate it. See *Succession of Gilmore*, 12 La. Ann. 562. So also, a signing of a judgment before the time has elapsed for a new trial, does not make it final and effective, where a motion for a new trial is seasonably made and subsequently granted. *State ex rel. Allen v. Judge*, 35 La. Ann. 1104.

[a] **As between the parties**, premature signing of a judgment is not assignable in error. *Opothlarholer v. Gardiner*, 15 La. 512.

[b] **The early practice would not** permit the signing of a judgment upon a verdict until four days after the filing of the postea or rule to sign the same. *Snyder v. Jenkins*, 6 Wend. (N. Y.) 533; *Bank of Orange v. Brown*, 1 Wend. (N. Y.) 31; *Standfast v. Chamberlaine*, 3 Salk. 215, 91 Eng. Reprint 785; *Reignots v. Tipping*, 6 Mod. 241, 87 Eng. Reprint 990.

41. *Ottillie v. Waechter*, 33 Wis. 252, holding that the fact that the judgment was signed in another county did not affect its validity; the judgment is nevertheless to be considered the judgment of the county where the action was really tried and determined.

42. *National Bank of Greensboro v. Gilmer*, 118 N. C. 668, 24 S. E. 423.

43. *Scott v. Goodrich*, 24 La. Ann. 259. *Compare, Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76; *Tharpe v. Crumpler*, 63 Ga. 273; *Sloan v. Cooper*, 54 Ga. 486, holding that a judgment entered on the minutes of the day's proceedings and signed by the judge, though the judgment itself bears only the signature of the counsel, is irregular, but not void.

44. *Hurley v. Hewett*, 89 Me. 100, 35 Atl. 1026.

45. *Frost v. Flint*, 2 How. Pr. (N. Y.) 125.



When a special judge is appointed because of the disqualification of the regular judge, the judgment must be signed by the special judge,<sup>46</sup> and a signing by him in blank before entry of the judgment is not sufficient.<sup>47</sup>

Where a court is composed of more than one member, the signature of any one of them is sufficient.<sup>48</sup>

If a judge be prevented by absence, death or other cause creating a vacancy in the office from signing the judgment, it may be signed by his successor.<sup>49</sup>

C. COMPLETENESS AND CERTAINTY.<sup>50</sup> — 1. **In General.** — The judgment of the court should be complete in itself.<sup>51</sup> It must determine all the issues properly raised in the case, between all parties properly before the court.<sup>52</sup> It must determine the rights recovered or the penalties imposed,<sup>53</sup> and award the proper relief.<sup>54</sup> It should express with certainty and precision the determination of the court,<sup>55</sup> and must

46. *Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864.

[a] **Where the regular judge is disqualified**, he cannot sign the judgment or orders made by the special judge. *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860.

47. *Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864.

48. *Stone v. State*, 20 N. J. L. 404; *In re Millcreek Road*, 9 Pa. Co. Ct. 592.

49. *Pittsburgh, C. C. & St. L. Ry. Co. v. Johnson*, 49 Ind. App. 126, 93 N. E. 683, 95 N. E. 610; *Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251; *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860.

[a] This applies to special as well as regular judges. *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860. See also the title "Judicial Officers."

50. **Completeness and certainty of decrees**, see 6 STANDARD PROC. 775, et seq.

51. *Morgan v. Tweddle*, 119 Mich. 350, 78 N. W. 121.

**Recitals in general**, see *infra*, XI, E.

52. See 14 STANDARD PROC. 977; also 14 STANDARD PROC. 1005.

53. Ill.—*People v. Pirfenbrink*, 96 Ill. 68; *Coats v. Barrett*, 49 Ill. App. 275. Kan.—*Brown v. Galena, etc. Co.*, 32 Kan. 528, 4 Pac. 1013. Ohio.—*State ex rel. Andrews v. Holden*, 12 Ohio Dec. (N. P.) 91.

54. See *infra*, XI, I; also 14 STANDARD PROC. 773.

55. See the following: Ala.—*Alabama Nat. Bank v. Hunt*, 125 Ala. 512, 28 So. 488; *Bell v. Otts*, 101 Ala. 186,

13 So. 43, 46 Am. St. Rep. 117. Colo.—*Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 922. Ill.—*Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. 651; *Martin v. Barnhart*, 39 Ill. 9; *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98; *Coats v. Barrett*, 49 Ill. App. 275. Ind.—*Bevington v. Buck*, 18 Ind. 414. Ia.—*Thompson v. Cook*, 21 Iowa 472. Kan.—*Houston v. Clark*, 36 Kan. 412, 13 Pac. 739. Ky.—*Honore v. Colmesnil*, 1 J. J. Marsh. 506; *Logan v. Cloyd*, 1 A. K. Marsh. 201. Me.—*Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525. Miss.—*Kelly v. Wimberly*, 61 Miss. 548. Neb.—*Horn v. Miller*, 20 Neb. 98, 29 N. W. 260. N. Y.—*Ventimiglia v. Eichner*, 213 N. Y. 147, 107 N. E. 48. Ore.—*Dray v. Crich*, 3 Ore. 298. Pa.—*Park v. Holmes*, 147 Pa. 497, 23 Atl. 769; *McGlue v. Philadelphia*, 105 Pa. 236. Tenn.—*Harman v. Childress*, 3 Yerg. 327. Tex.—*Fitzgerald v. Evans*, 53 Tex. 461; *Mayfield v. State*, 40 Tex. 289; *Scott v. Burton*, 6 Tex. 322. Wash.—*Huntington v. Blakeney*, 1 Wash. Ter. 111. Wis.—*Wheeler v. Scott*, 3 Wis. 325.

[a] **A judgment must represent the ultimate fixed and precise determination of the judicial proceedings in which it is entered.** *School Directors v. Newman*, 47 Ill. App. 364.

[b] **A judgment must show distinctly and not inferentially that the matters in the record have been finally disposed of in favor of one of the litigants or that the rights of the parties in litigation have been finally adjusted.** *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

show in what case it was rendered,<sup>56</sup> by what court it was rendered,<sup>57</sup> and the term of the court, where terms of court have not been abolished.<sup>58</sup>

**Certainty.**—There must be a reasonable certainty in every judgment, that the defendant may be enabled to plead it in bar of any subsequent suit for the same cause of action.<sup>59</sup> But where the sense of a judgment can be clearly ascertained from the recitals in the whole

[c] Where a claim involves many items, the judgment of the court should, like the report of a referee, show what items the judgment is given upon and the application of payments. *Philadelphia v. Second, etc. Ry. Co.*, 2 Pa. Dist. 705.

[d] **Form and contents of the entry of judgment**, see 14 STANDARD PROC. 1011, et seq.

56. *Ferrell v. Summons*, 63 W. Va. 45, 59 S. E. 752.

57. See the following: **U. S.**—*Godard v. Coffin*, 2 Ware 382, 10 Fed. Cas. No. 5,490. **Ind.**—*Bevington v. Buck*, 18 Ind. 414. **Ia.**—*Balm v. Nunn*, 63 Iowa 614, 19 N. W. 810; *Spear v. Fitchpatrick*, 37 Iowa 127; *Taylor & Co. v. Runyon*, 3 Iowa 474. **Md.**—*Lee v. Carrollton Sav., etc. Assn.*, 58 Md. 301.

58. **Ala.**—*Jones v. Acre*, Minor (Ala.) 5. **Cal.**—*Thomas v. Fogarty*, 19 Cal. 644. **Ga.**—*Bowden v. Hatcher*, 83 Ga. 77, 9 S. E. 724. **Ind.**—*Bevington v. Buck*, 18 Ind. 414; *Smithson v. Dillon*, 16 Ind. 169.

59. *Stirling v. Garritee*, 18 Md. 468. And see the following: **Ala.**—*Dickerson v. Walker*, 1 Ala. 48. **Cal.**—*Kelley v. McKibben*, 53 Cal. 13. **Colo.**—*Haines v. Christie*, 27 Colo. 288, 60 Pac. 567. **Idaho.**—*Alexander v. Leland*, 1 Idaho 425. **Ill.**—*City of Chicago v. Coleman*, 254 Ill. 338, 98 N. E. 521; *People v. Pirfenbrink*, 96 Ill. 68; *Wood v. Ostram*, 29 Ill. 177; *Lane v. Bommelmenn*, 21 Ill. 143. **Ky.**—*Smith v. Peyton*, 6 T. B. Mon. 263; *Lawless v. Barger*, 9 Bush 665; *Stagner v. Fox*, 1 J. J. Marsh. 556; *Honore v. Colmesnil*, 1 J. J. Marsh. 506; *Boehem's Assignee v. Droste*, 10 Ky. L. Rep. 542. **La.**—*Russo v. Fidelity & Deposit Co.*, 129 La. 554, 56 So. 506; *Kellogg v. McMillan*, 9 La. Ann. 225. **Mo.**—*Rumsey v. People's Ry. Co.*, 144 Mo. 175, 46 S. W. 144. **Neb.**—*Village of Kenesaw v. Chicago, etc. R. Co.*, 91 Neb. 619, 136 N. W. 990. **N. Y.**—*U. S. Life Ins. Co. v. Jordan*, 46 Hun 201. **Ore.**—*Dray*

*v. Crich*, 3 Ore. 298. **Tenn.**—*Mollie Hamilton v. Paschal*, 9 Heisk. 203; *Boyken v. State*, 3 Yerg. 426; *Harman v. Childress*, 3 Yerg. 327. **Tex.**—*Sellman v. Lee*, 55 Tex. 319; *Stafford v. King*, 30 Tex. 257; *Spiva v. Williams*, 20 Tex. 442. **Va.**—*Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269. **W. Va.**—*Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542; *Thompson & Lively v. Mann*, 65 W. Va. 648, 64 S. E. 920. **Eng.**—*King v. James*, 5 Barn. & Ald. 894, 106 Eng. Reprint 1418.

[a] **Other Statements of Rule.**—(1) A judgment to be valid must be certain and conclusive as to the subject-matter and parties to the action and must be capable of execution. *Alexander v. Leland*, 1 Idaho 425. (2) Each judgment entered during a term must be of itself, full and in proper form, and the imperfections of one cannot be corrected by a reference to another. *Tombeckbee Bank v. Strong's Exr.*, 1 Stew. & P. (Ala.) 187, 21 Am. Dec. 657. (3) "To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries. *Boyken v. State*, 3 Yerg. 426." *Mollie Hamilton v. Paschal*, 9 Heisk. (Tenn.) 203. (4) A judgment to be binding must be certain and complete in itself, without reference to anything else to ascertain its meaning. *Dickerson v. Walker*, 1 Ala. 48. Compare, *infra*, XII, B, 3 and 6.

[b] A judgment annulling a former judgment described by number of suit, names of parties, and court in which it was rendered and declaring the title of plaintiff superior to that of defendant in the land described and annulling certain muniments of title and conveyance by names and dates is sufficiently certain. *Morrison v. Lofton*, 44 Tex. 16.

**Certainty as to amount of recovery**, see *infra*, XI, G, 1.



record it will not be held void for uncertainty.<sup>60</sup> Mere clerical errors will not invalidate a judgment as long as the decree of the court is clearly ascertainable.<sup>61</sup>

2. **Alternative or Conditional Judgments.**<sup>62</sup> — Alternative or conditional judgments at law are usually irregular, if not void, in civil,<sup>63</sup> as well as in criminal cases.<sup>64</sup> There are circumstances, however,

**Certainty as to party** for and against whom it is rendered, see *infra*, XI, F, 1.

60. U. S.—*In re Boyd*, 4 Sawy. 262, 3 Fed. Cas. No. 1,746. Ala.—*McLaren v. Anderson*, 81 Ala. 106, 8 So. 188; *Rhodes v. Walker*, 44 Ala. 213; *Moore v. Hubbard*, 4 Ala. 187. Conn.—*Clark v. Moses, Kirby* 143. Idaho.—*Moore v. Taylor*, 1 Idaho 630. Ill.—*Hoffbert v. Klinkhardt*, 58 Ill. 450; *Benedict v. Dillehunt*, 4 Ill. 287. Ind.—*Gentry v. Purcell*, 84 Ind. 83; *Foot v. Glover*, 4 Blackf. 313; *Furry v. O'Connor*, 1 Ind. App. 573, 580, 28 N. E. 103. Ia.—*Fowler v. Doyle*, 16 Iowa 534; *Finnegan v. Manchester*, 12 Iowa 521. Kan.—*Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 466. Ky.—*Stuart v. Troutman's Admr.*, 6 Ky. L. Rep. 447; *Mudd v. Carrico*, 4 Litt. 16. La.—*McManus v. Stevens*, 10 La. Ann. 177. N. H.—*Wilbur v. Abbott*, 58 N. H. 272; *Stokes v. Sanborn*, 45 N. H. 274. Tex.—*Dunlap v. Southerlin*, 63 Tex. 38. See also *infra*, XII, B, 3.

61. Ala.—*Ellis v. Dunn*, 3 Ala. 632; *Tankersley v. Silburn*, Minor 185. Ill.—*Hofferbert v. Klinkhardt*, 58 Ill. 450. Ohio.—*Waggoner v. Dubois' Lessee*, 19 Ohio 67.

See also 14 STANDARD PROC. 1012.

**Effect of errors in designation of names of parties**, see *infra*, XI, F, 1.

62. **Judgment against two or more parties in alternative**, see *infra*, XI, F, 1.

63. Ia.—*Battell & Collins v. Lowery*, 46 Iowa 49. Kan.—*The Consolidated Min., etc. Co. v. Huff*, 62 Kan. 405, 63 Pac. 442. Ky.—*Terril v. Arnold*, 4 Litt. 300. Me.—*State v. Sturgis*, 110 Me. 96, 85 Atl. 474. Mo.—*Cox v. Bright*, 65 Mo. App. 417. N. C.—*Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414. Tex.—*Cooksey v. Jordan*, 104 Tex. 618, 143 S. W. 141. Wis.—*Schultz v. Chicago, etc. Ry. Co.*, 48 Wis. 375, 4 N. W. 399.

[a] "Judgments must be certain. Their validity and binding force must

rest upon facts existing at the time of their rendition. They cannot rest upon what may or may not occur after their rendition. They take their validity from the action of the court, and not from what persons may or may not do after the court has rendered them. The decisions of the courts of other states are to the effect of the one we make. . . . The case of *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414, is quite like the present one. In that case it was ruled: 'Where a judge granted a judgment for plaintiff in an action for the possession of land, to be stricken out if defendant filed a proper bond in thirty days after adjournment of court, the judgment was void.' It is perhaps not necessary to go to the extent of that case, and hold the conditional portion of the judgment void, but it certainly can be held irregular, and voidable upon direct attack." *The Consolidated Min., etc. Co. v. Huff*, 62 Kan. 405, 63 Pac. 442.

[b] A judgment permitting a defendant to verify his answer upon the condition that if the ruling of the court giving judgment for plaintiff for want of a properly verified answer should be sustained the defendant would submit to a judgment for a certain sum, is vitiated by the condition. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 209.

[c] **Invalid Condition Does Not Affect Judgment.**—Where the judge signed a judgment, but directed the clerk to strike it out if a bond was filed in a specified time it was held that the judgment was valid but that the order to strike it out on the condition named was invalid. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1, *distinguishing* *Strickland v. Cox*, 102 N. C. 411, 9 S. E. 414, wherein the judgment itself was conditional "to be stricken out if," etc., and hence was held invalid.

64. See the title "Sentence and Judgment."

where such judgments are permitted,<sup>65</sup> as in the case of an action brought for the recovery of personal property, wherein the judgment may and usually must be in the alternative, for the property or its value.<sup>66</sup>

3. **Effect of Surplusage.**—Surplusage in a judgment does not vitiate it; the surplusage is disregarded.<sup>67</sup>

D. CONFORMITY TO PROCESS, PLEADINGS, VERDICT AND FINDINGS.<sup>68</sup>

65. See the following: **Ind.**—Chandler v. Chandler, 13 Ind. 492, judgment conditioned on payment of costs by prevailing party. **La.**—West v. McConnell, 5 La. 424, 25 Am. Dec. 191; Robeson v. Carpenter, 7 Mart. (N. S.) 30; Bryans v. Dunseth, 1 Mart. (N. S.) 412. **Md.**—Huston v. Ditto, 20 Md. 305, 326. **Minn.**—Carlton v. Carey, 61 Minn. 318, 63 N. W. 611. **N. J.**—Johnston v. Bowers, 69 N. J. L. 544, 55 Atl. 230. **Pa.**—Harmar v. Holton, 25 Pa. 245.

[a] **Condition Acting as Stay of Execution.**—A condition annexed to a judgment by which it is to be released on the payment of a sum of money, etc., is in the nature of an injunction to stay proceedings at law and an uncertainty in the condition does not necessarily avoid the judgment. Harmar v. Holton, 25 Pa. 245.

[b] If either party wishes for a conditional judgment, he must move for it. But the motion must be addressed to and heard by the court. It is not a matter for the jury. Hadley v. Hadley, 80 Me. 459, 15 Atl. 47.

66. See the following: **U. S.**—Boley v. Griswold, 20 Wall. 486, 22 L. ed. 375. **Ala.**—Rose v. Pearson, 41 Ala. 687; Miller v. Jones' Admr., 29 Ala. 174; Brown v. Brown, 5 Ala. 508 (detinue). **Ky.**—Rogers v. Bradford, 8 Bush 163 (replevin); Gaddis & Co. v. Ramsey, 8 Ky. Op. 65. **Mo.**—Woolbridge v. Quinn, 70 Mo. 370; White v. Graves, 68 Mo. 218; Smith v. Kander, 58 Mo. App. 61. **N. Y.**—Young v. Willet, 8 Bosw. 486; Wheeler v. Allen, 49 Barb. 460. **S. C.**—Robbins v. Slattery, 30 S. C. 328, 9 S. E. 510; Joplin v. Carrier, 11 S. C. 327. **Tex.**—Wolf v. Lachman, 20 S. W. 867; Davis v. Calhoun, 41 Tex. 554; Burlacher v. Watson, 38 Tex. 62; Cheatham v. Riddle, 8 Tex. 162.

See also 7 STANDARD PROC. 488, and the title "Replevin."

[a] But there must be evidence of its value or an alternative decree will

be erroneous. Reilly v. Freeman, 1 App. Div. 560, 37 N. Y. Supp. 570.

67. **Cal.**—Burke v. Carruthers, 31 Cal. 467; Wallace v. Eldredge, 27 Cal. 495; Hentig v. Johnson, 8 Cal. App. 221, 96 Pac. 390. **Ga.**—Saffold v. Banks, 69 Ga. 289. **Idaho.**—Hazard v. Cole, 1 Idaho 276. **Ill.**—Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097; Helmuth v. Bell, 150 Ill. 263, 37 N. E. 230; Comrs. of Highways v. Drainage Comrs., 127 Ill. 581, 21 N. E. 206; East St. Louis v. Canty, 65 Ill. App. 325; Washington Park Club v. Baldwin, 59 Ill. App. 61; Peddicord v. Security Live Stock Ins. Co., 26 Ill. App. 467; Board of Education v. Hoag, 25 Ill. App. 558. **Ind.**—Kearns v. State, 3 Blackf. 334; Thorn v. Tyler, 3 Blackf. 504. See Neff v. State *ex rel.* Patterson, 3 Ind. 564. **Ky.**—Cleveland Orphan Inst. v. Helm, 24 Ky. L. Rep. 2485, 74 S. W. 274. **Mich.**—Conlin v. Lamont Iron Co., 116 Mich. 626, 74 N. W. 1004. **Mo.**—Steinback v. Lisa, 1 Mo. 228. **N. Y.**—Simmons v. Craig, 137 N. Y. 550, 33 N. E. 76. **S. C.**—Longstreet v. Lafitte, 2 Spears L. 664. **Tex.**—French v. Olive, 67 Tex. 400, 3 S. W. 568; Flournoy v. Healy, 31 Tex. 590; Windisch v. Gussett, 30 Tex. 744. **Va.**—Orange & A. R. Co. v. Fulvey, 17 Gratt. (58 Va.) 366; McMichen v. Amos, 4 Rand. (25 Va.) 134. **Wash.**—Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120.

See also *infra*, XI, F, 4, note 15.

[a] In Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, such part of the judgment as ordered the payment to be made in gold coin was rejected as surplusage.

[b] Where a general judgment limited its enforcement to payment from certain funds, the limitation was considered as surplusage, not vitiating the judgment. East St. Louis v. Canty, 65 Ill. App. 325.

[c] Fact that findings of fact are incorporated in judgment will not vitiate it. See *infra*, XI, E, 1, note 84.

68. Necessity for judgment by de-

**1. Conformity to Process.**—The judgment rendered in a case must be in conformity with the writ or summons.<sup>69</sup> A judgment for an amount greater than that named in the *ad damnum* in the writ is erroneous,<sup>70</sup> but not void.<sup>71</sup> Where it is required that the amount of the demand be specified in or endorsed on the process,<sup>72</sup> the judgment, where the defendant fails to appear, cannot be rendered for an amount exceeding the amount stated in or endorsed on the process.<sup>73</sup> An endorsement which is made in a case where it is not required will

fault conforming to pleadings and process, see *supra*, V, J, 4.

**Amendment of judgment to conform to verdict, findings, and pleadings,** see *infra*, XIII, A, 3, b, (VII).

69. *Hughes v. Union Ins. Co.*, 8 Wheat. (U. S.) 294, 5 L. ed. 620.

[a] A judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded or exhibit the cause why it is given for a less sum, otherwise, non constat, but the difference still remains due. *Hughes v. Union Ins. Co.*, 8 Wheat. (U. S.) 294, 310, 5 L. ed. 620.

[b] **A variance (1) in the Christian name of a defendant,** between the writ and declaration on the one hand and the verdict and judgment on the other is fatal. *Sweazy v. Nettles*, 2 Mo. 6. (2) But a summons against Sue Dixon is sufficient to sustain a judgment against Sue R. Dixon, unless it is made to appear that Sue Dixon and Sue R. Dixon are different persons. *Dixon v. Melton*, 137 Ky. 689, 126 S. W. 358.

[c] Where suit is brought against a person by the name of John Cox, service is had on James Cox, and judgment is rendered against J. Cox, there is error unless it is shown in the record that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415. Designation of parties generally, see *infra*, XI, F.

70. Ky.—*Robinett v. Morris'* Admr., Hard. 93. Me.—*Smith v. Keen*, 26 Me. 411. Mass.—*Hemmenway v. Hickes*, 4 Pick. 497. Vt.—*Chaffee v. Hooper*, 54 Vt. 513. Va.—See *Palmer v. Mill*, 3 Hen. & M. (13 Va.) 502.

[a] **Where Action Is Referred.** After the action together with other claims against the defendant has been referred to arbitrators under a rule of court, it is not error to render a judgment for an amount exceeding the *ad damnum* in the writ. *Day v. Berkshire Woollen Co.*, 1 Gray (Mass.) 420.

[b] **Under a statute,** providing that if there be a plea of payment with notice of set-off and if it shall appear that any part of the debt has been paid, it shall be the duty of the jury to discount so much, and find a verdict for the balance, for which the plaintiff shall have judgment, if there had been a payment to the amount of one dollar, the jury must find the balance due, and that judgment must be rendered accordingly although the balance far exceeds the writ. The same course is to be pursued if there is a finding that no payment has been made. *Smock v. Warford*, 4 N. J. L. 306.

[c] **Cure of Error.**—The error in rendering judgment for more than is laid in the writ is not cured by crediting the excess on the execution. *Robinet v. Morris' Admrs.*, Hard. (Ky.) 93.

[d] **Omission of Ad Damnum.**—Where the *ad damnum* of a writ is omitted or other inconsistencies appear therein and a judgment is rendered for a certain sum, the judgment is insufficient. *Bickford v. Flannery*, 70 Me. 106.

71. *Smith v. Keen*, 26 Me. 411; *Chaffee v. Hooper*, 54 Vt. 513.

72. See the title "Process."

73. Cal.—*Lamping v. Hyatt*, 27 Cal. 99; *Lattimer v. Ryan*, 20 Cal. 628. Ill.—*Brown v. Phillips*, 6 Ill. App. 250. Neb.—*Erek v. Omaha Nat. Bank*, 43 Neb. 613, 62 N. W. 67; *Cleveland Cop. Stove Co. v. Grimes*, 9 Neb. 123, 2 N. W. 345. Ohio.—*American Audit Co. v. Miller*, 11 Ohio Cir. Ct. (N. S.) 368. Pa.—*Graff v. Graybill*, 1 Watts 428.

See also *supra*, V, J, 4. But see *Hopper v. Steelman*, 3 N. J. L. 907.

[a] The court under this statute is without jurisdiction to render judgment against a defendant on his default for an amount greater than that endorsed on the summons. The error in rendering judgment for a greater



limit the judgment to what is claimed in the notice.<sup>74</sup> A judgment, however, exceeding the amount specified in the process is proper, if the excess is for interest.<sup>75</sup> If because of negligence or clerical error a summons is issued for less than the damages laid in the declaration, a judgment exceeding the amount stated in the summons but within the declaration will be upheld on error.<sup>76</sup>

Where the defendant appears and answers to the merits, the fact that the judgment exceeds the amount endorsed on the summons is unimportant.<sup>77</sup>

**2. Conformity to Pleadings and Evidence.**—a. *General Rule.* Judgments must be *secundum allegata et probata*, or in other words, judgments rendered must be in accordance with both the pleadings and the evidence.<sup>78</sup> This rule, though one of the common law, obtains under the codes also, although it may not be so strictly applied.<sup>79</sup>

amount cannot be cured by an offer to remit. *American Audit Co. v. Miller*, 11 Ohio Cir. Ct. (N. S.) 368.

[b] Where the face of the summons specifies the rate of interest demanded, as ten per cent, and the indorsement on the summons recites that judgment on default would be taken for a certain sum with interest, without specifying the rate, it is not prejudicial error to resort to the face of the summons to determine the rate of interest, and a judgment for interest in excess of seven per cent but less than ten per cent will be upheld. *McKibben v. Harris*, 54 Neb. 520, 74 N. W. 952.

[c] **Statute Is Mandatory.**—A statute providing that if the defendant fails to appear judgment shall not be rendered for a larger amount than that endorsed on the summons is mandatory. *Cleveland Co-op. Stove Co. v. Grimes*, 9 Neb. 123, 2 N. W. 345.

**74. Watson v. McCartney**, 1 Neb. 131, an endorsement which does not indicate all the relief prayed for is deceptive and calculated to mislead a defendant.

**75. Ill.**—*Elliott v. Knight*, 64 Ill. App. 87, where the excess is for less than the interest which accrued after suit brought. See *Welch v. Karstens*, 60 Ill. 117; *Dowling v. Stewart*, 4 Ill. 193. **Miss.**—*Lynch v. Comrs. of the Sinking Fund*, 4 How. 377. **Pa.**—*Graff v. Graybill*, 1 Watts 428.

[a] On a summons containing a notice that the plaintiff will take judgment for a specified sum "with interest in addition thereto," a judgment for the sum with interest may be rendered, such a summons being proper

under the code. *DeWitt v. Swift*, 3 How. Pr. (N. Y.) 280.

**76. Messervey v. Beckwith**, 41 Ill. 452; *Thompson v. Turner*, 22 Ill. 389. See *Plato v. Turrill*, 18 Ill. 273.

**77. Erck v. Omaha Nat. Bank**, 43 Neb. 613, 62 N. W. 67.

**78. Ark.**—*Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298. **Conn.** *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 470, 36 Atl. 832. **Ga.**—*Denson v. Keys*, 140 Ga. 134, 78 S. E. 768. **Idaho.** *Lowe v. Turner*, 1 Idaho 107. **Ill.** *Gutsch Brew. Co. v. Fischbeck*, 41 Ill. App. 400. **Ky.**—*Pitts v. Hatton*, 162 Ky. 330, 172 S. W. 647. **La.**—*Lazarus v. Friedrichs*, 117 La. 711, 42 So. 230; *Smith, Harris & Co. v. Amacker*, 15 La. Ann. 299. **Mo.**—*Dougherty v. Adkins*, 81 Mo. 411; *Baldwin v. Whaley*, 78 Mo. 186. **N. Y.**—*Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82; *Day v. New Lots*, 107 N. Y. 148, 13 N. E. 915; *Wright v. Delafeld*, 25 N. Y. 266; *Stuart v. Mechanics' & Farmers' Bank*, 19 Johns. 496; *In re Postal Tel. Cable Co.*, 169 App. Div. 382, 154 N. Y. Supp. 997; *Weeks v. New York, etc. R. Co.*, 145 App. Div. 535, 129 N. Y. Supp. 888; *Gordon v. Ellenville & K. R. Co.*, 119 App. Div. 797, 104 N. Y. Supp. 702; *Metz v. Campbell Printing Press Co.*, 11 Misc. 284, 32 N. Y. Supp. 155. **Tex.**—*Fields v. Florence (Tex. Civ. App.)*, 123 S. W. 187. **Utah.** *Fillmore City v. Fillmore, etc. Mill Co.*, 36 Utah 339, 103 Pac. 967.

See also *infra*, XI, D, 2, b and c.

As to remedy where the judgment does not conform to the pleadings, evidence and verdict, see *infra*, XIII, A, 3, b, (VIF).

**79. Under the codes**, "the courts

In accordance with this rule, judgments based upon allegations in the pleadings which are not sustained by the proof are erroneous.<sup>80</sup> And judgments based upon facts found which are not involved in the issues raised by the pleadings,<sup>81</sup> or which are in substantial variance from

are more liberal than formerly in making or allowing amendments of pleadings, and when the substantial rights of the parties have been fairly tried, trifling variances are disregarded, and judgment given according to the real right of the case as established. . . . This right of disregarding variances proceeds upon the ground, that the substantial rights of the parties are set up in the pleadings and section 169 forbids amendments where the party will be misled or surprised. But the whole scope of these provisions of the code, in respect to pleadings and amendments thereof, implies that all the material allegations of the plaintiff or defendant shall be spread upon the record, shall be actually inserted in the pleadings, and when variances are disregarded, it is upon the principle that they may be amended *nunc pro tunc* at the trial and the court will so order to perfect the record so that it shall show the question really litigated and decided. The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*." *Wright v. Delafield*, 25 N. Y. 266.

[a] Under a statute providing that judgments may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and that the court may determine the ultimate rights of the parties as between themselves and may grant to the defendant any relief to which he may be entitled, judgments must be warranted by and based upon the allegations of the complaint and answer as much as was ever the case in the courts of law and equity. *Wright v. Delafield*, 25 N. Y. 266.

80. Conn.—*Vail v. Hammond*, 60 Conn. 374, 380, 22 Atl. 954. Ill.—*Fuqua v. Robinson*, 10 Ill. 128. Kan.—*Kroenert v. Miller*, 106 Pac. 459. Mo.—*McQuinn v. Logue*, 143 Mo. App. 232, 128 S. W. 516. N. Y.—*Reed v. McConnell*, 133 N. Y. 425, 31 N. E. 22. Vt.—*Burdick v. Champlain Glass Co.*, 11 Vt. 19. Wash.—*Easter v. Hall*, 12 Wash. 160, 40 Pac. 728.

[a] Under a statute making rail-

road companies responsible in damages for property injured by fire caused by their engines without proof of negligence, a party may recover without proof of negligence although he has alleged negligence, for by the statement of more than is required, he does not forfeit his right to recover upon the facts he is required to and did state. *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340, 25 S. W. 936.

81. Ark.—*Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298. Cal.—*Hicks v. Murray*, 43 Cal. 515. Conn.—*Goldman v. New York, etc. R. Co.*, 83 Conn. 59, 75 Atl. 148; *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507; *Stein v. Coleman*, 73 Conn. 524, 48 Atl. 206; *Whiting v. Koepke*, 71 Conn. 77, 40 Atl. 1053; *Atwood v. Welton*, 57 Conn. 514, 18 Atl. 322. Ill.—*Hardy v. Polakow*, 151 Ill. App. 199; *Gutsch Brew. Co. v. Fischbeck*, 41 Ill. App. 400. Ia.—*Watt v. Robbins*, 160 Iowa 587, 142 N. W. 387. Ky.—*Preece v. Faulkner*, 150 Ky. 500, 150 S. W. 646; *Handley's Heirs v. Young*, 4 Bibb 376; *Morrison's Exr. v. Hart*, 2 Bibb 4. Mo.—*Mark v. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20; *Kiskaddon v. Jones*, 63 Mo. 190; *Chambers v. Kupper-Benson Hotel Co.*, 154 Mo. App. 249, 134 S. W. 45. N. Y.—*Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82; *Day v. New Lots*, 107 N. Y. 148, 13 N. E. 915; *Bradt v. McClenahan*, 118 App. Div. 768, 103 N. Y. Supp. 884; *Abromovitz v. Markowitz*, 58 Misc. 231, 108 N. Y. Supp. 1044; *Mueller v. Schmenger*, 28 Misc. 445, 59 N. Y. Supp. 189. N. C.—*Parsley & Co. v. Nicholson*, 65 N. C. 207. Tex.—*Wallace & Co. v. Bogel & Bro.*, 62 Tex. 636; *Chrisman v. Miller*, 15 Tex. 160; *Hall v. Jackson*, 3 Tex. 305; *Mims v. Mitchell*, 1 Tex. 443; *Patterson v. Sylvan Beach Co. (Tex. Civ. App.)*, 171 S. W. 515; *Osvold v. Williams (Tex. Civ. App.)*, 169 S. W. 185; *Fields v. Florence (Tex. Civ. App.)*, 123 S. W. 187. W. Va.—*Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

[a] "Proofs without allegations are just as unavailing as allegations without proofs." *Bremer v. Calumet Canal Co.*, 123 Ill. 104, 13 N. E. 837; *De-*



the facts pleaded,<sup>82</sup> are also erroneous. Although sufficient may have been proved to entitle a plaintiff to recover upon a good and sufficient complaint, the judgment cannot be sustained if the complaint is insufficient.<sup>83</sup>

**Conformity as to Theory of Action.**<sup>84</sup> — If the facts as shown by the evidence are contrary to the theory of the plaintiff's action, a judgment cannot be rendered thereon;<sup>85</sup> as where the complaint alleges an action in tort, a judgment as upon contract cannot be rendered;<sup>86</sup>

*troit Stove Wks. v. Koch*, 30 Ill. App. 328.

[b] Where a ground of liability not suggested by the pleadings is submitted to the jury and there is a general verdict, a judgment thereon will not be upheld unless the other ground of liability is so clearly established that, had a direction for verdict been ordered, it would be sustained. *Springer v. Westcott*, 87 Hun 190, 33 N. Y. Supp. 805.

82. *Coons v. Pritchard*, 69 Fla. 362, 68 So. 225; *Parish v. Pensacola*, etc. R. Co., 28 Fla. 251, 9 So. 696; *Abrams v. Allen* (Miss.), 68 So. 927.

As to necessity for correspondence between pleading and proof, see generally 13 ENCY. OF EV. 619.

83. Cal.—*Rosenkranz v. Wagner*, 62 Cal. 151; *Barron v. Frink*, 30 Cal. 486. Ill.—*Gutsch Brew. Co. v. Fischbeck*, 41 Ill. App. 400. Minn.—*Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873. Tex.—*Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679; *Hahl v. Deutsch*, 42 Tex. Civ. App. 1, 94 S. W. 443.

See also 14 STANDARD PROC. 789, note 95.

As to necessity for statement of cause of action in a complaint, see generally 8 STANDARD PROC. 668, 910.

84. **Conformity as to form of action**, see *infra*, XI, D, 2, b, (III).

85. Ark.—*Stitt v. Rector*, 70 Ark. 613, 69 S. W. 552. Cal.—*Dobbs v. Purington*, 65 Pac. 1091; *Burke v. Levy*, 68 Cal. 32, 8 Pac. 527. Colo.—*Bothwell v. Stock Yards Co.*, 39 Colo. 221, 90 Pac. 1127. Ind.—*Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624. Ky.—*White v. White*, 150 Ky. 283, 150 S. W. 388. Mo.—*Moss v. Brant*, 216 Mo. 641, 116 S. W. 503; *Huss v. Heydt Bakery Co.*, 210 Mo. 44, 108 S. W. 63; *Irwin v. Chiles*, 28 Mo. 576; *Cronan v. Stutsman*, 168 Mo. App. 46, 151 S. W. 166; *Rhodes v. Guhman*, 156 Mo. App. 344, 137 S. W. 88. N. Y.—*Arnold v. Angell*, 62 N. Y. 508; *Graham*

*v. Read*, 57 N. Y. 681; *Security*, etc. Co. *v. Stewart*, 154 App. Div. 434, 139 N. Y. Supp. 74; *Gordon v. Ellenville & K. R. Co.*, 119 App. Div. 797, 104 N. Y. Supp. 702; *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84; *Broads v. Livingston*, 21 Misc. 783, 47 N. Y. Supp. 143; *Felter v. Maddock*, 11 Misc. 297, 32 N. Y. Supp. 292. N. C.—*Green v. Biggs*, 167 N. C. 417, 83 S. E. 553; *Raby v. Cozad*, 164 N. C. 287, 80 S. E. 415; *McCollum v. Chisholm*, 146 N. C. 18, 59 S. E. 160. N. D.—*Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367. Tenn.—*Osborne v. Boswell*, 61 S. W. 96. Tex.—*Texas & P. Ry. Co. v. Logan*, 3 Wills. Civ. Cas., §186. Wash.—*McLachlan v. Gordon*, 86 Wash. 282, 150 Pac. 441.

[a] **Plaintiff must recover on the facts alleged in the complaint and a proceeding on a definite and certain theory will not support a judgment on another theory.** *Walrath v. Hanover Fire Ins. Co.*, 216 N. Y. 220, 110 N. E. 426.

[b] **One cannot declare on a trespass and recover as for negligence.** *Gordon v. Ellenville & K. R. Co.*, 119 App. Div. 797, 104 N. Y. Supp. 702.

[c] **A judgment on the ground of mistake rendered upon a complaint charging fraud cannot be sustained.** *Gallup v. Bernd*, 132 N. Y. 370, 377, 30 N. E. 743.

86. N. Y.—*Graves v. Waite*, 59 N. Y. 156, 162; *Degraw v. Elmore*, 50 N. Y. 1; *Mea v. Pierce*, 63 Hun 400, 18 N. Y. Supp. 293; *National Com. Bank v. Lackawana*, etc. Co., 59 App. Div. 270, 69 N. Y. Supp. 396; *Lustgarten v. Hecht*, 134 N. Y. Supp. 567; *Lustenberger v. Lustenberger*, 133 N. Y. Supp. 428. Okla.—*Noble v. Atchinson*, etc. R. R. Co., 4 Okla. 534, 46 Pac. 483. S. C.—*South Carolina Steamboat Co. v. Wilmington*, etc. R. Co., 46 S. C. 327, 24 S. E. 337. Tex.—*Behrens Drug Co. v. Hamilton* (Tex. Civ. App.), 45 S. W.

and likewise when the declaration is upon a cause of action sounding in contract, a judgment as for a tort will not be upheld.<sup>87</sup>

b. *Conformity to Pleadings.*—(I.) *In General.*—It is a general rule, that judgments must follow and be supported by the pleadings in the case; but an immaterial variance between the pleadings and

922. Wash.—*McLachlan v. Gordon*, 86 Wash. 282, 150 Pac. 441.

[a] Where the allegations of the complaint state an action *ex delicto*, it is not competent at the trial to convert it into one *ex contractu*. *Neudecker v. Kohlberg*, 81 N. Y. 296, 302, citing *DeGraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562; *Walter v. Bennett*, 16 N. Y. 250. But see *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 36 Atl. 832, holding that "When the complaint sets forth facts sufficient to support a cause of action and those facts are established by the evidence to the satisfaction of the trier, the court must pronounce the sentence of the law upon the facts as found. . . . However strongly a plaintiff may have planted himself upon the theory that his action is founded on tort, he is still entitled to claim a judgment upon the theory of contract; and if the law is so that the plaintiff is entitled, upon the facts alleged and proved, to a judgment, it is the duty of the court to render that judgment, although the cause proved should be classed as one founded on contract, and the plaintiff has never ceased to claim that it is founded on tort."

[b] A judgment for "money loaned" cannot be rendered on a complaint for the recovery of money fraudulently obtained. *Kress v. Woehrle*, 23 Misc. 472, 52 N. Y. Supp. 628.

[c] Where the pleading of the plaintiff charges a conversion and that of the defendant sets up a contract, a judgment as upon contract is within the pleadings. It is proper for the court in ascertaining the issues involved in a suit and in rendering judgment to consider all the pleadings of the parties. Besides the defendant may have been guilty of conversion notwithstanding the agreement and it will be presumed that the court found such to be the case although not expressly stated. *First Nat. Bank v. Mineola St. Bank* (Tex. Civ. App.), 155 S. W. 603.

87. Cal.—*Guild Gold Min. Co. v. Mason*, 115 Cal. 95, 46 Pac. 901. Mass.

*Newmarket Mfg. Co. v. Coon*, 150 Mass. 566, 23 N. E. 380. Mo.—*Robbins v. St. Louis, etc. R. Co.*, 34 Mo. App. 609; *Bailey v. McCully*, 28 Mo. App. 572.

[a] If the plaintiff waive the tort and sues *ex contractu* he cannot recover a judgment *ex delicto*, even though the evidence show a tort. *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103.

88. See the following: U. S.—*Coe v. Armour Fertilizer Wks.*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027; *Standard Oil Co. v. Hadley*, 224 U. S. 270, 280, 32 Sup. Ct. 406, 56 L. ed. 760, Ann. Cas. 1913D, 936; *Clark v. Arizona Mut. Sav. & Loan Assn.*, 217 Fed. 640. Cal.—*Metropolis Trust & Savings Bank v. Monnier*, 169 Cal. 592, 147 Pac. 265; *Yuba County v. Kate*, etc. Min. Co., 141 Cal. 360, 364, 74 Pac. 1049; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082; *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Cummings v. Cummings*, 75 Cal. 434, 441, 17 Pac. 442; *Eaton v. Rocca*, 75 Cal. 93, 97, 16 Pac. 529; *Bachman v. Sepulveda*, 39 Cal. 688; *Putnam v. Lamphier*, 36 Cal. 151; *Benedict v. Gray*, 2 Cal. 251, 56 Am. Dec. 332; *Cannon v. McKenzie*, 3 Cal. App. 286, 85 Pac. 130. Colo.—*Loukowski v. Pryor*, 46 Colo. 584, 106 Pac. 7. See *Brown v. Linn*, 50 Colo. 443, 115 Pac. 906. Conn.—*Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366; *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507. Fla.—*Baker, etc. Co. v. Indian River St. Bank*, 61 Fla. 106, 55 So. 836. Ga.—*Evans v. Thompson*, 143 Ga. 61, 84 S. E. 128. Ill.—*Harty Bro. & Co. v. Polakow*, 151 Ill. App. 199. Ia.—*Schick v. West Davenport Imp. Co.*, 167 Iowa 294, 149 N. W. 451; *Watt v. Robbins*, 160 Iowa 537, 142 N. W. 387; *Bethany Church v. Moise*, 151 Iowa 521, 32 N. W. 14. Kan.—*New v. Smith*, 86 Kan. 1, 119 Pac. 380; *Hammers v. Merriek*, 42 Kan. 32, 21 Pac. 783. Ky.—*Payne v. Nicholson*, 155 Ky. 94, 159 S. W. 672; *Louisville & N. R. Co. v. Moore*, 150 Ky. 692, 150 S. W. 849; *Emison*

*v. Walker*, 17 Ky. L. Rep. 238, 31 S. W. 461. **La.**—*Francingues v. Dupieris*, 71 So. 503; *Tensas, etc. Land Co. v. Ferguson*, 128 La. 171, 54 So. 708. **Miss.**—*Warbington v. Norris*, 3 How. (Miss.) 227. **Mont.**—*Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310. **Neb.**—*Higgins v. Vandever*, 85 Neb. 89, 122 N. W. 843; *O'Connor v. Fields*, 79 Neb. 840, 113 N. W. 528; *Fidelity & Dep. Co. v. Parkinson*, 68 Neb. 319, 94 N. W. 120; *Solt v. Anderson*, 67 Neb. 103, 93 N. W. 205; *Clemons v. Heelan*, 52 Neb. 287, 72 N. W. 270; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236. **Nev.**—*Humbolt M. & M. Co. v. Terry*, 11 Nev. 237; *Perkins v. Sierra Nevada Silver Min. Co.*, 10 Nev. 405. **N. J.**—*Collins v. Whiteside*, 75 N. J. L. 865, 69 Atl. 174. **N. M.** *Senescal v. Bolton*, 7 N. M. 351, 34 Pac. 446. **N. Y.**—*Wright v. Delafield*, 25 N. Y. 266; *Davis v. Broadalbin Knitting Co.*, 90 App. Div. 567, 86 N. Y. Supp. 127; *Kress v. Woehrl*, 23 Misc. 472, 52 N. Y. Supp. 628; *Simon v. Silber*, 145 N. Y. Supp. 87. **N. C.** *Neal v. Hussey*, 48 N. C. 70. **N. D.** *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470; *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518. **Ohio.**—*Heirs of Waldsmith v. Admr. of Waldsmith*, 2 Ohio 156. **Okla.**—*Rogers v. Bass, etc. Co.*, 150 Pac. 706. **Ore.**—*Mountain Timber Co. v. Case*, 65 Ore. 417, 133 Pac. 92; *Dufur v. Nelson*, 58 Ore. 409, 115 Pac. 148. **Pa.**—*Weiser v. Freeman*, 227 Pa. 78, 75 Atl. 1021. **S. D.**—*Craig v. Craig*, 22 S. D. 417, 118 N. W. 712; *Seiberling v. Mortinson*, 10 S. D. 644, 75 N. W. 202; *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749. **Tenn.** *Nashville, etc. R. Co. v. Marion County*, 120 Tenn. 347, 108 S. W. 1058. **Tex.** *Rich v. Western Union Tel. Co.*, 101 Tex. 466, 108 S. W. 1152; *First Baptist Church v. Fort*, 93 Tex. 215, 54 S. W. 892; *Connellee v. Hopkins*, 31 S. W. 315; *Roche v. Lovell*, 74 Tex. 191, 11 S. W. 1079; *Dunlap v. Southerlin*, 63 Tex. 38; *Nalls v. McGill* (Tex. Civ. App.), 184 S. W. 275; *Toyah Valley Irr. Co. v. Winston* (Tex. Civ. App.), 174 S. W. 677; *Patterson v. Sylvan Beach Co.* (Tex. Civ. App.), 171 S. W. 515; *Oswald v. Williams* (Tex. Civ. App.), 169 S. W. 185. **Utah.**—*In re Evans*, 42 Utah 282, 130 Pac. 217; *Stokey v. Mackay*, 42 Utah 1, 128 Pac. 580; *Florence Mfg. Co. v. Pacific Exp. Co.*, 36 Utah 346, 103 Pac. 966; *Sowles v. Clawson*, 28 Utah 74, 76 Pac.

1067; *Darke v. Ireland*, 4 Utah 192, 7 Pac. 714. **Va.**—*Virginia Iron, Coal, etc. Co. v. Hughes' Admr.*, 88 S. E. 88; *Arminius Chemical Co. v. Landrum*, 73 S. E. 459. **W. Va.**—*Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

See also *supra*, XI, D, 2, a.

[a] "A judgment must be in accord with the pleadings and record as a whole. It is not rendered on the petition and answer only, but on the plaintiff's pleading, those of the defendant, and the findings of the court. Although the judgment would be sustained by the petition and answer, it is erroneous if the plaintiff's pleadings, taken together, show that she is not entitled to recover, unless the defect is supplied in the pleadings of the defendant." *Solt v. Anderson*, 67 Neb. 103, 93 N. W. 205.

[b] Unessential allegations in the petition may be disregarded and judgment rendered on the remainder. *Connell v. Brumback*, 18 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 149.

[c] The rendition of judgment upon a contract as pleaded in the answer, instead of on the contract in the complaint is not error. *Ach v. Carter*, 21 Wash. 140, 57 Pac. 344.

[d] In determining whether a complaint contains averments sufficient to support a judgment, every intendment will be indulged in favor of the judgment and all doubts of construction will be indulged in support thereof. *San Gabriel Valley Bank v. L. V. Town Co.*, 4 Cal. App. 630, 89 Pac. 360. Construction of judgments generally, see *infra*, XII, B.

[e] Presumption.—"In the absence of the pleadings or averment as to their contents, it ought to be assumed that they were broad enough to authorize the relief given by the judgment, notwithstanding the allegation here [in an application invoking the inherent power of a court to correct its judgment] of the conclusion that they were not." *Indiana, etc. R. Co. v. Bird*, 116 Ind. 217, 18 N. E. 837. See also *Leavell v. Seale* (Tex.), 45 S. W. 171.

[f] A judgment rendered against two defendants as principals when the pleadings disclose that one is a principal and the other a surety is erroneous and will be reversed. *Trester v. Pike*, 60 Neb. 510, 83 N. W. 676.

[g] Variation Treated as Surplus-



Judgment will not be a fatal error.<sup>80</sup>

A judgment in favor of a party must accord with and be warranted by his pleadings.<sup>81</sup> The plaintiff's right to recover is limited to the facts alleged in his pleading,<sup>81</sup> or as is sometimes stated, a plaintiff must recover upon the cause of action alleged in his complaint.<sup>82</sup>

ago.—Where a judgment gave a lien on real property as well as personal and the declaration claimed a lien on personal property only, this recital in the judgment was treated as surplusage and did not affect the validity of the judgment. *Conlin v. Lamont Iron Co.*, 116 Mich. 626, 74 N. W. 1004.

[h] In Louisiana, to prevent delay and to save costs, although a petitioner may have mistaken the ground of the defendant's liability, judgment will be rendered for him. *Russell v. Cash*, 2 La. 185. See also *Peterson v. Short*, 15 La. 159.

As to validity of judgment by consent, where the pleadings do not authorize a judgment in a contested case, see 11 STANDARD PROC. 915.

Decrees as affected by pleadings, see 6 STANDARD PROC. 750, et seq.

89. U. S.—*Wallace v. Loomis*, 97 U. S. 146, 21 L. ed. 895, variance as to medium of payment. Ark.—*Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806, variance as to name. Mich. *Bole v. Sands & Maxwell Lumber Co.*, 77 Mich. 239, 43 N. W. 873, variance as to name.

See also *infra*, XI, F, 1.

[a] A judgment which does not accord with immaterial allegations of the pleading, will not, on that account, be held to be in violation of the rule requiring conformity between judgments and pleadings. *White v. Allatt*, 87 Cal. 245, 25 Pac. 420.

90. U. S.—*Clark v. Arizona Mut. Sav. & Loan Assn.*, 217 Fed. 640. Ala. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123. Conn. *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507. N. D.—*Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518. Ore. *Dufur v. Nelson*, 58 Ore. 409, 115 Pac. 148.

[a] But a petitioner seeking to restrain the sale of certain land on the ground it is her homestead is entitled to judgment where the defendant admitted the judgment had been paid, although the fact of payment had not been pleaded. To establish claims under a

judgment the party must prove a valid and active judgment. *Abee v. San Antonio Brew. Assn.* (Tex.), 78 S. W. 973.

[b] A judgment for labor and materials furnished is not supported by a petition for labor performed. *Fidelity & Dep. Co. v. Parkinson*, 68 Neb. 319, 94 N. W. 120.

91. U. S.—*Kelley v. Benton*, 179 Fed. 466, 103 C. C. A. 577. Ark. *Dressler v. Carpenter*, 107 Ark. 353, 155 S. W. 108. Cal.—*Heinlen v. Heilbron*, 71 Cal. 557, 12 Pac. 673. Conn. *Stein v. Coleman*, 73 Conn. 524, 48 Atl. 206; *Whiting v. Koepke*, 71 Conn. 77, 40 Atl. 1053; *Moran v. Bentley*, 69 Conn. 392, 37 Atl. 1092; *Powers v. Mulvey*, 51 Conn. 432; *Shepard v. New Haven & Northampton Co.*, 45 Conn. 54. Ind.—*Boardman v. Griffin*, 52 Ind. 101. Ia.—*Schick v. West Davenport Imp. Co.*, 167 Iowa 294, 149 N. W. 451; *Bethany Church v. Morse*, 151 Iowa 521, 132 N. W. 14. Ky.—*Sealy v. Williston*, 117 S. W. 959; *Louisville & N. R. Co. v. Moore*, 150 Ky. 692, 150 S. W. 849. La.—*Wells v. Blackman*, 121 La. 394, 46 So. 437. Mo.—*Rhodes v. Guhman*, 156 Mo. App. 344, 137 S. W. 88; *Chambers v. Kupper-Benson Hotel Co.*, 154 Mo. App. 249, 134 S. W. 45; *Kellerman Con. Co. v. Chicago House Wrecking Co.*, 137 Mo. App. 292, 118 S. W. 99. Tex.—*Connally v. Saunders* (Tex. Civ. App.), 142 S. W. 975.

92. Cal.—*Heinlen v. Heilbron*, 71 Cal. 557, 12 Pac. 673; *Mondran v. Goux*, 51 Cal. 151. Colo.—*Fischbach v. Garrison Milling, etc. Co.*, 46 Colo. 29, 102 Pac. 895. Conn.—*Berman v. Kling*, 81 Conn. 403, 71 Atl. 507; *Moran v. Bentley*, 69 Conn. 392, 403, 37 Atl. 1092. Fla.—*Parrish v. Pensacola, etc. R. Co.*, 28 Fla. 251, 9 So. 696. Ky.—*Ballard v. Durr*, 165 Ky. 632, 177 S. W. 445. La.—*Lazarus v. Friedrichs*, 117 La. 711, 42 So. 230. Mo.—*Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561; *Mark v. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20; *Reed v. Bolt*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; *Harris v. Han-*

This rule is not so strictly applied to defendants, as they are sometimes allowed the benefit of defenses which they did not raise in their pleadings,<sup>93</sup> but a judgment cannot be given a demurrant on a ground different from that stated in his demurrer.<sup>94</sup>

A judgment upon a finding which is contrary to an admission in the pleadings is erroneous.<sup>95</sup>

(II.) **Must Be Confined to Issues.**—The judgment must be confined to the issues raised by the pleadings.<sup>96</sup> A judgment which determines

nibal & St. J. Railroad Co., 37 Mo. 307; Quigley v. King, 182 Mo. App. 196, 168 S. W. 285; Schnitzer v. Excelsior Powder Mfg. Co. (Mo. App.), 160 S. W. 282; Rhodes v. Guhman, 156 Mo. App. 344, 137 S. W. 88; Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180. **N. Y.**—Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Southwick v. First Nat. Bank, 84 N. Y. 420; O'Hehir v. Cent. New England R. Co., 152 App. Div. 677, 137 N. Y. Supp. 627; Davis v. Broadalbin Knitting Co., 90 App. Div. 567, 86 N. Y. Supp. 127; Adams v. McCann, 59 N. Y. Super. 59, 13 N. Y. Supp. 424. **N. C.**—McFarland v. Cornwell, 151 N. C. 428, 66 S. E. 454. **Ohio.**—Rosebrough v. Ansley, 35 Ohio St. 107. **Okla.**—Overstreet, etc. Co. v. Citizens' Bank, 12 Okla. 383, 72 Pac. 379. **S. D.**—Anderson v. Chilson, 8 S. D. 64, 65 N. W. 435. **Tex.**—Rich v. Western Union Tel. Co., 101 Tex. 466, 108 S. W. 1152.

[a] "Though the evidence may justify a recovery upon a cause of action other than the one alleged, the appellant court is without authority to award it." Riker v. Curtis, 10 Misc. 125, 30 N. Y. Supp. 940.

93. See Mullen v. Morris, 43 Neb. 596, 62 N. W. 74, where the judgment credited the defendant with a payment alleged in the petition but denied in the answer.

[a] Where it appears from the evidence introduced by the plaintiff in an action for damages received by reason of the alleged negligence of defendants, that the negligence was that of an independent contractor, the defendants are entitled to a nonsuit, although he had not pleaded such fact. Easter v. Hall, 12 Wash. 160, 40 Pac. 728.

94. Wilson v. Mayor, 6 Abb. Pr. (N. Y.) 6.

Judgments upon demurrers, see generally 6 STANDARD PROC. 987, et seq.

95. White v. Douglass, 71 Cal. 115,

11 Pac. 860; Gregory v. Nelson, 41 Cal. 278; Nunan v. San Francisco, 38 Cal. 689.

[a] **A judgment in favor of a defendant who defaulted is erroneous and cannot stand.** Bouscaren v. Brown, 40 Neb. 722, 59 N. W. 385.

96. **U. S.**—Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464. **Ala.**—Kirkland v. Pilcher, 174 Ala. 170, 57 So. 46. **Ariz.**—Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555; Chenoweth v. Butterfield, 11 Ariz. 315, 94 Pac. 1131. **Cal.**—Gregory v. Nelson, 41 Cal. 278. **Colo.**—City of Colorado Springs v. Colorado & S. R. Co., 38 Colo. 107, 89 Pac. 820; Newman v. Bullock, 23 Colo. 217, 222, 47 Pac. 379. **Conn.**—Dewire v. Hanley, 79 Conn. 454, 65 Atl. 573; New Idea Pattern Co. v. Whelan, 75 Conn. 455, 53 Atl. 953; Stein v. Coleman, 73 Conn. 524, 48 Atl. 206; Greenthal v. Lincoln, Seyms & Co., 67 Conn. 372, 35 Atl. 266. **Ind.**—Hutts v. Martin, 134 Ind. 592, 33 N. E. 676; McFadden v. Ross, 108 Ind. 512, 8 N. E. 161; Macy v. Wood, 49 Ind. App. 469, 97 N. E. 553; Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103. **Kan.**—Spaeth v. Kouns, 95 Kan. 320, 148 Pac. 651, L. R. A. 1915E, 271; Evans v. Central Life Ins. Co., 125 Pac. 86. **Ky.**—Waggner v. Howsley, 164 Ky. 113, 175 S. W. 4; Ohio Valley Coal, etc. Co. v. Heine, 159 Ky. 586, 167 S. W. 873; Dickerson's Heirs v. Morgan's Exr., 8 Dana (Ky.) 130. **La.**—Union Sawmill Co. v. Summit Lumber Co., 124 La. 270, 50 So. 35. **Mo.**—Wolz v. Venard, 253 Mo. 67, 161 S. W. 760; Davidson v. Davidson Real Est., etc. Co., 249 Mo. 474, 155 S. W. 1; McGregor v. Ware Const. Co., 188 Mo. 611, 87 S. W. 981; Ross v. Ross, 81 Mo. 84; Newham v. Kenton, 79 Mo. 382. **Mont.**—Erbes v. Smith, 35 Mont. 38, 88 Pac. 563. **N. Y.**—Wright v. Delafield, 25 N. Y. 266; *In re Tel. Cable Co.*, 154 N. Y. Supp. 997; Banta v. Banta, 103 App. Div.



questions not within the court's jurisdiction because not in issue, is to that extent void, although the question decided may be within the general jurisdiction of the court.<sup>97</sup> But the parties may by consent depart from the issues framed by the pleadings and have questions

172, 93 N. Y. Supp. 393. **N. C.**—*Candle v. Morris*, 160 N. C. 168, 76 S. E. 17; *Wilson v. Taylor*, 98 N. C. 275, 3 S. E. 492. **Ohio**.—*Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132. **Okl.**—*Rogers v. Bass & Harbour Co.*, 150 Pac. 706; *Anglea v. McMaster*, 17 Okla. 501, 87 Pac. 660. **Ore.**—*Friendly v. Elwert*, 57 Ore. 599, 105 Pac. 401. 111 Pac. 690, 112 Pac. 1085. **Pa.**—*Royse v. May*, 93 Pa. 454. **Phil. Isl.**—*Falcon v. Manzano*, 15 Phil. Isl. 441; *Regalado v. Luchsinger*, 1 Phil. Isl. 619. **S. C.**—*McMillan v. Hughes*, 88 S. C. 296, 70 S. E. 804. **S. D.**—*Seiberling v. Mortinson*, 10 S. D. 644, 75 N. W. 202. **Tex.**—*Wheeler v. Wheeler*, 65 Tex. 573; *Arno Co-op. Irr. Co. v. Pugh* (Tex. Civ. App.), 177 S. W. 991. **Wash.**—*McLachlan v. Gordon*, 86 Wash. 282, 150 Pac. 441.

[3] **Judgment Should Not Be Rendered on an Issue Not Fairly Raised by the Pleadings.**—*Speth v. Kouss*, 95 Kan. 320, 148 Pac. 651, L. R. A. 1915E, 271.

[b] **Verdict Not Responsive to Issue.**—It is fundamental error for judgment to be rendered on answer of jury which is not responsive to issue without which there is no basis for judgment. *Indiana Co-op. Canal Co. v. Gray* (Tex. Civ. App.), 184 S. W. 242.

[c] **Personal Judgment in Proceeding In Rem.**—Where an attachment on a note is sued out against a non-resident defendant, and where the defendant pleads the statute of limitations, the proceeding becomes a suit as in case of personal service and a general judgment against him can be rendered. *Miller v. Whitehead*, 66 Ga. 283.

**Conformity to issues in judgments in forcible entry and detainer**, see 8 **STANDARD PROC.** 1125.

97. **U. S.**—*Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464; *Barnes v. Chicago*, etc. R. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. ed. 1128; *Hooven*, etc. Co. v. *Featherstone*, 111 Fed. 81, 49 C. C. A. 229. **Ala.**—*Kirkland v. Pileher*, 174 Ala. 170, 57 So. 46. **Ark.**—*Hoover v. Binkley*, 66 Ark. 645, 51 S. W. 73; *State Bank v. Sherrill*, 12 Ark. 183.

**Cal.**—*Stearns Ranches Co. v. McDowell*, 134 Cal. 562, 66 Pac. 724; *Wallace v. Farmers Ditch Co.*, 130 Cal. 578, 62 Pac. 1078; *Eastlick v. Wright*, 121 Cal. 309, 53 Pac. 654; *Elmore v. Elmore*, 114 Cal. 516, 46 Pac. 458. **Colo.**—*Breckenridge Merc. Co. v. Bailif*, 16 Colo. App. 554, 66 Pac. 1079; *Venner v. Denver Water Co.*, 15 Colo. App. 495, 63 Pac. 1061. **Ga.**—*Jackson v. Miles*, 94 Ga. 484, 19 S. E. 708. **Ind.**—*American Furniture Co. v. Batesville* (Ind.), 35 N. E. 682; *Hutts v. Martin*, 134 Ind. 592, 33 N. E. 676; *Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987; *Boardman v. Griffin*, 52 Ind. 101; *Bradford v. McBride*, 50 Ind. App. 624, 96 N. E. 503; *Baxter v. Baxter*, 46 Ind. App. 514, 92 N. E. 881, 1039; *Bartmess v. Holliday*, 27 Ind. App. 544, 61 N. E. 750; *Oolitic Stone Co. v. Crofton*, 4 Ind. App. 571, 31 N. E. 375. **Kan.**—*Kendall Boat Co. v. Davenport*, 63 Kan. 884, 65 Pac. 688. **La.**—*State ex rel. McMahon v. St. Paul*, 52 La. Ann. 1039, 27 So. 571; *Fisk, Watt & Co. v. Mead*, 18 La. 332; *Hennen v. Wood*, 16 La. Ann. 263. **Mo.**—*Kyle v. Hoyle*, 6 Mo. 526. **Neb.**—*Jarmine v. Swanson*, 83 Neb. 751, 120 N. W. 437; *State ex rel. Connolly v. Haverly*, 62 Neb. 767, 87 N. W. 959; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236; *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218. **N. J.**—*Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385; *Munday v. Vail*, 34 N. J. L. 418. **N. M.**—*Badaracco v. Badaracco*, 10 N. M. 761, 65 Pac. 153. **N. Y.**—*Husted v. Van Ness*, 158 N. Y. 104, 52 N. E. 645; *Schlimbach v. McLean*, 83 App. Div. 157, 82 N. Y. Supp. 516; *Bolivar v. Bolivar Water Co.*, 62 App. Div. 484, 70 N. Y. Supp. 750; *Clapp v. McCabe*, 84 Hun 379, 32 N. Y. Supp. 425. **S. D.**—*Seiberling v. Martinson*, 10 S. D. 644, 75 N. W. 202. **Tenn.**—*Thompson v. Keck Mfg. Co.*, 107 Tenn. 451, 64 S. W. 709. **Tex.**—*Long v. Long*, 29 Tex. Civ. App. 536, 69 S. W. 428. **Va.**—*Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36. **Wis.**—*Magunson v. Clithero*, 101 Wis. 551, 77 N. W. 882.

determined which are not raised thereby.<sup>98</sup> This consent may be express,<sup>99</sup> or it may be implied from the circumstances attending the trial.<sup>1</sup> It has been held that, under certain circumstances, a party may waive the defect that a judgment is broader than the issues.<sup>2</sup>

(III.) As to Form of Action.<sup>3</sup> — The judgment should conform to the pleadings with respect to the form of the action shown thereby.<sup>4</sup> Therefore a money judgment cannot be rendered upon a declaration or complaint in unlawful detainer,<sup>5</sup> or detainee.<sup>6</sup> Nor may a judgment in ejectment be rendered upon a complaint in assumpsit.<sup>7</sup> And in an action of debt, the rendition of a judgment as in assumpsit is erroneous;<sup>8</sup> but the rendition of a judgment for damages upon a

[a] A judgment entered by the court confessedly outside the issues rests upon the same footing as a judgment in which the subject-matter is entirely foreign to the jurisdiction conferred upon the court. *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218.

[b] A judgment which cannot be rendered under a complaint is as invalid as a judgment on a complaint which fails to state the cause of action. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46.

98. *Colo.*—*Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379. *Minn.*—*Erickson v. Fischer*, 51 Minn. 300, 53 N. W. 638. *N. Y.*—*Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502; *Farmers' Loan & Trust Co. v. Housatonic R. Co.*, 152 N. Y. 251, 46 N. E. 504; *Knickerbocker v. Robinson*, 83 App. Div. 614, 82 N. Y. Supp. 314; *Engel v. Sontag*, 110 N. Y. Supp. 933. *Tenn.*—*Wright v. Durrett*, 52 S. W. 710. *Tex.*—*Williamson v. Wright*, 1 Tex. Unrep. Cas. 711.

See generally the title "Variance and Failure of Proof."

[a] "Evidence of facts or stipulations as to the facts of a case, cannot make the case broader than it appears by allegation, nor can a party by mere force of facts admitted or proven become entitled to relief to which he would not have been entitled had his case been resisted only by general demurrer interposed to the pleadings upon which he relies." *Hicks v. Murray*, 43 Cal. 515.

99. *Campbell v. Consalus*, 25 N. Y. 613.

1. Acquiescence in trial of a new and different cause of action may be by silence or conduct. *Reed v. McConnell*, 133 N. Y. 425, 31 N. E. 22.

[a] Consent Implied.—"In the ab-

sence of amended pleading or of stipulation, the court of review must infer the consent to try issues from the evidence offered upon the one side, and the absence of objections or the character of objections, if any are made upon the other side." *Frear v. Sweet*, 118 N. Y. 454, 458, 23 N. E. 910.

Where the judgment is by agreement, see 14 STANDARD PROC. 919.

2. Where a party approves a form of judgment submitted to him, he waives a defect that the judgment is broader than the issues. *National Circle Co. v. Hines*, 83 Conn. 676, 92 Atl. 401.

3. Conformity as to theory of action, see *supra*, XI, D, 2, a.

4. See the cases generally throughout this section.

[a] In an action upon a covenant for a liquidated sum, the rendition of a judgment for the sum and interest declaring it to be "the debt in the declaration" instead of putting the principal and interest together and calling it damages is not reversible error. *Jenkins v. Yeates*, 2 J. J. Marsh. (Ky.) 48.

[b] Under a statute relating to bonds dispensing with a formal judgment for the penalty and authorizing the court to give a judgment for what is due in equity and good conscience, a judgment for damages is proper. *Sinclair v. Gadecomb*, 1 Vt. 22.

5. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46.

6. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46.

7. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46.

8. *Anderson v. Sloan*, 1 Colo. 484; *Brown v. Keller*, 38 Ill. 63.

As to judgment in debt generally, see 6 STANDARD PROC. 492.

declaration in debt, although technically an error<sup>9</sup> is not an error affecting the validity of the judgment.<sup>10</sup>

In code states, this rule has been modified and the courts will render such judgment as the evidence and pleadings show the party entitled to, regardless of the form of action.<sup>11</sup> But even under the code practice if a party brings an equitable action he must maintain it upon equitable grounds or fail, even though he may prove a good legal action,<sup>12</sup> for to hold otherwise would be in violation of the rule

[a] But if the judgment entered as in assumpsit binds the defendant to pay no more than an accurate judgment in debt would have done, it will not be reversed merely because in assumpsit. *Sandford v. Richardson*, 1 Ala. 182; *Carroll v. Meeks*, 3 Port. 226.

[b] Where the verdict and judgment on a declaration in debt are for "rent due," as the verdict and judgment seem to exclude interest, they must have been for the debt alone and will be sustained. *Brown v. Keller*, 38 Ill. 63.

9. *Bowden v. Bowden*, 75 Ill. 111; *Rockford, R. I. & St. L. R. Co. v. Steele*, 69 Ill. 253; *Jones v. Lloyd*, 1 Ill. 225; *Independent Order v. Stahl*, 64 Ill. App. 314; *Bradford v. Curlee*, 41 Miss. 558.

10. *Bradford v. Curlee*, 41 Miss. 558 (the error is no ground of reversal); *Smith v. Nolen*, 2 How. (Miss.) 755.

[a] The objection is merely technical and the judgment will not be reversed unless the question was raised in the trial court. *Bowden v. Bowden*, 75 Ill. 111. To same effect see *Rockford, R. I. & St. L. R. Co. v. Steele*, 69 Ill. 253; *Independent Order v. Stahl*, 64 Ill. App. 314.

11. U. S.—*Atlantic Nat. Bank v. Southern R. Co.*, 106 Fed. 623. Conn.—*Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 36 Atl. 832. Ia.—*Lee v. Coon Rapids Nat. Bank*, 166 Iowa 242, 144 N. W. 630. Mo.—*Rutherford v. Sample*, 186 Mo. App. 449, 171 S. W. 778. Mont.—*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49. N. Y.—*Wright v. Hooker*, 10 N. Y. 51; *Wilder v. Boynton*, 63 Barb. 547; *Eldridge v. Adams*, 54 Barb. 417; *Doughty v. Crozier*, 9 Abb. Pr. 411; *Brennan v. Gale*, 56 App. Div. 4, 67 N. Y. Supp. 382.

[a] The rights of a party are not to be determined by the label which he places upon his petition, but upon the facts pleaded. Although a party

may have erroneously alleged a conversion of money he may recover for money had and received if the facts pleaded and proved warrant it. *Lee v. Coon Rapids Nat. Bank*, 166 Iowa 242, 144 N. W. 630.

12. *Brinkerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58; *Sternberger v. McGovern*, 56 N. Y. 12; *Bradley v. Aldrich*, 40 N. Y. 504; *Heywood v. Buffalo*, 14 N. Y. 534; *Dalton v. Vanderveer*, 31 Abb. N. C. 430, 23 Civ. Pro. 443, 8 Misc. 484; *Mann v. Fairchild*, 41 N. Y. 106, 111.

[a] Under the code, actions at law and suits in equity are in fact retained. The pleader need not state whether his action is at law or in equity, but he is only required to state the facts constituting his cause of action, and if the facts justify a recovery at law, a judgment granting such relief will be granted. Likewise if the facts justify a recovery in equity a judgment will be rendered granting such relief. But the judgment in every case must be warranted by the facts stated. *Stevens v. New York*, 84 N. Y. 296, 304.

[b] The rule, that when equity has obtained jurisdiction of the parties and subject-matter of the action, it may adapt the relief to the exigencies of the case, even to rendering a personal judgment in order to prevent a failure of justice, applies when the general basis of fact upon which equitable relief was sought has been made out, but for some reason it becomes impracticable to grant such relief, or when the relief would be insufficient. It does not apply to a case where it appears there was never any ground for equitable relief whatever but the sole remedy was an action at law. *Dudley v. Third Order St. Francis*, 138 N. Y. 451, 34 N. E. 281.

[c] Where Facts Are Insufficient to Obtain Equitable Relief.—But where a party proceeds upon the theory that



that the complainant must recover upon the cause of action alleged.<sup>13</sup>

(IV.) **As to Parties.**<sup>14</sup> — (A.) **IN GENERAL.** — The judgment must correspond to the pleading as to the parties for and against whom it is rendered.<sup>15</sup> A judgment in favor of or against persons not parties to the action is erroneous.<sup>16</sup> In accordance with the rule restricting a party to the relief sought, a judgment against a party against whom a judgment is not asked is erroneous.<sup>17</sup> And a general judgment cannot be rendered against "defendants" where different relief is asked against different defendants.<sup>18</sup>

(B.) **CONFORMITY AS TO CAPACITY.** — The judgment must conform to the pleadings as to the capacity in which the parties sue and are sued.<sup>19</sup> Where a person sues or is sued in his individual capacity the court cannot render a judgment for or against him in a representative capacity,<sup>20</sup> and conversely, where he sues or is sued in a representative capacity upon a cause of action for or against him as such, a judgment for or against him as an individual is improper.<sup>21</sup> But a person

his relief is in equity but fails to state sufficient facts to entitle him to equitable relief, he will be given the relief to which he appears to be entitled. If the plaintiff is entitled to a money judgment, a money judgment will be rendered. *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.

13. *Anderson v. Chilson*, 8 S. D. 64, 65 N. W. 435.

14. **Designation of parties and additions**, see *infra*, XI, F.

15. A complaint alleging the performance of services for defendant and another, and a promise by the defendant to pay therefor supports a judgment against the defendant. *Delafield v. San Francisco, etc. R. Co.*, 107 Cal. xvii, 40 Pac. 958.

[a] **Variance as to Name.** — That the defendant company is named as a "railroad" company in the complaint and a "railway" company in the judgment is not a material variance. *St. Louis, etc. Ry. Co. v. State*, 55 Ark. 200, 17 S. W. 806. See also *Bole v. Sands & Maxwell Lumber Co.*, 77 Mich. 239, 43 N. W. 873.

[b] A party may be estopped to object to a variance in the name of the party in whose favor a judgment is rendered, as where he attempts by petition to set it aside on other grounds. *Glover v. Cox*, 137 Ga. 684, 73 S. E. 1068.

16. See 14 STANDARD PROC. 782.

[a] The amendment of pleadings so as to leave out some of the parties defendant operates as a discontinuance as to them, but the entitling of the

judgment as against them is merely a clerical misprision. It is only the name given to designate the cause and is of no effect against the omitted defendants. The error is unimportant. *Browner v. Davis*, 15 Cal. 9.

17. *Kentucky Liquor Co. v. Greenbaum*, 150 Ky. 569, 150 S. W. 805.

As to general rule regarding relief that may be granted, see *infra*, XI, D, 2, b, (VI).

18. *Feder v. Field*, 117 Ind. 386, 20 N. E. 129; *Thompson v. School Dist.*, 71 Mo. 495.

**Designation of parties as plaintiff or defendant**, see *infra*, XI, F, 2.

19. Conn. — *Mowry v. Hawkins*, 57 Conn. 453, 18 Atl. 784. Ill. — *Stokes v. Riley*, 121 Ill. 166, 11 N. E. 877. Tex. See *Connellee v. Hopkins* (Tex. Civ. App.), 31 S. W. 315.

20. Ill. — *Stokes v. Riley*, 121 Ill. 166, 11 N. E. 877. N. Y. — *Merritt v. Seaman*, 6 N. Y. 168. Tex. — *Pryor v. Krause* (Tex. Civ. App.), 168 S. W. 498.

[a] **But when the plaintiff amends** his pleading charging a defendant as an individual, and complains of him both as an individual and in his representative capacity, the court has authority to render judgment against him in both capacities. *Pryor v. Krause* (Tex. Civ. App.), 168 S. W. 498.

21. *Austin v. Munroe*, 47 N. Y. 360, distinguished in *Wick v. Jewett*, 9 N. Y. St. 477.

[a] Where an administrator or executor is sued in his representative



who sues in a representative capacity, such as executor or administrator, and sets forth a cause of action accruing to him in his own right may recover a judgment in his individual capacity and the words describing the capacity in which he sues will be considered mere description of the person, and not invalidate the judgment.<sup>22</sup>

(V.) As to Description of Property.<sup>23</sup> — The description of the property in the judgment should follow the description in the complaint.<sup>24</sup> A slight variance between the description in the judgment and that in the declaration or complaint will not invalidate the judgment, however.<sup>25</sup> But a material variance is cause for reversal.<sup>26</sup>

(VI.) As to Relief.<sup>27</sup> — (A.) IN GENERAL. — The rule that judgments must conform to the pleadings applies to the relief granted.<sup>28</sup> And

capacity and a personal judgment is rendered against him it will be invalid. *Foley v. Scharmann*, 58 App. Div. 250, 68 N. Y. Supp. 771; *Humphreys' Admr. v. West's Admrs.*, 3 Rand. (24 Va.) 516.

22. *Butler v. Kenner*, 2 Mart. (N.S.) 274; *M'Grew v. Browder*, 2 Mart. (N.S.) 17; *Childress v. Davis*, 15 La. 492; *Hunter v. Postlewaite*, 10 Mart. (O.S.) 456, 12 Am. Dec. 334. N. Y. *Bingham v. Marine Nat. Bank*, 18 Abb. N. C. 135; *Wick v. Jewett*, 9 N. Y. St. 477, *distinguishing Austin v. Munroe*, 47 N. Y. 360. Tex.—*Morrison v. Hodges*, 25 Tex. Supp. 176.

Effect of surplusage generally, see *supra*, XI, C, 3. See also *infra*, XI, F, 4.

23. Description of property generally, see *infra*, XI, H.

24. Cal.—*Holman v. Vallejo*, 19 Cal. 498. Ill.—*Russell v. Brown*, 41 Ill. 183. Mont.—*Foster v. Wilson*, 5 Mont. 53, 58, 2 Pac. 310.

[a] Where there is an apparent mistake in the declaration in the description of the land followed by a correct and particular description, it is proper for the clerk to follow the latter in entering judgment. *Anderson v. Timney*, 5 Mackey (D. C.) 335.

[b] A judgment for a different piece of land than that sued for (*Throckmorton v. Davenport*, 55 Tex. 236; *Arno Co-op. Irr. Co. v. Pugh* [Tex. Civ. App.], 177 S. W. 991; *Sen v. Rehling* [Tex. Civ. App.], 29 S. W. 1114), or awarding damages to land not described in the complaint (*Heinlen v. Heilbron*, 71 Cal. 557, 12 Pac. 673), is erroneous.

[c] It is presumed that the land described in the judgment is the same as that in the petition there being no

contradiction in the description, though that in the judgment is fuller. *Chapman v. Polack*, 66 Cal. xvii, 5 Pac. 232; *Leavell v. Seale* (Tex.), 45 S. W. 171.

25. *Mitchell v. Fidelity, etc. Co.*, 20 Ky. L. Rep. 713, 47 S. W. 446; *Sen v. Rehling* (Tex. Civ. App.), 29 S. W. 1114.

26. *Conley v. Dunn*, 28 Mont. 295, 72 Pac. 654.

27. Showing relief granted, see *infra*, XI, I.

28. Ark.—*Rogers v. Brooks*, 30 Ark. 612. Idaho.—*Lowe v. Turner*, 1 Idaho 107. Ind.—*Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614; *Boardman v. Griffin*, 52 Ind. 101. Ia.—*Hines v. Horner*, 86 Iowa 594, 53 N. W. 317. Kan.—*Hammers v. Merrick*, 42 Kan. 32, 21 Pac. 783. Md.—*Lumpkin v. Lumpkin*, 108 Md. 470, 70 Atl. 238. Mich.—*Burchy v. Carpenter*, 181 Mich. 78, 147 N. W. 612. Minn.—*Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41. N. M.—*Senescal v. Bolton*, 7 N. M. 351, 34 Pac. 446. N. Y. *Pioneer v. Alexander*, 7 Misc. 709, 28 N. Y. Supp. 157. N. C.—*Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47. Ohio.—*Moorman v. Schmidt*, 69 Ohio St. 328, 69 N. E. 617. Tenn.—*Simpson v. Markwood*, 6 Baxt. 340. Tex. *Vaughn v. Pearce* (Tex. Civ. App.), 153 S. W. 171.

[a] A plaintiff is entitled to relief to the extent that the averments of his petition are sustained by the proof (*Toy v. McHugh*, 62 Neb. 820, 87 N. W. 1059); but relief beyond that authorized by the facts alleged cannot be granted. See 6 STANDARD PROC. 715.

[b] Where in obedience to an order of the appellate court directing a court to render judgment as prayed for in

as a general rule a judgment granting relief which has not been asked for by the party is erroneous.<sup>29</sup> It is true that under a prayer for general relief, the court may render a judgment granting the relief the parties are entitled to under the pleadings and proofs.<sup>30</sup>

the answer, the court rendered judgment as prayed for, except for the addition of the order, "And said defendant is entitled to and shall have any appropriate process of this court to enforce said judgment hereby given, and each and every part thereof," there is no error. *White v. Wise*, 1 Cal. App. xviii, 81 Pac. 664.

[c] The consent of the parties to the rendition of a judgment exceeding the cause of action stated in the complaint is as ineffectual to confer authority upon the court to render it, as if there had been no cause of action stated in the complaint. *Rosebrough v. Ansley*, 35 Ohio St. 107.

[d] To What Cases Rule Applies. The rule requiring the recovery to be secundum allegata et probata obtains in all cases where it does not appear that substituted issues were litigated on the trial. *Riker v. Curtis*, 10 Misc. 125, 30 N. Y. Supp. 940.

[e] In Replevin.—A judgment of *retorno habendum* cannot be had in replevin where the plea is *non cepit* and the verdict is "not guilty," as this plea only puts in issue the taking of the property. *Rohe v. Pease*, 189 Ill. 207, 59 N. E. 520. See generally the title "Replevin."

29. See the following: Ia.—*Heins v. Wicke*, 102 Iowa 396, 71 N. W. 345 (judgment by default); *Dist. Tp. of Eureka v. Farmers' Bank*, 88 Iowa 194, 55 N. W. 342; *Tice v. Derby*, 59 Iowa 312, 13 N. W. 301; *Lafave v. Stone*, 55 Iowa 49, 7 N. W. 400; *Byam v. Cook*, 21 Iowa 392; *McGlaughlin v. O'Rourke*, 12 Iowa 459. Ky.—*Radford v. Southern Mut. Life Ins. Co.*, 12 Bush 434. La.—*Cole v. Reddick's Heirs*, 28 La. Ann. 843. Mo.—*Gamble v. Daugherty*, 71 Mo. 599. Me.—*Palmer v. York Bank*, 18 Me. 166. Mont.—*Erbes v. Smith*, 35 Mont. 38, 88 Pac. 568. N. Y.—*Husted v. Ingraham*, 75 N. Y. 251. Ohio.—*Rhodenbaugh v. Carey*, 2 Ohio Dec. (Reprint) 599, judgment on default. Phil. Isl.—*Lerma v. De la Cruz*, 7 Phil. Isl. 581. Tex.—*Houston v. Emery's Sons*, 76 Tex. 282, 13 S. W. 264; *Throckmorton v. Davenport*, 55 Tex. 236; *Hogan v. Kellum*, 13 Tex.

396; *Home Inv. Co. v. Strange* (Tex. Civ. App.), 152 S. W. 510; *Hahl v. Deutsch*, 42 Tex. Civ. App. 1, 94 S. W. 443. Wash.—*Oldfield v. Angeles Brew. & M. Co.*, 72 Wash. 168, 129 Pac. 1098.

See also 6 STANDARD PROC. 719; and generally the title "Prayer."

[a] It is not the duty of a court to extend to a party a real or supposed benefit which he manifests no desire to obtain. *Nevada County & S. C. Co. v. Kidd*, 37 Cal. 282, 304; *Morrison v. Bowman*, 29 Cal. 337, 354.

[b] Relief cannot be granted by a judgment which is not specifically prayed for or within the contemplation of a prayer for general relief. *Walker v. Walker*, 93 Iowa 643, 61 N. W. 930.

[c] "When the plaintiff by the prayer of the petition asks a particular recovery or special relief, which is consistent with the case stated, and there is no prayer for general relief, the special prayer must be regarded as evidencing the nature and object of the suit and in this respect as giving character to it; and the plaintiff will not in general be entitled to a different relief from that which he asked, for the presumption is that the plaintiff best knows the nature of his case and the injury he has sustained." *Hogan v. Kellum*, 13 Tex. 396, quoted and applied in *City of Houston v. Emery's Sons*, 76 Tex. 282, 13 S. W. 264.

[d] As to judgment for more land than claimed in an action of forcible entry and detainer, see 8 STANDARD PROC. 1125.

[e] Need Not Follow Exact Language of Prayer.—It is not necessary that a decree should follow the exact language of the prayer for relief. It is sufficient if it substantially grants the relief prayed for. *Johnson-Maakestad v. Johnson*, 44 Ill. App. 593; *Little v. White*, 3 Ind. 544.

[f] Where a petition justifies it, relief according to the equities of the case will be granted although somewhat different than the specific relief sought. *Rutherford v. Sample*, 186 Mo. App. 469, 171 S. W. 578.

30. See the following: Ga.—*Hairal-*

**Application of Rule to Defendants.** — This rule applies to judgments for defendants as well as plaintiffs.<sup>31</sup> An affirmative judgment cannot be rendered for a defendant who does not pray for it, as this would be in clear conflict with the general rule requiring judgments to be *secundum allegata et probata*.<sup>32</sup>

(B.) **CONFORMITY AS TO AMOUNT.**<sup>33</sup> — The amount for which a judgment is rendered must be supported by the pleadings.<sup>34</sup> It is a general rule, irrespective of the form of the action, that a plaintiff can

son v. Carson, 111 Ga. 57, 36 S. E. 319; Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145. **Ia.**—Rees, Gabriel & Co. v. Shepherdson, 95 Iowa 431, 64 N. W. 286; Hoskins v. Rowe, 61 Iowa 180, 16 N. W. 78. **Kan.**—Hardy v. La Dow, 72 Kan. 174, 83 Pac. 401. **Ky.** Kentucky, etc. Coal Co. v. Frazier, 161 Ky. 374, 170 S. W. 986; McHugh v. Louisville Bridge Co., 23 Ky. L. Rep. 1546, 65 S. W. 456. **La.**—Independent Ice & D. W. Mfg. Co. v. Anderson, 106 La. 55, 30 So. 270. **Neb.**—Kelley v. Wehn, 63 Neb. 410, 88 N. W. 682; Grand Island Sav. & L. Assn. v. Moore, 49 Neb. 686, 59 N. W. 115. **Tex.** Lakeside Irr. Co. v. Kirby (Tex. Civ. App.), 166 S. W. 715. **Wash.**—Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862.

See generally the title "Prayer."

[a] But a personal judgment is not grantable under a prayer for general relief in an equitable action. Rees, Gabriel & Co. v. Shepherdson, 95 Iowa 431, 64 N. W. 286.

[b] Under a statute requiring that, in a case in which the recovery of money be demanded, the amount thereof shall be stated, and requiring a demand for the relief to which the plaintiff may suppose himself entitled, one cannot recover a money judgment under a prayer for general relief. Rush v. Brown, 101 Mo. 586, 14 S. W. 735.

31. Brown v. Iowa Legion of Honor, 107 Iowa 439, 78 N. W. 73.

32. **Cal.**—McDougald v. Argonaut Land & Dev. Co., 117 Cal. 87, 48 Pac. 1021. **Ga.**—Evans v. Thompson, 143 Ga. 61, 84 S. E. 128. **Ia.**—Walker v. Walker, 93 Iowa 643, 61 N. W. 930. **La.**—Couprie's Heirs v. Dufau, 1 Mart. (N. S.) 90. **Mo.**—Young v. Glascock, 79 Mo. 574; Jolliffe v. Collins, 21 Mo. 338; Muller v. Gillick, 66 Mo. App. 500. **Nev.**—Low v. Blackburn, 2 Nev. 70. **N. Y.**—Wright v. Delafield, 25 N.

Y. 266; Blewett v. Hoyt, 118 App. Div. 227, 103 N. Y. Supp. 451; Simon v. Silber, 145 N. Y. Supp. 87. **Pa.**—Neely v. Sensenig, 150 Pa. 520, 24 Atl. 748. **S. C.**—Humbert v. Brisbane, 25 S. C. 506. **Tex.**—Mackey's Heirs v. Welch's Exx., 22 Tex. 390; Holland v. Preston (Tex. Civ. App.), 41 S. W. 374; Trueheart v. Simpson (Tex. Civ. App.), 24 S. W. 842.

But compare, Conger v. Chamberlain, 14 Wis. 187, 279; Benedict v. Horner, 13 Wis. 256, 285 (under statute).

[a] Where there are several defendants, one of whom does not ask affirmative relief, a judgment granting affirmative relief to all is erroneous, at least as to the defendant who asked no affirmative relief. Trueheart v. Simpson (Tex. Civ. App.), 24 S. W. 842.

33. Specification of amount generally, see *infra*, XI, G, 1.

As to remission of excess, see the title "Remission of Damages."

34. **Ga.**—French Piano and Organ Co. v. Cardwell, 114 Ga. 340, 40 S. E. 292. **Ill.**—Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071; Morrison v. Smith, 130 Ill. 304, 23 N. E. 241; Toledo P. & W. Ry. Co. v. Pence, 71 Ill. 174; Kelley v. Third National Bank, 64 Ill. 541; Tucker v. Gill, 61 Ill. 236; Redner v. Davern, 41 Ill. 245; Altes v. Hinecker, 36 Ill. 265, 275, 85 Am. Dec. 406; Hichins v. Lyon, 35 Ill. 150; Rives v. Kumpler, 27 Ill. 291; Brown v. Smith, 24 Ill. 196; Oakes v. Ward, 19 Ill. 46. **Kan.**—Hardy v. La Dow, 72 Kan. 174, 83 Pac. 401; Loper v. State, 48 Kan. 540, 29 Pac. 687; Pratt v. Brockett, 20 Kan. 201; Educational Assn., etc. v. Hitchcock, 4 Kan. 36. **Ky.**—Feemster v. Johnson, 1 J. J. Marsh. 68; Fowler v. Cowper, 1 Sneed 58; Edwards v. Wiester, 2 A. K. Marsh. 382, 751. **La.**—Cincinnati Ins. Co. v. Harrison, 21 La. Ann. 379. **Me.**—Bickford v. Flannery, 70 Me. 106. **Mo.** Cauthorn v. Berry, 69 Mo. App. 401.



recover no more damages than are laid in his declaration or complaint,<sup>35</sup> and demanded in his prayer of relief;<sup>36</sup> but this rule has been departed from in certain instances.<sup>37</sup> The fact that a party claims too much does not defeat his action, but judgment may be rendered for a smaller amount actually shown to be due.<sup>38</sup> But conversely if the

**Neb.**—*Van Etten v. Kusters*, 48 Neb. 152, 66 N. W. 1106. **Tex.**—*Hoffman v. Bowen*, 17 Tex. 506.

Judgment exceeding amount stated in the affidavit of attachment, see 3 STANDARD PROC. 736.

35. **Ala.**—*Boardman v. Poland*, 2 Port. 431; *Derrick v. Jones*, 1 Stew. 18; *Flournoy v. Childress*, Minor 93; *Dinsmore v. Austill*, Minor 89. **Cal.** *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. **Ga.**—*Lester v. Cloud*, 67 Ga. 770. **Ill.** *Hobson v. Emporium, etc. Co.*, 42 Ill. 306; *Altes v. Hineckler*, 36 Ill. 265, 276; *Hichins v. Lyon*, 35 Ill. 150; *Linder v. Monroe's Exrs.*, 33 Ill. 388; *Walcott v. Holcomb*, 24 Ill. 331; *Brown v. Smith*, 24 Ill. 196; *Stephens v. Sweeney*, 7 Ill. 375; *Fournier v. Faggott*, 4 Ill. 347. **Mass.**—*Safford v. Weare*, 142 Mass. 231, 7 N. E. 730; *Grosvenor v. Danforth*, 16 Mass. 74. **Mich.**—*Kenyon v. Woodward*, 16 Mich. 326. **N. H.**—See *Jarvis v. Brooks*, 27 N. H. 37, 68, 59 Am. Dec. 359. **Vt.** *Anonymous*, Brayt. 72. **Va.**—*Georgia Home Ins. Co. v. Goode & Co.*, 95 Va. 751, 30 S. E. 366.

[a] Where the ad damnum is less than the amount shown to be due by the tenor of the notes pleaded in the petition, judgment may be rendered for the latter sum. *McCauley v. Farmers & Merchants State Bank* (Tex. Civ. App.), 175 S. W. 728.

[b] A judgment in accordance with the prayer of a petition may be rendered although the amount thereof exceeds the ad damnum. *Sanders v. City Nat. Bank* (Tex.), 12 S. W. 110.

[c] **Ad Damnum Held Surplusage.** Under a statute providing that the complaint should conclude with a demand for relief, it was held, in *French v. Davis*, 38 Miss. 218, that the statement of damage in the conclusion of the complaint, viz., "that the said defendant has not paid the said sums of money, etc., 'to the damage of the plaintiff two hundred dollars, and therefore,' " etc., is surplusage and the rendition of judgment for more than the

amount stated in the conclusion is not error.

[d] **Judgment by Confession for Excessive Amount.**—A declaration in a certain amount cannot be the basis of a judgment for a greater amount although the defendant confessed judgment for the greater amount. *Lester v. Cloud*, 67 Ga. 770.

[e] **Erroneous Division of the Sums Claimed.**—Where the aggregate amount of the judgment is for less than the aggregate claimed in the declaration, the judgment will not be reversed for any technical error in the division of the sum, as where judgment was entered for less than the amount of the debt proper, and for more than the damages claimed, the aggregate being less than the amount claimed in the declaration. *Boardman v. Poland*, 2 Port. (Ala.) 431.

36. *Ketchum v. White*, 72 Iowa 193, 33 N. W. 627.

As to relief that may be granted under a particular prayer for relief, see the title "Prayer."

37. **In assumpsit on a promissory note**, if the defendant, after appearance, withdraws his plea, the court may render judgment for the amount of the note and interest thereon, without regard to the amount of damages laid in the declaration. *Kennedy v. Young*, 25 Ala. 563.

38. **Ark.**—*Browns v. Hill & Co.*, 5 Ark. 78. **Ga.**—*Knox v. Yow*, 91 Ga. 367, 17 S. E. 654. **Ill.**—*Chicago & A. R. Co. v. O'Brien*, 34 Ill. App. 155. **N. Y.**—*Starkweather v. Quigley*, 7 Hun 26. **N. C.**—*Brame v. Swain*, 111 N. C. 540, 15 S. E. 938.

[a] A party who asks for more relief at the hands of the court than he is entitled to does not thereby attempt a fraud on the opposite party, nor consummate a fraud if he gets it. *Murdock v. De Vries*, 37 Cal. 527.

[b] A party who claims treble damages but who is not entitled to it, may have single damages, if entitled thereto, under the evidence. *Starkweather v. Quigley*, 7 Hun (N. Y.) 26. See



pleadings and evidence warrant a recovery for the whole amount claimed, a judgment less than that is erroneous.<sup>39</sup>

**Interest.** — A judgment for interest upon the obligation may be granted when not prayed for.<sup>40</sup>

**Costs.** — Judgment may be given for costs in addition to the amount shown by the pleadings.<sup>41</sup> As costs are an incident to the recovery and no part of the relief sought,<sup>42</sup> they will be granted although not prayed for.<sup>43</sup>

Where there is a bill of particulars, a judgment for an amount in excess of the amount therein stated cannot be had.<sup>44</sup>

(C.) CONFORMITY AS TO MEDIUM OF PAYMENT.<sup>45</sup> — Judgments must be supported by the pleadings in respect to the medium of payment. If not so supported, they are erroneous.<sup>46</sup>

(D.) UNDER STATUTES. — It is provided by statute in some states that where there is an answer to the complaint, the court may grant any relief to the plaintiff consistent with the case made by the complaint

also *Cramer v. Oppenstein*, 16 Colo. 495, 27 Pac. 713.

39. *Metz v. Campbell Printing Press, etc. Co.*, 11 Misc. 284, 32 N. Y. Supp. 155; *Pionier v. Alexander*, 7 Misc. 709, 28 N. Y. Supp. 157; *Owens v. Flynn*, 7 Misc. 171, 27 N. Y. Supp. 336; *Shapiro v. McLaughlin*, 6 Misc. 146, 25 N. Y. Supp. 1117.

40. *Rutenie v. Hamakar*, 40 Ore. 444, 67 Pac. 196; *Georgia Home Ins. Co. v. Goode & Co.*, 95 Va. 751, 30 S. E. 366. *Compare*, *Hubbard v. Blow*, 1 Wash. (1 Va.) 70. *Contra*, *Moore v. McHaney*, 191 Mo. App. 686, 178 S. W. 258.

See generally the title "Interest."

41. *French v. Goodnow*, 175 Mass. 451, 56 N. E. 719.

42. 5 STANDARD PROC. 791.

43. *Reed v. Corrigan*, 114 Iowa 638, 87 N. W. 676; *Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328.

44. Ill.—*Morton v. McClure*, 22 Ill. 257; *George H. Hess Co. v. Dawson*, 51 Ill. App. 146. Kan.—See *St. Louis & S. F. Ry. Co. v. Armstrong*, 25 Kan. 561. N. Y.—*Bowman v. Earle*, 3 Duer 691; *Morrison v. L'Hommedieu*, 15 App. Div. 623, 44 N. Y. Supp. 79.

See 4 STANDARD PROC. 408.

[a] Where a bill of particulars is surplusage, as in an action on a written guaranty, a judgment within the ad damnum is not erroneous because it exceeds the bill of particulars. *Clark v. Ford*, 11 Ill. App. 199.

45. Designation of medium of payment, see *infra*, XI, G, 2.

46. Cal.—*Chamberlin v. Vance*, 51 Cal. 75; *Watson v. San Francisco, etc. R. R. Co.*, 50 Cal. 523; *Goldsmith v. Sawyer*, 46 Cal. 209; *Bachman v. Sepulveda*, 39 Cal. 688; *McComb v. Reed*, 28 Cal. 281. Idaho.—*Emery v. Langley*, 1 Idaho 694. Ill.—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097. N. J. *Marshman v. Conklin*, 21 N. J. Eq. 546. N. C.—*Parsley & Co. v. Nicholson*, 65 N. C. 207.

[a] A judgment founded on a contract payable in "gold or silver coin," which requires payment in gold only, is erroneous; it should follow the pleadings and the recital should be "gold or silver coin." *Burnett v. Stearns*, 33 Cal. 469.

[b] A judgment payable in lawful money is not invalid although the bill alleges that the bonds were payable in gold coin. *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895.

[c] Confederate Money.—A judgment for money cannot be rendered on a contract payable in "Confederate notes." *Martin v. Bartow Iron Works*, 35 Ga. 320.

Judgment in gold coin as being in excess of relief prayed for, see *infra*, XI, D, 2, b, (VI), (D), note 48, [g].

[d] Where Contract Payable in Property.—The judgment upon a note payable in property should be for the property and not for money unless the note has become converted into a money demand. *Ransom & Co. v. Stanberry*, 22 Iowa 334; *Burling v. Goodman*, 1 Nev. 314.

and embraced within the issue;<sup>47</sup> but if there be no answer, the relief

47. See generally the statutes, and the following: Cal.—Code Civ. Proc., §580; *Poladori v. Newman*, 116 Cal. 375, 48 Pac. 325; *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908; *Nevada County & S. C. Co. v. Kidd*, 37 Cal. 282, 304. Colo.—Code Civ. Proc., §186; *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040; *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278; *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27; *McClure v. Comrs. of La Plata County*, 23 Colo. 130, 46 Pac. 677; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465; *Smith v. Havens*, 6 Colo. 297; *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. 820. Ind. *Humphrey v. Thorn*, 63 Ind. 296; *Truitt v. Truitt*, 37 Ind. 514; *Hunter v. McCoy*, 14 Ind. 528; *Resor v. Resor*, 9 Ind. 347; *Mandlove v. Lewis*, 9 Ind. 194; *Colson v. Smith*, 9 Ind. 8. Ia. Code, 1897, §3775; *Stubblefield v. Gadd*, 112 Iowa 681, 84 N. W. 917; *Marder, Luse & Co. v. Wright*, 70 Iowa 42, 29 N. W. 799; *Wilson v. Miller*, 16 Iowa 111. Kan.—*Hardy v. La Dow*, 72 Kan. 174, 83 Pac. 401; *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Kimball v. Connor*, 3 Kan. 414; *First Nat. Bank v. Wattles*, 8 Kan. App. 136, 54 Pac. 1103. Ky.—*Hansford v. Holdam*, 14 Bush 210. Minn.—*Hoffman Truck Co. v. Erickson*, 124 Minn. 279, 144 N. W. 952; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866. Mo.—Rev. St., 1909, §2100; *Reed v. Bott*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; *Bick v. Dixon*, 148 Mo. App. 703, 129 S. W. 254; *Gunnell v. Emerson*, 80 Mo. App. 322. But see *Payne v. King*, 141 Mo. App. 246, 124 S. W. 1066. N. Y.—*Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55; *Lawrence v. Grout*, 140 App. Div. 629, 125 N. Y. Supp. 982; *Chaurant v. Mailard*, 56 App. Div. 11, 67 N. Y. Supp. 345; *Clapp v. McCabe*, 84 Hun 379, 32 N. Y. Supp. 425. N. C.—Code Civ. Proc., §565; *Herring v. Wallace Lumb Co.*, 163 N. C. 481, 79 S. E. 876; *Lytton Mfg. Co. v. House Mfg. Co.*, 161 N. C. 430, 77 S. E. 233; *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (N. S.) 606; *Carson v. Bunting*, 154 N. C. 530, 70 S. E. 923; *Reade v. Street*, 122 N. C. 301, 30 S. E. 124; *Johnson v. Loftin*, 111 N. C. 319, 16 S. E. 179; *Knight v. Houghtalling*, 85 N. C. 17,

34. Ore.—*Rutenic v. Hamakar*, 40 Ore. 444, 67 Pac. 196. S. C.—*Sheppard v. Green*, 48 S. C. 165, 175, 26 S. E. 224; *Christopher v. Christopher*, 18 S. C. 600.

[a] **Similar to Rule in Equity.**—The code in this section adheres very closely to the rules in equity; that is to say, in cases of default the relief is confined to the relief demanded in the complaint, as was the rule under a prayer for special relief in equity, while in the other case it is extended to granting relief similar to that granted under a prayer for general relief in the chancery courts. *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908. To same effect *Knight v. Houghtalling*, 85 N. C. 17, 34.

[b] Under such provisions, the prayer for relief is never conclusive. A party is entitled to such relief as the evidence under the pleadings represents. *Gray v. Heinze*, 82 Misc. 618, 144 N. Y. Supp. 1045.

[c] **This section does not warrant** the court in disappointing the expectation and claims of both parties so far as the case is equitable in nature, by denying the plaintiff's claim, and then selecting of facts found some of which may warrant an action for damages, which the plaintiff has neither alleged nor proved, and then order an assessment by a referee, and judgment for the damages assessed. *Bradley v. Aldrich*, 40 N. Y. 504, 100 Am. Dec. 528.

[d] "The first and principal complaint is that the court exceeded its authority in reforming the lease, when the only relief sought was its cancellation. It is insisted that the prayer of the petition measured the power of the court in rendering judgment. While the code requires that the plaintiff shall demand the relief to which he supposes himself to be entitled, the relief which the court may grant him depends upon the facts alleged in the petition rather than upon the arbitrary demand which he may make in his prayer. . . . The prayer of a pleading is sometimes used to explain the averments that precede it, and a party who is given no more than he demands may not be in a position to complain, but, so far as the court is concerned, it is the case made by the pleadings and the facts

granted cannot exceed that demanded in the complaint,<sup>43</sup> even though

proved, and not the prayer of the party, which determines the measure of relief which the court may award." *Hardy v. La Dow*, 72 Kan. 174, 83 Pac. 401 (the complaint in this case concluded with a prayer for general relief, however). But see *Atchison, etc. R. Co. v. Combs*, 25 Kan. 729.

48. See generally the statutes and the following: **Cal.**—Code Civ. Proc., §580; *Berentz v. Belmont Oil Co.*, 148 Cal. 577, 84 Pac. 47; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; *Nevada County & S. C. Co. v. Kidd*, 37 Cal. 282, 304; *Lamping & Co. v. Hyatt*, 27 Cal. 99; *Raun v. Reynolds*, 11 Cal. 14. **Colo.**—*Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278; *Smith v. Havens*, 6 Colo. 297; *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. 820. **Idaho.**—*Lowe v. Turner*, 1 Idaho 107. **Ind.**—*Humphrey v. Thorn*, 63 Ind. 296; *Colson v. Smith*, 9 Ind. 8. **Ia.**—*O'Connell v. Cotter*, 44 Iowa 48. **Minn.**—*Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. 85. **N. Y.**—*Bullard v. Sherwood*, 85 N. Y. 253; *Kelly v. Downing*, 42 N. Y. 71; *Bradley v. Aldrich*, 40 N. Y. 504; *Simonson v. Blake*, 12 Abb. Pr. 331; *Clapp v. McCabe*, 84 Hun 379, 32 N. Y. Supp. 425; *Chaurant v. Maillard*, 56 App. Div. 11, 67 N. Y. Supp. 345. **N. C.**—*White v. Snow*, 71 N. C. 232. **Wash.**—*Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534. **Wis.**—*Viles v. Green*, 91 Wis. 217, 64 N. W. 856; *Jones v. Jones*, 78 Wis. 446, 47 N. W. 728; *McKenzie v. Peck*, 74 Wis. 208, 42 N. W. 247.

See also 14 STANDARD PROC. 905.

[a] The judgment rendered where no answer is filed must be of the character prayed for in the complaint. Where a several judgment is asked, the rendition of a joint judgment is erroneous, as such a judgment is not of the character of that demanded. *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27. As to joint and several or separate judgments generally, see *infra*, XI, K, 3.

[b] **General Prayer as a Demand.** "The relief which the statute contemplates shall be granted in the absence of an answer is the relief demanded.

A general prayer is not such a demand." *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27.

[c] **Where One of Several Defendants Answers.**—Where there are two defendants, one of whom answered and one did not, and the complaint did not demand a judgment including interest on the debt alleged to be due, a judgment allowing interest is, to that extent erroneous. *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. 820.

[d] **Where there is no prayer for damages**, and the damages are not stated in the complaint, a default judgment for damages is erroneous. *Pittsburgh Coal Min. Co. v. Greenwood*, 39 Cal. 71.

[e] **Judgment on Petition Amended After Constructive Service.**—Where a non-resident defendant is brought into court by an order of publication and does not appear, the plaintiff cannot have any other or different relief than that prayed for. If, after publication, he amend his petition and take a different judgment from that prayed for originally, the judgment is void. After service by publication the defendant cannot be held to have any notice of amendments to the petition. *Janney v. Spedden*, 38 Mo. 395.

[f] **If the demand in the complaint is for unliquidated damages**, a judgment by default for a sum certain is irregular and will be set aside in a proper proceeding. *White v. Snow*, 71 N. C. 232.

[g] A judgment by default (1) that the amount be collected in gold coin, exceeds the relief prayed for where the complaint prays for so much money without specifying the kind of money and is erroneous under a statute limiting judgments on default to the relief prayed for. *Lamping & Co. v. Hyatt*, 27 Cal. 99; *Belford v. Woodward*, 158 Ill. 122, 133, 41 N. E. 1097. See also *Watson v. San Francisco, etc. R. Co.*, 50 Cal. 523, followed in *Chamberlin v. Vance*, 51 Cal. 75, 85. (2) In a collateral proceeding the judgment will be held valid as to the matter within the jurisdiction of the court, and void as to the direction that the payment be made in gold coin. *Belford v. Woodward*, 158 Ill. 122, 134, 41 N. E. 1097.

[h] **In Kentucky**, (1) the statute reads "If no defense be made, the



the facts alleged show that he is entitled to other relief,<sup>49</sup> and therefore, the amount of the plaintiff's recovery is limited to the amount prayed for.<sup>50</sup>

Where there is an answer the relief granted under this provision must be consistent with the case made by the complaint or petition,<sup>51</sup> but the demand for relief is generally wholly immaterial in a contested case,<sup>52</sup> although it may sometimes determine the relief that may be accorded;<sup>53</sup> and it has been held that an entirely different relief

defendant cannot have judgment for any relief not specifically demanded; but if defense be made, he may have judgment for other relief under a prayer therefor." Code, §90; *Kentucky Liquor Co. v. Greenbaum*, 150 Ky. 569, 150 S. W. 805; *Board of Sinking Fund Comrs. v. Mason & Foard Co.*, 19 Ky. L. Rep. 771, 41 S. W. 548. (2) Under this statute, a personal judgment cannot be granted under a prayer for all proper relief where the defendant asserted a claim to the homestead, as such is not a defense to the action. *Hansford v. Holden*, 13 Bush (Ky.) 210. (3) Nor is a demurrer a defense within the meaning of this statute. *Board of Sinking Fund Comrs. v. Mason & Foard Co.*, 19 Ky. L. Rep. 771, 41 S. W. 548.

49. *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. 85; *McKenzie v. Peck*, 74 Wis. 208, 42 N. W. 247.

[a] **Relief which is consistent** with that prayed for may be granted. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

50. **Cal.**—*Brooks v. Carpentier*, 53 Cal. 287; *Chase v. Christianson*, 41 Cal. 253; *Gage v. Rogers*, 20 Cal. 91. **Colo.** *Wilbur v. Maynard*, 6 Colo. 483. **Nev.** *Burling v. Goodman*, 1 Nev. 314. **N. C.** *Reade v. Street*, 122 N. C. 301, 30 S. E. 124; *White v. Snow*, 71 N. C. 232.

[a] **The reason of the rule** limiting the recovery in default cases to the amount of the prayer of relief is obvious. "The defendant by his default admits the justice of the claim, and thus consents that judgment be taken against him for what is prayed for in the first instance; whereas, if a greater or a different relief were demanded, he may appear and contest the claim as unjust and unreasonable." *Burling v. Goodman*, 1 Nev. 314, *quoted and followed* in *Lowe v. Turner*, 1 Idaho 107.

[b] **When Interest Should Begin To Run.**—A default judgment upon a

complaint praying judgment in a specific sum and that the judgment should bear interest is erroneous in awarding interest as from the date of the filing of the complaint. The interest should run from the date of the entry of judgment. *Gage v. Rogers*, 20 Cal. 91.

51. *Marder, Luse & Co. v. Wright*, 70 Iowa 42, 29 N. W. 799; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Bradley v. Aldrich*, 40 N. Y. 504, 100 Am. Dec. 528.

[a] **Relief Upon Reply.**—A plaintiff cannot obtain relief upon the allegations made in the reply wholly different from that demanded in the complaint, as it is not the office of a reply to state a cause of action. *Marder, Luse & Co. v. Wright*, 70 Iowa 42, 29 N. W. 799.

52. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155; *Gillam v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470.

[a] The fact that the particular relief granted is not specifically prayed for is immaterial in a contested case. *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113.

53. *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735.

[a] Speaking of the holding that the prayer may sometimes determine the relief that may be accorded, the court in *Bick v. Dixon*, 148 Mo. App. 703, 129 S. W. 254, said that it understood that this is so, when the petition states facts consistent with the prayer for relief, which is specific and when to grant relief not prayed for and plainly not contemplated by the plaintiff in stating his case, would surprise the defendant and deprive him of some right of procedure he is entitled to; as, where the entire theory of the case was for relief in equity and that relief was prayed, though relief at law might be consistent with the facts alleged, it will not be given.



from that prayed for in the pleadings cannot be granted.<sup>54</sup>

A demurrer is not an answer within this statute.<sup>55</sup> The statute is intended as a protection to defendants who suffer default,<sup>56</sup> and it cannot be availed of by persons who are not defendants,<sup>57</sup> or who are not interested in the defense of the action.<sup>58</sup>

(E.) EFFECT OF EXCESSIVE JUDGMENT. — A judgment exceeding the demand, rendered in a cause in which the court has jurisdiction of the subject-matter and of the person, is erroneous merely<sup>59</sup> but not void.<sup>60</sup> If the excess is very trifling, it will be ignored.<sup>61</sup>

c. *Conformity to Evidence.* — The judgment rendered should conform to and be supported by the evidence.<sup>62</sup> A judgment upon a

54. *Marder, Luse & Co. v. Wright*, 70 Iowa 42, 29 N. W. 799; *Lafever v. Stone*, 55 Iowa 49, 7 N. W. 400.

55. *Colo.*—*Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27. *Ky.*—*Kelly v. Downing*, 42 N. Y. 71. See *Board of Sinking Fund Comrs. v. Mason & Foard Co.*, 19 Ky. L. Rep. 771, 41 S. W. 548. *Mo.*—*Rush v. Brown*, 101 Mo. 586, 14 S. W. 735.

[a] *Contra*, *Viles v. Green*, 91 Wis. 217, 64 N. W. 856, especially where it appears that the judgment was rendered upon notice and the defendant was present when it was rendered and made no objection and took no exception to the judgment.

56. *Peck v. New York & N. J. R. Co.*, 85 N. Y. 246.

57. *Peck v. New York & N. J. R. Co.*, 85 N. Y. 246.

58. *Peck v. New York & N. J. R. Co.*, 85 N. Y. 246.

59. *Cal.*—*Chase v. Christianson*, 41 Cal. 253; *Lamping & Co. v. Hyatt*, 27 Cal. 99. *Ia.*—*Ketchum v. White*, 72 Iowa 193, 33 N. W. 627; *Lafever v. Stone*, 55 Iowa 49, 7 N. W. 400; *O'Connell v. Cotter*, 44 Iowa 48. *Wis.*—*Jones v. Jones*, 78 Wis. 446, 47 N. W. 728.

[a] A judgment in excess of the amount declared for is irregular but not void and may be cured by amendment. *Bruce v. Lowman, etc. Co.*, 64 Ga. 769. Amendments as to amount and character of relief obtained, see *infra*, XIII, A, 3, b, (VI).

[b] A judgment is not necessarily erroneous for exceeding the plaintiff's pleadings where the matter upon which it is rendered is pleaded by the defendant and the plaintiff's prayer is sufficiently broad to cover the judgment awarded. *Rutkaski v. Zalaski (Conn.)*, 96 Atl. 365.

60. *Cal.*—*Reeve v. Kennedy*, 43 Cal

643; *Chase v. Christianson*, 41 Cal. 253. *Ga.*—*Buice v. Lowman Gold & Silver Min. Co.*, 64 Ga. 769. *Ia.*—*Ketchum v. White*, 72 Iowa 193, 33 N. W. 627; *O'Connell v. Cotter*, 44 Iowa 48. *Utah.* *Darke v. Ireland*, 4 Utah 192, 7 Pac. 714. *Wis.*—*Jones v. Jones*, 78 Wis. 446, 47 N. W. 728; *McKenzie v. Peck*, 74 Wis. 208, 42 N. W. 247.

61. *Ala.*—*Sanford v. Richardson*, 1 Ala. 182. *Mich.*—*Bowen v. School Dist. No. 9*, 36 Mich. 149. *Tenn.*—*Williams v. Bank of Tennessee*, 1 Coldw. 43; *Edwards v. Greene*, 5 Sneed 669.

62. See the following: *Ariz.*—*Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94. *Cal.*—*Redd v. Murry*, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; *Larson v. Larson*, 22 Cal. App. 331, 134 Pac. 342. *Colo.*—*Denver v. Walker*, 45 Colo. 387, 101 Pac. 348. *Fla.*—*Coons v. Pritchard*, 69 Fla. 362, 68 So. 225; *Seaboard Air Line R. Co. v. Harper Piano Co.*, 63 Fla. 264, 58 So. 491. *Ind.* *Whitman Agricultural Co. v. Hornbrook*, 24 Ind. App. 255, 55 N. E. 502. *Kan.*—*Uncle Sam Oil Co. v. Forrester*, 79 Kan. 610, 100 Pac. 512; *Hammers v. Merriek*, 42 Kan. 32, 21 Pac. 783. *Ky.*—*Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Mulholland & Bros. v. Samuels*, 8 Bush 63. *Mich.* *Beuthien v. Alberts*, 154 Mich. 142, 117 N. W. 556. *Mo.*—*Coleman v. Hicks*, 158 Mo. 367, 59 S. W. 70; *Bruen v. K. C., etc. Fair Assn.*, 40 Mo. App. 425; *King v. Brockschmidt*, 3 Mo. App. 571. *N. Y.*—*Donlon v. Donlon*, 154 App. Div. 212, 138 N. Y. Supp. 1039; *Raby v. Greater New York Dev. Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813; *Blewett v. Hoyt*, 118 App. Div. 227, 103 N. Y. Supp. 451; *Meyer v. Page*, 112 App. Div. 625, 98 N. Y. Supp. 739; *Shapiro v. McLaughlin*, 6 Misc. 146, 25 N. Y. Supp. 1117; *Jacobs v. Allen*, 135

finding which is not justified by,<sup>63</sup> or is contrary to,<sup>64</sup> the evidence cannot be sustained. Thus a judgment for less,<sup>65</sup> or in excess of that shown to be due by the evidence,<sup>66</sup> is erroneous.

**3. Conformity to Verdict and Findings.**<sup>67</sup>—The judgment must be in conformity with the verdict or findings in all respects.<sup>68</sup> It

N. Y. Supp. 663. **Ohio.**—Cincinnati Connecting Belt R. R. Co. v. Burski, 4 Ohio Cir. Ct. (N. S.) 98. **Phil. Isl.** Cia Gen. De Tabacos v. Trinchera, 7 Phil. Isl. 689; Ang Seng Queen v. Te Chico, 7 Phil. Isl. 541; Sanz v. Lavin, 6 Phil. Isl. 299. **Tex.**—Patterson v. Sylvan Beach Co. (Tex. Civ. App.), 171 S. W. 515; White v. McCullough, 56 Tex. Civ. App. 383, 120 S. W. 1093. **Wis.**—Gage v. Allen, 89 Wis. 98, 61 N. W. 361.

See generally *supra*, XI, D, 2, a.

**63.** White v. Douglass, 71 Cal. 115, 11 Pac. 860.

**Findings Must Be Supported by the Evidence.**—See 8 STANDARD PROC. 1055, et seq.

**64.** White v. Douglass, 71 Cal. 115, 11 Pac. 860; Root v. Topeka Water Supply Co., 46 Kan. 183, 26 Pac. 398.

[a] A finding for a defendant is **erroneous**, where the defendant's testimony admits the plaintiff's case and does not contradict it. Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93.

**65.** Robinson v. Ficken, 10 Misc. 758, 32 N. Y. Supp. 118; Shapiro v. McLaughlin, 6 Misc. 146, 25 N. Y. Supp. 1117; Kelsay Lumb. Co. v. Rotsky (Tex. Civ. App.), 178 S. W. 837.

[a] Where a certain amount is claimed by the pleadings, and there is no evidence to contradict the amount claimed, a judgment for less than the sum claimed is not *secundum allegata et probata*. Owens v. Flynn, 7 Misc. 171, 27 N. Y. Supp. 336.

**66. Ill.**—Manken v. Wilson, 8 Ill. App. 303. **Ia.**—Callender v. Drabelle, 73 Iowa 317, 35 N. W. 240. **Kan.** St. Louis & S. F. Ry. Co. v. Armstrong, 25 Kan. 561. **Mich.**—Mitchell v. Shuert, 16 Mich. 444. **Neb.**—Deering & Co. v. Miller, 33 Neb. 654, 50 N. W. 1056.

**67. Conformity of judgment to verdict in criminal cases, see the title "Sentence and Judgment."**

**Necessity for incorporating verdict in judgment, see *infra*, XI, E.**

**68. U. S.**—Ferkel v. Columbia Clay Wks., 192 Fed. 119, 112 C. C. A. 406; Bennett v. Butterworth, 11 How. 669, 13 L. ed. 859. **Ala.**—Spears v. Wise,

187 Ala. 346, 65 So. 786; Bell v. Otts, 101 Ala. 186, 13 So. 43, 46 Am. St. Rep. 117. **Ariz.**—Shannon Copper Co. v. Potter, 14 Ariz. 481, 131 Pac. 157. **Ark.**—McDonough v. Williams, 86 Ark. 600, 112 S. W. 164, amount of recovery. **Cal.**—California Mother Lode Min. Co. v. Page, 165 Cal. 549, 133 Pac. 14; Beach v. Cooper, 72 Cal. 99, 103, 13 Pac. 161; Ross v. Austill, 2 Cal. 183. **Fla.**—Baker & Holmes Co. v. Indian River State Bank, 61 Fla. 106, 55 So. 836. **Ga.**—Darien Bank v. Clarke Lumb. Co., 112 Ga. 947, 38 S. E. 363. **Idaho.**—Moore v. Evans, 24 Idaho 153, 132 Pac. 971. **Ind.**—Burns' Ann. St., 1914, §590; Jarboe v. Brown, 39 Ind. 549 (verdict for sum in gross, judgment cannot itemize such sum); Lake Erie & W. R. Co. v. Reed, 57 Ind. App. 65, 103 N. E. 127. **Kan.**—Educational Assn., etc. v. Hitchcock, 4 Kan. 36, amount in judgment can be no greater than that stated in verdict; Carter v. Christie, 1 Kan. App. 604, 42 Pac. 256. **Ky.**—Dunn v. Blue Grass Realty Co., 163 Ky. 384, 173 S. W. 1122; Marmaduke v. Tennant's Heirs, 4 B. Mon. 210; Martin v. Com., 6 J. J. Marsh. 549; Russell v. Shepherd, Hard. 44; Bourlier Cornice & Roof Co. v. Loemker, 23 Ky. L. Rep. 2346, 67 S. W. 10; Bogard v. Turner, 23 Ky. L. Rep. 630, 63 S. W. 607. **La.**—Solomon v. Gardiner, 50 La. Ann. 1293, 23 So. 896; Walker v. Acklen, 19 La. Ann. 186; Black v. Catlett, 1 Rob. 540. **Mass.**—Adams v. Frothingham, 3 Mass. 363, 3 Am. Dec. 151. **Miss.**—Carr v. Anderson, 24 Miss. 188. **Mo.**—Newton v. St. Louis & S. F. R. Co., 168 Mo. App. 199, 153 S. W. 495; Haumueller v. Ackermann, 130 Mo. App. 387, 109 S. W. 857. **Mont.**—Consol., etc. Min. Co. v. Struthers, 41 Mont. 565, 111 Pac. 152; Butte Electric R. Co. v. Mathews, 34 Mont. 487, 87 Pac. 460; Duane v. Molinak, 31 Mont. 343, 78 Pac. 588; Conley v. Dunn, 28 Mont. 295, 72 Pac. 654 (description of property in judgment radically different from that in verdict). **Neb.**—Morseh v. Besack, 52 Neb. 502, 72 N. W. 953; Foster & Smith Lumb. Co. v. Leisure,

3 Neb. (Unof.) 237, 91 N. W. 556. **N. Y.**—*Pangburn v. Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423; *Corn Exchange Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805; *Folcarelli v. Ward*, 132 App. Div. 316, 116 N. Y. Supp. 1093. **N. C.**—*Illoell v. White*, 169 N. C. 640, 86 S. E. 569; *American Soda Fountain Co. v. Schell*, 160 N. C. 529, 76 S. E. 631 (judgment cannot add interest where no provision is made therefor in verdict); *Jackson v. Williams*, 152 N. C. 203, 67 S. E. 755. **Okla.**—*Smith v. Eagle Mfg. Co.*, 25 Okla. 404, 108 Pac. 626. **Pa.**—*Maus v. Mahoning Tp.*, 24 Pa. Super. 624; *Kalbach v. Ontelaunce*, 16 Pa. Co. Ct. 590. **S. C.**—*Eason v. Miller & Kelly*, 15 S. C. 194. **S. D.** *Goldberg v. Sisseton Loan & Title Co.*, 24 S. D. 49, 123 N. W. 266. **Tex.** *Vernon's Sayles' Tex. Civ. St.*, 1914, §1994; *Armstrong v. Hix* (Tex.), 175 S. W. 430; *Ablowich v. National Bank*, 95 Tex. 429, 67 S. W. 79; *San Antonio, etc. R. Co. v. Addison*, 96 Tex. 61, 70 S. W. 200 (judgment cannot award interest if verdict made no provision therefor); *Johnson v. Newman*, 35 Tex. 166; *Union Carpet Lining Co. v. Miller & Co.*, 38 Tex. Civ. App. 575, 86 S. W. 651; *Hayes v. Stowers Furniture Co.* (Tex. Civ. App.), 180 S. W. 149; *Eastham v. Patty & Brockinton*, 37 Tex. Civ. App. 336, 83 S. W. 885; *Smith v. Smith*, 10 Tex. Civ. App. 485, 32 S. W. 28. **Utah.**—*Brittain v. Gorman*, 42 Utah 586, 133 Pac. 370. **Wash.**—2 Ball. Ann. Codes, §5115; *Gerard-Fillio Co. v. McNair*, 74 Wash. 368, 133 Pac. 462; *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999. **Wis.**—*Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871.

[a] "It is a cardinal rule that the judgment must follow the verdict and if the jury have given a specified sum in an action for damages the court cannot increase or decrease the amount nor can it change the substance of the verdict." *Winn v. Finch* (N. C.), 88 S. E. 332.

[b] The word "conformity" as used herein means agreement—congruity with something else—and its use is intended to convey the idea that the judgment should carry out the intent of the verdict. *Eason v. Miller & Kelly*, 15 S. C. 194.

[c] **Rule Where Two Verdicts Are Found.**—Although two verdicts are found by a jury that only will be considered the proper verdict upon which the judgment is founded. *Mc-*

*Kinnon v. Reliance Lumb. Co.*, 63 Tex. 30.

[d] Where the jury assessed the damages at a certain amount in gold coin or a certain amount in legal tender notes and the judgment was entered for the latter sum, it was held that the judgment did not follow the verdict. *Knox v. Gerhauser*, 3 Mont. 267.

[e] In an action on a bond in which the complaint asks actual and exemplary damages from the principal and sureties, and the verdict follows the complaint and is general, the rendition of a judgment for exemplary damages against the principal alone is proper as under the facts the sureties were not liable for exemplary damages. "We cannot say the judgment should have been rendered for exemplary damages against the sureties upon the ground that the verdict was general and then reverse the judgment because the sureties could not be made so liable." *Emerson, Talcott & Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671; *Willard v. Archer*, 63 Cal. 33.

[f] **Where Verdict Erroneous as to Amount.**—The court, in rendering judgment, cannot change the amount even though the verdict be erroneous in that respect. *Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S. W. 1122.

[g] But under a statute, providing that where the verdict is special, the court shall render a proper judgment, if data is given in a special verdict or special finding of facts, from which it clearly appears that the amount assessed by the jury is the result of error in computation or grows out of some omission, the proper judgment to be rendered by the court would be the amount which a correct computation made from the data furnished would indicate. *Dawson v. Shirk*, 102 Ind. 181, 1 N. E. 292.

[h] Where the finding by the court is erroneous due to miscalculation of the amount due, a judgment for the proper amount is not erroneous. *Houston v. Newsome*, 82 Tex. 75, 17 S. W. 603.

[i] Where the jury find more damages than are laid in the writ or declaration, the court should enter judgment for the damages laid. *Robinet v. Morris' Admsrs.*, Hard. (Ky.) 93; *Baltzell v. Hickman*, 4 Litt. (Ky.) 265.

[j] **Judgment and Verdict Held Not Inconsistent.**—**Ga.**—*Parker v. Salmons*,



need not literally follow the verdict, however;<sup>69</sup> and a judgment which declares judicially the legal effect of the verdict is good in substance.<sup>70</sup> In making up the judgment, the verdict cannot be aided by the evidence in the cause;<sup>71</sup> but the pleadings may be referred to for such purpose.<sup>72</sup>

**Validity.** — If the verdict goes beyond the issues raised by the pleadings, it is void *pro tanto*,<sup>73</sup> and the surplus matter may be disregarded in entering the judgment.<sup>74</sup> But a judgment founded on a verdict or findings which are void for uncertainty cannot be upheld.<sup>75</sup>

113 Ga. 1167, 39 S. E. 475. **Ky.**—Pittsburg, etc. R. Co. *v.* Darlington's Admx., 129 Ky. 266, 111 S. W. 360; Jackson *v.* Hill, 22 Ky. L. Rep. 563, 58 S. W. 434; Metropolitan Life Ins. Co. *v.* Sehlhorst, 21 Ky. L. Rep. 912, 53 S. W. 524. **La.**—De Young *v.* De Young, 9 La. Ann. 545.

**Findings Must Support Judgment.** See 8 STANDARD PROC. 1032, et seq.

69. Browne *v.* Fechner (Tex. Civ. App.), 159 S. W. 461.

[a] But must be in accordance with the disposition of the issues in the case as made by the verdict. Browne *v.* Fechner (Tex. Civ. App.), 159 S. W. 461.

70. Howard *v.* Johnson, 91 Ga. 319, 13 S. E. 132; May *v.* Martin, 32 Tex. Civ. App. 132, 73 S. W. 840 (verdict for intervenor authorizes judgment against plaintiff).

[a] Where the verdict rendered is in favor of the plaintiff and against the principal only and is silent as to the surety, a judgment discharging the surety is efficacious. Howard *v.* Johnson, 91 Ga. 319, 13 S. E. 132.

[b] A judgment that plaintiffs take nothing and that defendants recover their costs from plaintiffs is in conformity to a verdict for the "defendant" in an action where defendants asked for no affirmative relief. Butler *v.* Estrella Raisin, etc. Co., 124 Cal. 239, 56 Pac. 1040.

71. Browne *v.* Fechner (Tex. Civ. App.), 159 S. W. 461; Blakeley *v.* El Paso Bldg. & L. Assn. (Tex. Civ. App.), 26 S. W. 292; Brient *v.* Bruce, 5 Tex. Civ. App. 580, 24 S. W. 35.

[a] In Louisiana, the judge, in giving judgment, may take the matters found by the verdict and the evidence given on other branches of the cause and render judgment on both. Morris *v.* Hatch, 2 Mart. N. S. (La.) 491.

72. Browne *v.* Fechner (Tex. Civ. App.), 159 S. W. 461; Blakeley *v.* El

Paso Bldg. & L. Assn. (Tex. Civ. App.), 26 S. W. 292; Brient *v.* Bruce, 5 Tex. Civ. App. 580, 24 S. W. 35.

[a] "Where the jury by their general verdict find everything in favor of the plaintiff, and neither party has asked that they shall make any special findings, the court may render judgment on the verdict, in accordance with the special facts as alleged in the plaintiff's petition, although such special facts are not specifically mentioned in the verdict." O'Keef *v.* Seip, 17 Kan. 131. And see, Betts *v.* Butler, 1 Idaho 185, holding that where the amount is not in controversy and the verdict is general, the court may, by referring to the pleadings, make its judgment for the amount admitted to be due.

[b] **Applying Verdict to Particular Count.**—Under a declaration containing a count for common-law trespass and a count for a statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute and proceed to render a judgment for treble the damages returned. Osburn *v.* Lovell, 36 Mich. 246; Shrewsbury *v.* Bawtlitz, 57 Mo. 414. See also Royse *v.* May, 93 Pa. 454.

**Reference to pleadings generally in aid of construction of judgment, see** *infra*, XII, B, 3, b.

73. See the title "Verdict."

74. Chamberlin *v.* Vance, 51 Cal. 75; Watson *v.* San Francisco, etc. R. Co., 50 Cal. 523.

[a] Where in an action for damages, the verdict is for the damages payable in gold coin, the words "gold coin" are mere surplusage and should be disregarded in entering the judgment. Chamberlin *v.* Vance, 51 Cal. 75, 85.

75. **Ala.**—Alexander *v.* Wheeler, 69 Ala. 332. **Cal.**—Hullinger *v.* Big Sespe



Judgments entered non obstante veredicto are an exception to this rule, and will be found fully treated elsewhere in this article.<sup>76</sup>

**4. Conformity to Referee's Report.**—Where the judgment is founded on the report of a referee it must conform to his findings and conclusions and a departure in any essential matter will invalidate the judgment.<sup>77</sup>

**E. RECITALS.**<sup>78</sup>—**1. Generally.**—There are many matters which it is unnecessary to recite in the judgment,<sup>79</sup> such as the appearance or non-appearance of the parties,<sup>80</sup> or the form of the action,<sup>81</sup> whether

Oil Co. (Cal. App.), 151 Pac. 369. **Ga.** Abbott v. Roach, 113 Ga. 511, 571, 38 S. E. 955. **Idaho.**—Moore v. Evans, 24 Idaho 153, 132 Pac. 971. **Tex.**—Houston, etc. R. Co. v. Walsh (Tex. Civ. App.), 183 S. W. 18.

[a] **Verdict Subject to Several Interpretations.**—"The judgment must always conform to the verdict, and, if that is capable of being understood in either of two or more possible ways, then it is impossible for the judgment to follow the verdict because it cannot follow in two opposite directions at the same time. So that it would seem that an ambiguous verdict is not merely irregular but is absolutely fatal to the judgment. Newton v. St. Louis & S. F. R. Co., 168 Mo. App. 199, 153 S. W. 495.

**76.** See 14 STANDARD PROC. 958, et seq.

**77. Ind.**—Smith v. Harris, 135 Ind. 621, 35 N. E. 984. **Me.**—Anonymous, 31 Me. 590. **Mass.**—Com. v. Pejepsent, 7 Mass. 399; Nelson v. Andrews, 2 Mass. 164. **Minn.**—Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694. **N. H.**—Brown v. Cochran, 11 N. H. 199. **N. Y.**—Hyman v. Friedman, 138 N. Y. 639, 34 N. E. 512; O'Shea v. Kirker, 4 Bosw. 120; Robbins v. Mount, 55 Hun 80, 8 N. Y. Supp. 388; Union Bay Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. Supp. 368. **N. C.**—Allen v. McMinn, 76 N. C. 395. **Pa.**—Moon v. Long, 12 Pa. 207.

[a] **A referee's report which states that he is unable to come to a satisfactory decision but finds for the defendant on the ground that the burden of proof is on the plaintiff will support a judgment for the defendant.** Cummings v. Remick, 63 N. H. 429.

[b] **Where the sum found by the referee is in excess of the amount claimed in the declaration the court**

may sustain the report and reduce the sum awarded to conform with the pleadings and render judgment for that amount. Kettler v. Kettler, 28 Neb. 403, 44 N. W. 465.

**78. Recitals in decrees,** see 6 STANDARD PROC. 777.

**Recitals in default judgment,** see 14 STANDARD PROC. 901, et seq.

**79. In a judgment of forfeiture it is sufficient to recite that the principal and bail were called in open court and did not appear in the terms of their undertaking without reciting that a bond had been taken or the amount of the bond.** Spicer v. State, 9 Ga. 49.

**A Georgia statute which provides "that a judgment shall recite that no issuable defense was filed" was construed to be directory; and an omission of the words did not affect the validity of the judgment.** Groover, Stubbs & Co. v. Inman, 60 Ga. 406.

**80. Ala.**—De Jarnette v. Dreyfus, 166 Ala. 138, 51 So. 932. **Cal.**—Green v. Swift, 50 Cal. 454, omission of recital as to appearance of parties does not affect validity of judgment. **Tex.** Caldwell v. Brown, 43 Tex. 216.

[a] **A court of general jurisdiction is presumed to have had jurisdiction over parties named in the cause against whom judgment is entered, even though the judgment contains no recitals of service or appearance.** Hendrick v. Biggan, 66 Misc. 576, 122 N. Y. Supp. 162.

**81. Penton v. Diamond,** 92 Ala. 610, 9 So. 175; McLaren v. Anderson, 81 Ala. 106, 8 So. 188; Williams v. Bowden, 69 Ala. 433; Meredith v. Holmes, 68 Ala. 190; Tecumseh Iron Co. v. Mangum, 67 Ala. 246; McAllister v. McDow, 26 Ala. 453; Galle v. Lynch, 21 Ala. 579; Reid v. Gordon, 2 Stew. 469; Williams v. Perkins, 1 Port. 471; Tankersley v. Silburn, 1 Minor 185.

it was in contract or in tort, or the names of the jury, where the trial is by jury.<sup>82</sup>

The facts upon which the judgment is founded need not be set out therein;<sup>83</sup> but the fact that the findings of fact are embodied in the judgment will not invalidate it.<sup>84</sup> Nor is it necessary to recite the legal grounds upon which the decision is based,<sup>85</sup> though some jurisdictions require that the judgment shall state concisely the grounds upon which the issues have been determined.<sup>86</sup> The verdict need not

[a] The form of the action is to be determined by the pleadings in the case. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

82. Ala.—*Davis v. State*, 136 Ala. 20, 33 So. 817; *Footte v. Lawrence*, 1 Stew. 483. Tex.—*Marlin's Heirs v. Stockbridge*, 14 Tex. 165. Va.—*Roach v. Blakey*, 89 Va. 767, 17 S. E. 228.

83. U. S.—*Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. ed. 737. Ark.—*Springfield Fire & Marine Ins. Co. v. Hamby*, 65 Ark. 14, 45 S. W. 472. Cal.—*In re Gregory's Estate*, 122 Cal. 483, 55 Pac. 144. Ga.—*McFarland v. McFarland*, 143 Ga. 598, 85 S. E. 758. Ia.—*Campbell v. Ayres*, 6 Iowa 339. Mo.—*Patterson v. Patterson*, 200 Mo. 335, 98 S. W. 613; *Ervin v. Brady*, 48 Mo. 560; *Judge v. Booge*, 47 Mo. 544. N. Y.—*Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51; *Bunten v. Orient Mut. Ins. Co.*, 8 Bosw. 448. Tex.—*Cook v. Hancock*, 20 Tex. 2; *Hamilton v. Ward*, 4 Tex. 356. Wis.—*Dousman v. Hooe*, 3 Wis. 466.

[a] Need Not Recite Evidence.—It is not a function of the judgment to show what evidence the court acted upon. The judgment of a court is giving the answer to the problem before it, and not the process by which the answer has been obtained. *Coats v. Barrett*, 49 Ill. App. 275.

[b] The findings of fact need not be incorporated in the judgment entry. *Springfield, etc. Ins. Co. v. Hamby*, 65 Ark. 14, 45 S. W. 472; *Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51 (wherein the court said: "At the end of the trial the court found the facts and conclusions of law separately. The judgment entered thereon contains a recital of the various facts found. This was improper. The judgment should contain nothing but a statement that the court has made its findings of fact and conclusions of law, and then decree the relief to which the plaintiff was entitled. All of these recitals

should, therefore, be stricken from the judgment. As this practice has become common, it is proper that we should call attention to its impropriety.")

84. *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Wallis v. First Nat. Bank*, 155 Wis. 533, 145 N. W. 195; *Pier v. Prouty*, 67 Wis. 218, 30 N. W. 232. See also 8 STANDARD PROC. 1019, 1020.

[a] The findings and judgment may be incorporated in one instrument without making the findings a part of the judgment proper. *Judge v. Powers*, 156 Iowa 251, 136 N. W. 315.

85. *Preston v. Auditor of Public Accounts*, 1 Call (5 Va.) 471.

[a] The law presumes that a judge of a court of record has good reasons for all his decisions and when the law entrusts to him the exercise of discretionary power, he is not obliged to state the reasons upon the record. *Hunnewell v. Young*, 18 Me. 262.

86. *Lapice v. Lapice*, 21 La. Ann. 226; *Dorr v. Jouet*, 20 La. Ann. 27; *Selby v. The Levee Commissioners*, 14 La. Ann. 434; *Jacobs v. Levy*, 12 La. Ann. 410; *Fleury v. Murphy*, 2 La. Ann. 59.

[a] Where the constitution provides (1) that a judgment shall contain the reasons upon which it is founded, if it recites that "the jury having found a verdict in favor of the plaintiff, it is ordered, adjudged, etc., it is a valid judgment (*McDonough v. Thompson*, 11 La. 566), (2) as is it where the judgment states that the court, being satisfied that the plaintiff's claim is correct," it is ordered, etc. *Slidell v. Locke*, 18 La. 461. (3) But a judgment in the following words: "This case having been regularly taken up according to assignment and after the testimony adduced and argument of counsel it is ordered," etc., has been held not to meet such requirements. *Police Jury of Baton Rouge v. Bozman*, 11 La. Ann. 94.

be incorporated in the judgment,<sup>87</sup> though the judgment should recite the fact that there was a verdict, where such is the case.<sup>88</sup> No statement in a judgment upon a verdict that it is upon the merits is necessary to determine its effect.<sup>89</sup> It is not necessary to recite in the judgment that the damages have been assessed by the clerk,<sup>90</sup> or that the judgment was rendered after due proof.<sup>91</sup>

2. **As to Jurisdiction.**—In judgments rendered by courts of limited jurisdiction, sufficient should be stated to show that the court rendering the same had jurisdiction of the subject-matter and parties to the action;<sup>92</sup> but in the case of judgments rendered by courts of general jurisdiction, jurisdiction is always presumed until the contrary is shown.<sup>93</sup>

F. DESIGNATION OF PARTIES AND ADDITIONS.<sup>94</sup>—1. **In General.** The parties must be designated in a judgment sufficiently to enable the clerk to know at whose instance to issue execution and against whose property it may properly be enforced;<sup>95</sup> a judgment that does

87. *McKinnon & Van Meter v. Reliance Lumb. Co.*, 63 Tex. 30.

[a] The verdict of a jury copied in the judgment need not contain the signature of the foreman. *McKinnon & Van Meter v. Reliance Lumb. Co.*, 63 Tex. 30; *Missouri, etc. Ry. Co. v. Wal- den* (Tex. Civ. App.), 46 S. W. 87.

Necessity for judgment conforming to verdict, see *supra*. XI, D, 3.

88. *Folcarelli v. Ward*, 132 App. Div. 316, 116 N. Y. Supp. 1093.

[a] A judgment upon a verdict should be in form a judgment for the party in whose favor the verdict was rendered. *Folcarelli v. Ward*, 132 App. Div. 316, 116 N. Y. Supp. 1093.

89. *Folcarelli v. Ward*, 132 App. Div. 316, 116 N. Y. Supp. 1093.

90. *Radcliff v. Erwin*, Minor (Ala.) 88; *Gregory v. McNealy*, 12 Fla. 578.

91. *Wade v. Hurst*, 143 Ga. 26, 84 S. E. 65; *Jones v. Tarver*, 19 Ga. 279; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488.

92. **Ill.**—*Spooner v. Warner*, 2 Ill. App. 240. **Tenn.**—*Gunn v. Boone*, 7 Heisk. 8; *Barry v. Patterson*, 3 Humph. 313. **Tex.**—*Thompson v. Griffin*, 19 Tex. 115.

See generally the titles "Justices of the Peace;" "Probate Courts."

[a] A personal judgment against a non-resident which does not show that the court had jurisdiction of the party is void. *Kilmer v. Brown*, 28 Tex. Civ. App. 420, 67 S. W. 1090.

Necessity for court having jurisdiction, see 14 STANDARD PROC. 777, et seq., and generally the title "Jurisdiction."

93. **U. S.**—*Grignon's Lessee v. Astor*, 2 How. 318, 11 L. ed. 283. **Minn.** *Miller v. Natwick*, 110 Minn. 448, 125 N. W. 1022. **N. H.**—*Wilbur v. Abbott*, etc., 58 N. H. 272. **N. Y.**—*Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162. **Tenn.**—*Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781.

See *infra*, XVII, A; the title "Jurisdiction," and 9 ENCY. OF EV. 927, 933, et seq.

[a] **Jurisdiction Presumed.**—The jurisdiction of a superior court of common law is always presumed unless the contrary appears and nothing is presumed to be out of the jurisdiction but that which specially appears to be so. *Wingate v. Hayward*, 40 N. H. 437, 441.

94. **Necessity for parties**, see 14 STANDARD PROC. 782, et seq.

**In suits by or against partners**, see generally the title "Partnership."

95. **Ala.**—*Gilbreath v. Manning*, 24 Ala. 418; *Kyle v. Mays*, 22 Ala. 673; *Hughes v. Mitchell*, 19 Ala. 268; *Turner's Admr. v. Dupree's Admr.*, 19 Ala. 198; *Spence v. Simmons*, 16 Ala. 828; *Patterson v. Officers of Circuit Court*, 11 Ala. 740; *Joseph's Admr. v. Joseph's Legatees*, 5 Ala. 280. **Ark.**—*Luttrell v. Reynolds*, 63 Ark. 254, 27 S. W. 1051.

**Ill.**—*De Wolf v. Long*, 7 Ill. 679; *Ful- ler Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428; *Coats v. Bar- rett*, 49 Ill. App. 275; *Aultman & Co. v. Wirth*, 45 Ill. App. 614. **Ky.**—*Church v. Chambers*, 3 Dana 274. **La.**—*Ford v. Tilden*, 7 La. Ann. 533. **Mo.** *Sweazy v. Nettles*, 2 Mo. 6. **Ohio.**



not show for and against whom it is rendered is void for uncertainty.<sup>96</sup> While it is true that each party should be designated by his true name, both Christian and surname in full, yet a mistake in the name of a party is not fatal. If his name is incorrectly spelled the doctrine of *idem sonans* may be invoked.<sup>97</sup> And it is not necessary that the names of the parties be correctly stated in the judgment, provided that by reference to the caption, or to the pleadings, process or proceedings in the action, the names may be made certain;<sup>98</sup> a variance or omission in this case will be held to be a clerical error, curable by amendment.<sup>99</sup>

State *ex rel.* Andrews *v.* Holden, 12 Ohio Dec. (N. P.) 91. **Pa.**—Park *v.* Holmes, 147 Pa. 497, 23 Atl. 769. **S. C.** Ordinary *v.* McClure, 1 Bailey L. 7, 19 Am. Dec. 648. **Tenn.**—Hubbard *v.* Birdwell, 11 Humph. 220; Steamer Mollie Hamilton *v.* Paschal, 9 Heisk. 203; McClellan *v.* Cornwell, 2 Coldw. 298; Boyken *v.* State, 3 Yerg. 426. **W. Va.** Ferrell *v.* Simmons, 63 W. Va. 45, 59 S. E. 752.

See also 14 STANDARD PROC. 1013.

**Conformity of parties with pleadings,** see *supra*, XI, D, 2, b, (IV).

96. Goldberg *v.* Markowitz, 94 App. Div. 237, 87 N. Y. Supp. 1045; Ferrell *v.* Simmons, 63 W. Va. 45, 59 S. E. 752.

[a] The failure to name the plaintiffs in a judgment, though an irregularity, cannot be taken advantage of when such judgment is offered as a muniment of title to support a sheriff's deed. Wyche *v.* Clapp, 43 Tex. 543.

**Certainty in judgment in general,** see *supra*, XI, C.

97. **Ill.**—Kerr *v.* Swallow, 33 Ill. 379. **Ia.**—Mallory *v.* Riggs, 76 Iowa 748, 39 N. W. 886. **Kan.**—Rowe *v.* Palmer, 29 Kan. 337. **Pa.**—Jenny *v.* Zehnder, 101 Pa. 296. **Tenn.**—Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781. **Tex.**—Selman *v.* Orr, 75 Tex. 528, 12 S. W. 697; Eichman *v.* State, 22 Tex. App. 137, 2 S. W. 538.

98. **U. S.**—Conrad *v.* Griffey, 11 How. 480, 13 L. ed. 779. **Ala.**—Lampkin *v.* Louisville & N. R. R. Co., 106 Ala. 287, 17 So. 448. **Cal.**—Chicago Clock Co. *v.* Tobin, 123 Cal. 377, 55 Pac. 1007. **Ia.**—Lindsey *v.* Delano, 78 Iowa 350, 43 N. W. 218; Finnagan *v.* Manchester, 12 Iowa 521; Campbell *v.* Ayres, 6 Iowa 339. **Kan.**—Union Pacific R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102. **Ky.**—Head *v.* Perry, 1 Mon. 253; Shackelford *v.* Fountain's Heirs, 1

T. B. Mon. 252, 15 Am. Dec. 115. **La.** Frey *v.* Fitzpatrick-Cromwell Co., 108 La. 125, 32 So. 437. **Mich.**—Aldrich *v.* Maitland, 4 Mich. 205. **Miss.**—Grimball *v.* Mississippi & A. R. Co., 3 Smed. & M. 38. **S. C.**—Goodgion *v.* Gilreath, 32 S. C. 388, 11 S. E. 207. **Tex.**—Smith *v.* Chenault, 48 Tex. 455; Little *v.* Birdwell, 27 Tex. 688; Bailey *v.* Crittenden (Tex. Civ. App.), 44 S. W. 404.

**Reference to record as aid in construction of judgments,** see generally XII, B, 3.

99. **Ala.**—McDaniel *v.* Johnston, 110 Ala. 526, 531, 19 So. 35; Flack *v.* Andrews, 86 Ala. 395, 5 So. 452; Crawford *v.* Whittlesey, 8 Ala. 806; Patterson *v.* Burnett, 6 Ala. 844. **Ark.**—Webster *v.* Bank of State, 4 Ark. 423. **Cal.**—Falcon *v.* Brittan, 84 Cal. 511, 24 Pac. 381. **Ill.**—Kerr *v.* Swallow, 33 Ill. 379. **Ind.**—Threlkeld *v.* Allen, 133 Ind. 429, 32 N. E. 576; McGaughey *v.* Woods, 106 Ind. 380, 7 N. E. 7. **Ky.**—Parsons *v.* Spencer, 83 Ky. 305. **N. C.**—Brooks *v.* Ratchiff, 33 N. C. 321. **Tex.**—Halsell *v.* McMurphy, 86 Tex. 100, 23 S. W. 647; Johnson *v.* Richardson, 52 Tex. 481; Terry *v.* French, 5 Tex. Civ. App. 120, 23 S. W. 911.

[a] A clerical error in naming the parties in a judgment will not render the judgment void. Crawford *v.* Whittlesey, 8 Ala. 806; Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429.

[b] Where in an action against the Austin Water, Light and Power Co., the jury brought in a verdict against the City Water Co. of Austin, and judgment was entered against the Austin Light and Power Co., it was held that inasmuch as the defendant was by its own attorney many times described as the City Water Co., the error was not ground for reversal. Austin Water, etc. Co. *v.* MaKemson (Tex.), 27 S. W. 588.

**Amendment of judgment as to design-**



The designation of parties in a judgment as the "heirs" of a certain person is sufficient, if it can be made certain by reference to the record of the case.<sup>1</sup> In a suit in the name of one for the use of another, a judgment which is entered in favor of the beneficiary alone is erroneous;<sup>2</sup> but a mere nominal or unnecessary party to an action should not be included in the judgment.<sup>3</sup> And in such a case a judgment against "the defendants" generally will not be reversed.<sup>4</sup>

**Designation in the Alternative.**—A judgment against two or more parties in the alternative is a nullity.<sup>5</sup>

**2. Fictitious or Wrong Name.**—A defendant may be sued by a fictitious name and if the pleadings are amended by inserting his true name a judgment rendered thereon is valid.<sup>6</sup> If a party is sued by a wrong name and service is made on the party intended to be sued and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded by such judgment.<sup>7</sup>

**3. Designation as Plaintiff or Defendant.**—The parties may be designated generally as "plaintiffs" or "defendants," and reference may be had to the pleadings to properly identify them; such a judgment will be held to comprise all those who are made parties as such

nation of parties, see *infra*, XIII, A, 3, b, (III).

1. *Parsons v. Spencer*, 83 Ky. 305; *Shackleford v. Fountain's Heirs*, 1 Mon. (Ky.) 252, 15 Am. Dec. 115.

[a] A judgment in favor of "the descendants" of a person without naming them individually is not void for uncertainty. *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210.

Reference to record as aid in construction of judgments, see *infra*, XII, B, 3.

2. **III.**—*Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823. **La.**—See *Jones v. Succession of Hoss*, 29 La. Ann. 564. **N. J.**—*Sonder v. Stout*, 3 N. J. L. 413. **N. C.**—*March v. Verble*, 79 N. C. 19.

[a] A judgment in favor of a nominal plaintiff "for the use of the estate of Saunders deceased," will not be disturbed on the ground that it does not show for whom it was rendered. *Dowell v. Mills*, 32 Tex. 440.

[b] A judgment may properly be entered against the real party in interest though not an actual party, where it participated in the trial. *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417.

3. *Cincinnati Ham. & D. R. R. Co. v. Spratt*, 2 Duv. (Ky.) 4.

[a] **Where Person Not a Party Is Interested in Subject-Matter.**—But a judgment may be rendered against one

who although only a nominal party to the suit is incidentally interested in the subject-matter and received the benefit of credit on the note sued on. *Harris v. Musgrove*, 59 Tex. 401.

4. *Cincinnati Ham. & D. R. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Harris v. Musgrove*, 59 Tex. 401.

**Designation of parties as plaintiff or defendant**, see *infra*, XI, F, 2.

5. *Alexander v. Leland*, 1 Idaho 425 (money judgment).

**Alternative or conditional judgments generally**, see *supra*, XI, C, 2.

6. **Cal.**—*Alameda Co. v. Crocker*, 125 Cal. 101, 57 Pac. 766; *San Francisco v. Burr*, 36 Pac. 771; *McKinlay v. Tuttle*, 42 Cal. 570. **La.**—*Enders v. The Henry Clay*, 8 Rob. 30. **N. Y.** *Fischer v. Hetherington*, 11 Misc. 575, 32 N. Y. Supp. 795.

[a] **Where a person goes under an assumed name and suit is brought against him in such name and judgment rendered in the assumed name the judgment will be good.** *Clark v. Clark*, 19 Kan. 522.

[b] **Where a person is known equally well by two names a judgment rendered against him in either name is valid.** *Hopson v. Schoelkopf* (Tex.), 27 S. W. 283.

7. **Cal.**—*McCreery v. Everding*, 54 Cal. 168. **Ill.**—*Pond v. Ennis*, 69 Ill. 341; *Davis v. Taylor*, 41 Ill. 405. **Ind.**

by the service of process and pleadings.<sup>8</sup> And a transposition of the words "plaintiff" and "defendant" in a judgment will not invalidate it, if it is clear from the rest of the record that it was a clerical mistake.<sup>9</sup> Where there are several defendants, a judgment against "the defendants" generally, will be limited to one only, if it is shown by the record that only one was intended.<sup>10</sup> Similarly, where the judgment is against the "defendant," it will be construed to mean all the defendants, if the record shows this intention.<sup>11</sup> The use of the word "plaintiff" instead of "plaintiffs," where there is more than one plaintiff, will be treated as a clerical error and the judgment will accrue to the benefit of all the plaintiffs.<sup>12</sup>

*Kinyen v. Stroh*, 136 Ind. 610, 36 N. E. 519. **Ky.**—*Louisville & N. R. Co. v. Hall*, 12 Bush 131. **Md.**—*First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53. **Mo.**—*Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51. **Pa.**—*Alt-house v. Hunsberger*, 6 Pa. Super. 163. **Tenn.**—*Brandon v. Diggs*, 1 Heisk. 472. **Eng.**—*Smith v. Patten*, 6 Taunt. 115, 128 Eng. Reprint 977.

8. **Ala.**—*Collins & Co. v. Hyslop*, 11 Ala. 508. **Fla.**—*Taylor v. Branham & Co.*, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362. **Ga.**—*Torrent v. Sulter*, 67 Ga. 32. **Ill.**—*Fink v. Disbrow*, 69 Ill. 76. **Ind.**—*Kirby v. Holmes*, 6 Ind. 33. **Mich.**—*Aldrich v. Maitland*, 4 Mich. 205. **Miss.**—*McCartey v. Kittrell*, 55 Miss. 253. **Tenn.**—*Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781; *Wilson v. Nance*, 11 Humph. 189. **Tex.**—*Smith v. Chenault*, 48 Tex. 455; *Little v. Birdwell*, 27 Tex. 688; *Hays v. Yarborough*, 21 Tex. 487. **Wis.**—*Dousman v. Hooe*, 3 Wis. 466.

[a] "The word 'defendant' in a judgment embraces all those who by the record are liable to the judgment." *Clagget v. Blanchard*, 8 Dana (Ky.) 41.

[b] Where an action is against two or more defendants and judgment is rendered against "the defendants," it will be construed to mean only such defendants as are properly before the court. *Cahill v. Vanlaningham*, 7 Ind. 540.

[c] **Defect Cured by Reference to Pleadings.**—While it is best that a judgment should be so complete within itself that the officer issuing the process to enforce it can see at a glance the parties for and against whom such process is to be issued yet, if the parties for and against whom it is rendered are so referred to therein as that

reference to its caption or the pleadings or process and proceedings in the action will make certain the names of the parties thus referred to it is sufficient. Every judgment may be construed and aided by the entire record. *Taylor v. Branham & Co.*, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362.

[d] Where there were two defendants, one of whom did not appear and was not served with process and the judgment was rendered against "the defendants," the court held that this was a clerical error which might have been amended by motion in the court below and that the court would treat it as so amended. *Stebbens v. Lenfesty*, 14 Ind. 4.

[e] Where the verdict is in favor of a part of the defendants and against the others, a judgment rendered against "the defendants" generally will not be erroneous. It will be construed with reference to the verdict upon which it is rendered and it will be held to be against only those defendants against whom verdict was given. *Lamar v. Williams*, 39 Miss. 342.

[f] **The Name of One Defendant Omitted.**—Where judgment is rendered against "the defendants," naming two of them, but omitting the name of the third, the judgment is still good against the unnamed defendant, if the record shows that the court had jurisdiction of him. *Coolbaugh v. Huether*, 6 Kulp (Pa.) 209.

Reference to record generally as aid in construction of judgment, see *infra*, XII, B, 3.

9. *Bowman v. Green*, 6 Mon. (Ky.) 339, 341.

10. See *infra*, XII, B, 4, c.

11. See *infra*, XII, B, 4, c.

12. See *infra*, XII, B, 4, b.

4. **Use of Christian Name and Initials.**—The use of the initials instead of the Christian name, though an irregularity, does not render the judgment void.<sup>13</sup> And if the initials are incorrectly designated the defect may be cured by reference to other parts of the record.<sup>14</sup> The Christian name or initials may be omitted entirely, without invalidating the judgment, provided they can be supplied by reference to the record.<sup>15</sup>

5. **Additions and Descriptions.**—The omission of additions, not properly a part of the name or description of the parties, does not render the judgment invalid.<sup>16</sup> So also, the improper addition of words merely descriptio personae does not affect the validity of the

13. *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748; *Bridges v. Layman*, 31 Ind. 384; *Jones v. Martin*, 5 Black. 351; *Vieborn v. Pollock*, 133 Mich. 524, 95 N. W. 576. But see *Dickerson v. Kelley*, 3 Penne. (Del.) 69, 50 Atl. 512.

[a] But where a defendant was sued as "James Cox" and service was returned as "John Cox" and judgment was entered against "J. Cox" was held to be such error as would invalidate the judgment unless there was something in the record to show the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

[b] **Business Name.**—Where a party is in the habit of signing checks and doing business at other places by the initials of his name, these initials will be treated as his business name and a judgment recovered against him by that name is not void. *Oakley v. Pegler*, 30 Neb. 628, 46 N. W. 920.

[c] **Using Initials of Corporate Name.**—A judgment against two railroad companies captioned with the initials of one company "et al," is sufficient against the other where the record shows that the other adopted the caption in its plea and described itself therein by its full corporate name. *Union Trust Co. v. Atchison, T. & S. F. R. Co.*, 8 N. M. 159, 42 Pac. 89.

14. **Ind.**—*McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7. **Ia.**—*Reed v. Lane*, 96 Iowa 454, 65 N. W. 380. **Mo.** *Krouski v. Missouri Pac. Ry.*, 77 Mo. 362. **Tex.**—*Crawford v. Wilcox*, 68 Tex. 109, 3 S. W. 695.

Reference to record to aid in construction of judgments, see *infra*, XII, B, 3.

15. **Ala.**—*Condry v. Henley*, 4 Stew. & P. 9. **Ind.**—*McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7; *Hopper v. Lucas*, 86 Ind. 43. **Mass.**—*Root v. Fellows*, 6 Cush. 29. **N. M.**—*Garland v.*

*Bartels*, 2 N. M. 1. **N. Y.**—*Fish v. Emerson*, 44 N. Y. 376; *Clute v. Emmerich*, 26 Hun 10; *Weil v. Martin*, 24 Hun 645; *Padgett v. Lawrence*, 10 Paige 170; *Grant v. Birdsall*, 2 Civ. Proc. 422. **Pa.**—*York Bank's Appeal*, 36 Pa. 458; *Ridgway, Budd & Co.'s Appeal*, 15 Pa. 177; *Sheridan's Estate*, 10 Kulp. 225. **S. C.**—*Goodgion v. Gilreath*, 32 S. C. 388, 11 S. E. 207. **Tenn.**—*Marshal v. Hill*, 8 Yerg. 101. **Tex.**—*Wyche v. Clapp*, 43 Tex. 543; *Hays v. Yarbrough*, 21 Tex. 487; *Bradford v. Rogers*, 2 Pos. Unrep. Cas. 57; *Ballew v. Casey*, 9 S. W. 189. **Vt.** *Newcomb v. Peck*, 17 Vt. 302. **Wash.** *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677.

[a] The omission of the Christian name of the defendant does not invalidate a judgment if the defendant intended was actually served. *Von Hatten v. Scholl*, 1 App. Div. 32, 36 N. Y. Supp. 771.

[b] The omission of the initial letter of the middle name of a defendant in a judgment will not invalidate it. *Clute v. Emmerich*, 26 Hun (N. Y.) 10.

[c] **Intervening Rights of Third Party.**—Where the initial of the middle name of the defendant is omitted in the judgment, though the judgment is good as against the defendant it is bad as against a third party whose interests have intervened by the purchase of real property after the recording of the judgment. *Wood v. Reynolds*, 7 Watts & S. (Pa.) 406.

16. **Omission of Word "Junior."** The word "junior" is no part of a name and where the plaintiff in the summons and declaration affixes the letters "Jr." to his name, the omission of those letters in the record of judgment is immaterial. *Loveland v. Sears*, 1 Colo. 433.



judgment.<sup>17</sup> But where the parties sue or are sued in a representative capacity, the parties should be designated in the judgment in the capacity in which they are sued.<sup>18</sup>

G. SPECIFICATION OF AMOUNT AND MEDIUM OF PAYMENTS.—1. **Specification of Amount.**<sup>19</sup>—a. *In General.*<sup>20</sup>—The amount for which the judgment is rendered must be specified with clearness and certainty;<sup>21</sup> a failure to do so will render the judgment erroneous, if

17. Cal.—*Rutan v. Wolters*, 116 Cal. 403, 48 Pac. 385. Ga.—*Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119; *Tinsley v. Lee*, 51 Ga. 482. Ia.—*Dougherty v. McManus*, 36 Iowa 657. N. C.—*Hall v. Craige*, 68 N. C. 305. Pa.—*Rockwell v. Tupper*, 7 Pa. Super. 174. Tex.—*Weis v. Skinner* (Tex. Civ. App.), 178 S. W. 34; *Sass v. Hirschfeld*, 23 Tex. Civ. App. 396; 56 S. W. 941; *Lenon v. Walker*, 2 Pos. Unrep. Cas. 568. Va.—*Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

See also *infra*, XII, B, 4, e, note 44.

[a] Where one is personally liable in an action brought against him, the description of him in the judgment "as tax-collector" will not vitiate the judgment, the words quoted being merely descriptive of the person, and having no legal effect otherwise. *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 18 S. E. 981.

[b] The word "curator" annexed to the name of a defendant against whom a decree is rendered is descriptive merely, and the decree is a personal one, although there be superadded a direction to the defendant "as curator" to collect and apply certain funds to its payment. *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

[c] Where a defendant signed a note as "superintendent" of a company and in an action on the note judgment was rendered against him individually, the court held that in the absence of a statement of facts it could not determine that it was error for the court below to treat the affix "superintendent" as mere descriptio personae. *Stevens v. Morris*, 35 Tex. 709.

**Effect of surplusage generally**, see *supra*, XI, C, 3.

18. See the following: U. S.—*Fortier v. New Orleans Bank*, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. ed. 764. Ga.—*Saffold v. Banks*, 69 Ga. 289. Ill.—*Masters v. Masters*, 13 Ill. App. 611. Ky.—See *Rudd v. Deposit Bank of Owens-*

*boro*, 105 Ky. 443, 49 S. W. 207, 971. Minn.—*Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753. N. Y.—*Legget v. Pelletreau*, 213 N. Y. 237, 107 N. E. 509; *Bennett v. Whitney*, 94 N. Y. 302. Tex.—*Brown v. Brown*, 71 Tex. 355, 9 S. W. 261.

See also *supra*, XI, D, 2, b, (IV), (B); and the titles "Executors and Administrators;" "Guardian and Ward;" "Receivers;" "Trusts and Trustees."

[a] If the pleadings are ambiguous as to capacity in which the plaintiff sues, the theory upon which the case was tried will control the judgment. The pleadings may be read in connection with a judgment which prima facie makes the defendant personally liable to show that the suit was against the defendants as executors. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072. Reference to pleadings as aid in construction of judgments, see generally *infra*, XII, B, 4, e.

[b] Where a party is sued in his legal representative capacity and judgment is rendered against him under the name of the "defendant" such judgment cannot be construed to be against him in his legal capacity. *Robbins' Admr. v. Walters*, 2 Tex. 130.

19. In judgments by confession, see 14 STANDARD PROC. 812, 835.

In judgment by default, see 14 STANDARD PROC. 904.

20. Conformity with pleadings, see *supra*, XI, D, 2, b, (VI), (B).

21. See the following: Ala.—*Spence v. Simmons*, 16 Ala. 828; *Mobile & C. P. R. R. Co. v. Talman*, 15 Ala. 472; *McCartney v. Calhoun*, 11 Ala. 110; *Tankersley v. Silburn*, Minor 185; *Dinsmore v. Austill*, Minor 89. Del.—*Etheridge v. Middleton*, 1 Marv. 139, 40 Atl. 714. Ga.—*Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S. E. 604. Ill.—*Guild v. Hall*, 91 Ill. 223; *Carpenter v. Sherry*, 71 Ill. 427; *Rothgerber v. Wonderly*, 66 Ill. 390; *Pittsburg*, Ft. W. & C. R. Co. v. Chicago, 53 Ill. 80; *Lawrence v.*



not void.<sup>22</sup> If the amount can be computed from data contained in

Fast, 20 Ill. 338; *Milbin v. Hawkey Ins. Co.*, 171 Ill. App. 262; *Dickinson v. Rahn*, 98 Ill. App. 245; *Fitzsimmons v. Munch*, 74 Ill. App. 259; *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Kamp v. Branch Crooks Saw Co.*, 47 Ill. App. 548. Ind.—*Needham v. Gillaspy*, 49 Ind. 245; *Burge v. Shirk*, 10 Ind. 396; *Wernway v. Brown*, 3 Blackf. 457. Ia.—*Anderson v. Reed*, 11 Iowa 177; *Taylor, Shipton & Co. v. Runyon*, 3 Iowa 474. Ky.—*Landerman v. McKinson*, 5 J. J. Marsh. 234; *Clarkson v. White*, 4 J. J. Marsh. 529, 20 Am. Dec. 229; *Mason v. Chambers*, 4 J. J. Marsh. 401; *Downing v. Dean's Exr.*, 3 J. J. Marsh. 378; *Booth v. Rogers*, 2 J. J. Marsh. 515; *Honore v. Colmesnil*, 1 J. J. Marsh. 506, 525; *Noland v. Richards*, 1 J. J. Marsh. 582; *White's Exrs. v. Guthrie*, 1 J. J. Marsh. 503; *Depew v. Bank of Limestone*, 1 J. J. Marsh. 378; *Clark v. Bell*, 4 Dana 15; *Brittenham v. Cummins*, 1 Bibb (Ky.) 487. La.—*Decker's Exrs. v. Bradford's Heirs*, 4 Mart. (O. S.) 311. Me.—*Bickford v. Flannery*, 70 Me. 106. Miss.—*Warbington v. Norris*, 3 How. 227. Mo.—*Steinback v. Lisa's Exrs.*, 1 Mo. 228. Okla.—*Board of Comrs. of Custer County v. Moon*, 8 Okla. 205, 57 Pac. 161. Pa.—*Park v. Holmes*, 147 Pa. 497, 23 Atl. 769. Tenn.—*Codwise v. Taylor*, 4 Sneed 346. Tex.—*Mussina v. Goldthwaite*, 34 Tex. 125; *Brown v. Horless*, 22 Tex. 645; *Barnett v. Caruth*, 22 Tex. 173, 73 Am. Dec. 255; *Moseley v. Brigham*, 12 Tex. 104; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717. Va.—*Early v. Moore*, 4 Munf. (18 Va.) 262. W. Va.—*Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562. Wis.—*Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269.

22. See the following: Ill.—*Dukes v. Rowley*, 24 Ill. 210; *Lane v. Bommelmann*, 21 Ill. 143; *Nichols v. Stewart*, 21 Ill. 106; *Boyne v. Vandalia R. R. Co.*, 128 Ill. App. 191 (citing with approval, *Avery v. Babcock*, 35 Ill. 175; *Carpenter v. Sherfy*, 71 Ill. 427); *Fitzsimmons v. Munch*, 74 Ill. App. 259; *School Directors v. Newman*, 47 Ill. App. 364. Ia.—*Giddings v. Giddings*, 70 Iowa 486, 30 N. W. 869; *Bartle v. Plane*, 68 Iowa 227, 26 N. W. 88; *Rigglesworth v. Reed*, *Morris* 19. Ky.—*Harrison v. Lee*, 7 J. J. Marsh. 171; *Taylor v. Morton*, 5 J. J. Marsh. 65;

*Clarkson v. White*, 4 J. J. Marsh. 529, 20 Am. Dec. 229; *Terrill v. Herron*, 4 J. J. Marsh. 519; *Bartlett v. Blanton*, 4 J. J. Marsh. 426; *Lowe v. Baber's Admr.*, 3 J. J. Marsh. 423; *Downing v. Dean's Exr.*, 3 J. J. Marsh. 378; *Booth v. Rogers*, 2 J. J. Marsh. 515; *Ward v. Davidson*, 2 J. J. Marsh. 443; *South-erland v. Crawford*, 2 J. J. Marsh. 369; *Ballard v. Davis*, 3 J. J. Marsh. 656; *Noland v. Richards*, 1 J. J. Marsh. 582; *Stagner v. Fox*, 1 J. J. Marsh. 556; *White's Exrs. v. Guthrie*, 1 J. J. Marsh. 503; *Smith v. Well's Admx.*, 4 Bush 92. La.—*Peet, Sims & Co. v. Whitmore*, 14 La. Ann. 408. Miss.—*Cloughton v. Black*, 24 Miss. 185; *Berry v. Anderson*, 2 How. 649; *Douglass v. Hendricks*, Walk. 230. N. H.—*Wilbur v. Abbott*, 58 N. H. 272. N. J.—*Hann v. Gosling*, 9 N. J. L. 248. N. Y.—*Frost v. Flint*, 2 How. Pr. 125. Okla.—*Board of Commissioners v. Moon*, 8 Okla. 205, 57 Pac. 161. Pa.—*Park v. Holmes*, 147 Pa. 497, 23 Atl. 769. Tenn.—*Codwise v. Taylor*, 4 Sneed 346. Tex.—*Brown v. Horless*, 22 Tex. 645; *Barnett v. Caruth*, 22 Tex. 173, 73 Am. Dec. 255. Va.—*Blane v. Sansum*, 2 Call (6 Va.) 495.

[a] A judgment for the plaintiff for a specified sum, "subject to an offset agreed upon by the parties aforesaid," is void for uncertainty. *Spiva v. Williams*, 20 Tex. 442.

[b] A judgment for the damages assessed by the jury when in fact no damages were assessed by the jury is erroneous. *Fowler v. Prewitt*, *Sneed* (Ky.) 59.

[c] A judgment that a surety, who sues as plaintiff, "be fully indemnified" is too indefinite. It should decree the exact sum due and to be paid. *Mudd v. Rodgers*, 10 La. Ann. 648.

[d] Where (1) a judgment is entered with blanks as to the amount to be supplied, it is invalid. Ill. *Nichols v. Stewart*, 21 Ill. 106; *School Directors v. Newman*, 47 Ill. App. 364. Ia.—*Giddings v. Giddings*, 70 Iowa 486, 30 N. W. 869; *Rigglesworth v. Reed*, *Morris* 19. Mich.—*Morgan v. Tweddle*, 119 Mich. 350, 78 N. W. 121. Okla. *Board of Comrs. of Custer County v. Moon*, 8 Okla. 205, 57 Pac. 161. (2) Thus where the amount of the damages was left blank in a judgment, but the amount of costs was specified, the court held that the judgment could be

the judgment itself it will not be void for uncertainty, however.<sup>23</sup> Reference may be had to the pleadings,<sup>24</sup> or to the verdict,<sup>25</sup> in the case to aid in determining the amount of the judgment.<sup>26</sup> Where both compensatory and punitive damages are allowed, the party against whom the judgment is rendered cannot require that they be stated separately in the judgment.<sup>27</sup> Where the damages in a judgment are assessed in two separate sums a misstatement of the aggregate will not affect its validity but will be treated as a clerical<sup>28</sup>

enforced for the amount of the costs only although the judge's calendar contained the minute, "clerk to assess." *Case v. Plato*, 54 Iowa 64, 6 N. W. 128. (3) But where the court ordered judgment on a promissory note the amount of which the clerk was directed to assess and the clerk made judgment entry leaving a blank for the amount which he afterwards filled in vacation, it was considered simply an irregularity and did not invalidate the judgment. *Lind v. Adams*, 10 Iowa 398.

Judgment blank as to costs, see *infra*, XI, G, 1, b.

[c] **Uncertain Credit.**—A judgment subject to an uncertain credit is erroneous. The amount of the credit should be ascertained and judgment rendered for the balance. *Early v. Moore*, 4 Mun. (18 Va.) 262.

23. See the following: **Ga.**—*Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S. E. 604. **Ill.**—*Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801; *Guild v. Hall*, 91 Ill. 233; *Hansen v. Rounsavell*, 74 Ill. 238; *Nichols v. Stewart*, 21 Ill. 106; *Washington Park Club v. Baldwin*, 59 Ill. App. 61. **Ind.**—*Biddle v. Pierce*, 13 Ind. App. 239, 41 N. E. 475. **Ia.**—*Anderson v. Reed*, 11 Iowa 177. **Ky.**—*Smith v. Wells' Admx.*, 4 Bush 92, 97; *Landerman v. McKinson*, 5 J. J. Marsh. 234; *Mason v. Chambers*, 4 J. J. Marsh. 401, 426; *Downing v. Dean's Exr.*, 3 J. J. Marsh. 378; *Ward v. Davidson*, 2 J. J. Marsh. 443. **La.**—*Mudd v. Rogers*, 10 La. Ann. 648. **Miss.**—*Warbington v. Norris*, 3 How. 227; *Berry v. Anderson*, 2 How. 649, 652. **Pa.**—*Lewis v. Smith*, 2 Serg. & R. 142; *Clarkson v. States*, 1 Lack. Leg. N. 119, 4 Pa. Dist. 428. **S. C.**—*Adicks v. Allison*, 21 S. C. 245, 259. **Va.**—*Early v. Moore*, 4 Mun. (18 Va.) 262.

[a] Every judgment must be certain and definite as to its amount. This element of certainty is present when the exact amount of the judgment may

be ascertained by the subtraction of one named sum from another named sum, as provided in the judgment. *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S. E. 604.

[b] **Judgment Valid If Amount Can Be Readily Computed.**—A judgment that the plaintiff have and recover of the defendant a specified sum of "\$205.79, his damages assessed by the jury, less the sum of \$5.79 remitted as aforesaid," is substantially a judgment for \$200.00 and is not erroneous for uncertainty. *Guild v. Hall*, 91 Ill. 223.

24. **Ill.**—*Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241. But see *Milhin v. Hawkey Ins. Co.*, 171 Ill. App. 262. **Kan.**—*Educational Assn. v. Hitchcock*, 4 Kan. 36. **Ky.**—*Depew v. Bank of Limestone*, 1 J. J. Marsh. 378. **La.**—*Decker's Exrs. v. Bradford's Heirs*, 4 Mart. (O. S.) 311; *Melancan's Heirs v. Duhamel*, 3 Mart. (N. S.) 7. **Miss.**—*Ladiner v. Ladiner*, 64 Miss. 368, 1 So. 492. **Tex.**—*Moseley v. Bringham*, 12 Tex. 104.

25. **Ala.**—*Ellis v. Dunn, Taylor & Co.*, 3 Ala. 632. **Ark.**—*Dyer v. Hatch*, 1 Ark. 339. **Ga.**—*Hayden v. Anderson*, 57 Ga. 378. **Ill.**—*Peoria & R. I. R. Co. v. Mitchell*, 74 Ill. 394; *Miller v. Kirby*, 74 Ill. 242. **Kan.**—See *Citizens' Bank v. Bowen*, 25 Kan. 117, 120. **Tex.**—*Barnett v. Caruth*, 22 Tex. 173, 73 Am. Dec. 255.

26. **Reference to record generally as aid in construction of judgment**, see *infra*, XII, B, 3.

[a] **The successor of the judge who made the record cannot go outside of the record to ascertain the amount for which judgment was intended to be rendered.** *Giddings v. Giddings*, 70 Iowa 486, 30 N. W. 869; *Lind v. Adams*, 10 Iowa 398; *Easterling v. State*, 35 Miss. 210.

27. **Hambly v. Hayden**, 20 R. I. 558, 40 Atl. 417.

28. **Ala.**—*Dickinson v. Branch Bank*

error, or as surplusage.<sup>29</sup> Where the value of several separate articles enter into the amount of a judgment, it is not a valid objection to it that the articles are not separately assessed, but that all are valued together.<sup>30</sup> Where one party is entitled to damages and the other to costs of the action there should be but one judgment, and that one for the difference between the two amounts in favor of the one entitled thereto.<sup>31</sup>

A judgment of affirmance which does not state the amount will be sufficiently certain if the amount can be definitely ascertained by reference to the original judgment.<sup>32</sup>

b. *Costs and Fees.*<sup>33</sup>—Costs do not form an integral part of the judgment, and if the amount thereof is omitted, there is no judgment for costs,<sup>34</sup> at least until they are properly taxed and entered in the judgment.<sup>35</sup> In some jurisdictions, the amount of costs may be left blank with instructions to the clerk to fill the amount in later.<sup>36</sup> In

of Mobile, 12 Ala. 54. Cal.—Hinekey v. Stebbins, 29 Pac. 52. Ill.—Kamp v. Branch Crooks Saw Co., 47 Ill. App. 548. Ky.—Deering v. Halbert, 2 Litt. 290.

29. Ala.—Brumby v. Langdon & Co., 10 Ala. 747. Ill.—Helmuth v. Bell, 150 Ill. 263, 37 N. E. 230, holding that a recital in a judgment for a gross sum attempting to distribute it among the several plaintiffs would be treated as surplusage. S. C.—Longstreet v. Lafitte, 2 Speers 664.

Effect of surplusage generally, see *supra*, XI, C, 3.

30. Ala.—Brumby v. Langdon & Co., 10 Ala. 747. Ark.—Jones v. Minogue, 29 Ark. 637. Tex.—Wright v. Henderson, 12 Tex. 43; Leavell v. Seale (Tex. Civ. App.), 45 S. W. 171.

31. Union Mercantile Co. v. Chandler, 90 Iowa 650, 57 N. W. 595; Johnson v. Farrell, 10 Abb. Pr. (N. Y.) 384; Fobes v. Meigs, 3 Wend. (N. Y.) 308; Warden v. Frost, 35 Hun (N. Y.) 141, 1 How. Pr. (N. S.) 364; Russell v. Griffin, 8 Abb. Pr. (N. Y.) 39; Crim v. Cronkhite, 15 How. Pr. (N. Y.) 250; Canfield v. Gaylord, 12 Wend. (N. Y.) 236; Coatsworth v. Ray, 52 N. Y. Supp. 498.

32. Ill.—Durham v. People, 67 Ill. 414; Benedict v. Dillehunt, 4 Ill. 287. N. C.—Bond v. Wool, 113 N. C. 20, 18 S. E. 77. Tex.—Luter v. Rose, 16 Tex. 52.

33. In judgments by confession, see 14 STANDARD PROC. 812, 835.

In judgment by default, see 14 STANDARD PROC. 904.

As to judgments for costs generally,

see 5 STANDARD PROC. 917, et seq.

34. Ala.—Holt v. Given & Co., 43 Ala. 612; Billingsley's Admr. v. Billingsley, 24 Ala. 518; Ijams & Carr v. Rice, 17 Ala. 404. Ind.—Palmer v. Glover, 73 Ind. 529. Ia.—Frankel v. Chicago, etc. R. Co., 70 Iowa 424, 30 N. W. 679. Kan.—Costello v. Wilhelm, 13 Kan. 229, 232; Lintan v. Housh, 4 Kan. 535. Mass.—Noyes v. Newmarch, 1 Allen 51. Neb.—Kissinger v. Staley, 44 Neb. 783. 63 N. W. 55. N. J.—Cook v. Brister, 19 N. J. L. 73. Pa.—Smith v. Block, 9 Serg. & R. 142. Wyo.—Mosher v. Uinta County, 2 Wyo. 462.

Specification of medium of payment of costs, see *infra*, XI, G, 2, a.

35. In re Young's Estate, 59 Ore. 348, 116 Pac. 1360.

36. U. S.—Flynn v. Edwards, 38 Fed. 873. Cal.—Antoine Co. v. Ridge Co., 23 Cal. 219. Conn.—Calhoun v. Terry Poster Co., 21 Conn. 526. Idaho—Cantwell v. McPherson, 3 Idaho 321, 29 Pac. 102. Ill.—Washington Park Club v. Baldwin, 59 Ill. App. 61. Ind.—Palmer v. Glover, 73 Ind. 529. Ia.—In re Brandes' Estate, 145 Iowa 743, 122 N. W. 954; Hoyer v. Buchholz, 145 Iowa 743, 122 N. W. 954; Frankle v. Chicago, B. & P. R. Co., 70 Iowa 424, 30 N. W. 679. Kan.—Edwards v. Farmers', etc. Bank, 67 Kan. 67, 72 Pac. 534; Clippenger v. Ingram, 17 Kan. 584. Mass.—East Tennessee Land Co. v. Leeson, 185 Mass. 4, 69 N. E. 351. Mich.—Schroeder v. Boyce, 127 Mich. 33, 86 N. W. 387. Minn.—Leyde v. Martin, 16 Minn. 38. Mo.—Beedle v. Mend, 81 Mo. 297, 304; McKnight v. Spain, 13 Mo. 534; Bobb v. Graham, 15 Mo. App.



some states it is unnecessary to state the costs separately, but they are included in the judgment;<sup>37</sup> but where costs follow as an incident to the judgment they should not be included therein and it is error so to do.<sup>38</sup>

Where an allowance is made for an attorney's fee under statute, the amount of such fee should be stated separately, and kept distinct from the amount of the judgment proper.<sup>39</sup>

c. *Interest*.—(I.) *On the Obligation*.—The exact amount of interest should be computed and included in the judgment;<sup>40</sup> it is bad practice to leave undetermined the amount of interest, to be afterwards computed by the clerk.<sup>41</sup> Indeed, it has been held that where the amount of interest is left blank, the award as to interest in the judgment is mere surplusage and ineffectual;<sup>42</sup> but it has also been held

289. **N. J.**—Cook *v.* Brister, 19 N. J. L. 73. **N. Y.**—Cotes *v.* Smith, 29 How. Pr. 326; Potter *v.* Smith, 9 How. Pr. 262; Dix *v.* Palmer, 5 How. Pr. 233; Hoffnung *v.* Grove, 18 Abb. Pr. 14; Macomber *v.* New York, 17 Abb. Pr. 35; Graham *v.* Pinekney, 7 Robt. 147. **N. C.**—Young *v.* Connelly, 112 N. C. 646, 17 S. E. 424. **Tenn.**—State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20. **Wash.**—Huntington *v.* Blakeney, 1 Wash. Ter. 111. **Wyo.**—Big Goose & Bever Ditch Co. *v.* Morrow, 8 Wyo. 537, 59 Pac. 159.

See also, 5 STANDARD PROC. 918, et seq.

[a] A judgment is not to be deemed perfected until the costs are duly taxed and inserted therein; but the omission will be treated merely as an irregularity. Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270.

[b] A judgment is not complete until the costs are inserted and the insertion of the costs is not an amendment of the judgment. Allen *v.* Wells Fargo & Co., 48 Misc. 610, 95 N. Y. Supp. 597.

[c] *Inserting Costs by Amendment*. The court may order the judgment amended by inserting the amount of costs left blank and such amendment is not cause for dismissing a pending levy on execution issued on such judgment. McLendon *v.* Frost, 59 Ga. 350. Amendment of judgments as to costs, see *infra*, XIII, A, 3, b, (VI), (B).

[d] *Ascertaining Amount Ministerial Act*.—Rendering a judgment for costs is a judicial act, but ascertaining the amount of such costs is ministerial. Cauthorn *v.* Bierhaus, 44 Ind. App. 362, 88 N. E. 314.

[e] A judgment for costs alone in

which the amount is left blank is erroneous. Mosher *v.* Uinta County, 2 Wyo. 462. And see Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Judgment blank as to amount, see *supra*, XI, G, 1, a.

37. **Ill.**—Jackson *v.* Cummings, 15 Ill. 449. **Ind.**—Palmer *v.* Glover, 73 Ind. 529. **N. J.**—Hay *v.* Imlay, 3 N. J. L. 832, holding that in debt, assumpsit, etc., the costs should be included in the sum recovered and form one entire judgment.

[a] *Inclusion of Costs Does Not Invalidate*.—The inclusion of costs in a judgment does not constitute error where they are stated as a separate item from the verdict inasmuch as there is nothing to prevent a change in the amount of costs on a motion to retax. Shearer *v.* Town of Buckley, 31 Wash. 370, 72 Pac. 76.

38. Davies *v.* Apperson, 146 Ill. App. 348; Brown *v.* Smith, 3 Caines (N. Y.) 80.

39. Rich *v.* Stretch, 4 Neb. 186.

40. If there is no provision for interest in the judgment it must, if interest be desired, be modified by the court which rendered it. Louisville Water Co. *v.* Clark, 15 Ky. L. Rep. 94.

[a] *Necessity for Data on Which Interest May Be Computed*.—Where a judgment is made to cover interest and there is no data to show how much is due, the finding is defective. Bell *v.* Ardis, 38 Mich. 609.

*Specification of medium of payment of interest*, see *infra*, XI, G, 2, a.

41. Lowande *v.* Otero & Co., 15 Porto Rico 181; Baer's Sons Grocer Co. *v.* Fruit Packing Co., 42 W. Va. 359, 26 S. E. 191.

42. Skinner Mfg. Co. *v.* Douville, 61



that where the pleadings are so clear that the clerk can by simple calculation determine the amount of interest, a judgment will not be held void because it leaves such calculation to the clerk.<sup>43</sup> Where a verdict does not include interest and does not afford sufficient data for its computation, the court in rendering judgment cannot compute the amount of the interest and render judgment therefor.<sup>44</sup> But it is otherwise if the jury return a verdict for damages with interest, without specifying the amount of the interest.<sup>45</sup>

While it is the better practice to state separately the damages and interest in the judgment, yet it is not error to render a judgment for an entire sum<sup>46</sup> where it does not exceed the aggregate of these two

Fla. 429, 54 So. 810; *Nichols v. Stewart*, 21 Ill. 106; *Prince v. Lamb*, 1 Ill. 378.

[a] **Amount of Interest Left Blank.** Where verdict in an action ex contractu awards a stated sum "with interest from date of suit" and judgment thereon is entered for the stated sum "as principal and the further sum of \_\_\_\_\_ dollars as interest," no amount being named as interest the judgment is effective only as to the stated sum and ineffectual as to the interest. *Skinner Mfg. Co. v. Douville*, 61 Fla. 429, 54 So. 810.

**Effect of surplusage generally in judgment,** see *supra*, XI, C, 3.

43. *Archer v. Moorehouse*, 1 Hempst. 184, 30 Fed. Cas. No. 18,225; *Hill v. Lyles* (Tex.), 81 S. W. 559.

**Reference to record as aid in construction of judgments,** see generally *infra*, XII, B, 3.

44. **Kan.**—*Southern Kan. R. Co. v. Showalter*, 57 Kan. 681, 47 Pac. 831; *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521; *Citizens' Bank v. Bowen*, 25 Kan. 117; *Carter v. Christie*, 1 Kan. App. 604, 42 Pac. 256. **Ky.**—*Russell v. Shepherd*, Hard. 44. **La.**—*Wichtrecht v. Fasnacht*, 17 La. Ann. 166; *Cochrane v. Murphy*, 4 La. Ann. 6. **Mont.**—*Gillett v. Clark*, 6 Mont. 190, 9 Pac. 823. **Tex.**—*Akin v. Jefferson*, 65 Tex. 137; *Shearer v. Smith*, 35 Tex. 427; *Smith v. Smith*, 10 Tex. Civ. App. 485, 32 S. W. 28.

[a] But see *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787, under a statute providing for rendition of a judgment for the principal with interest in an action of debt or assumpsit on notes and bills of exchange.

[b] Where the jury is instructed to include interest, it is presumed they did so and a judgment including interest on

the sum named in the verdict is erroneous. *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662, 3 N. W. 749.

45. *Louisville, etc. R. Co. v. Fort*, 112 Tenn. 432, 459, 80 S. W. 429.

46. *Dickinson v. Branch Bank*, 12 Ala. 54; *Bondurant v. Woods*, 1 Ala. 543; *Frazier v. Campbell*, 5 Tex. 275.

[a] **Verdict for Interest as Part of Damages.**—Whether in a given case the jury may award interest as damages is a question of law; and the jury having improperly included interest as an item of damage, it being separable, the court should exclude it in rendering the judgment. *Kentucky Tobacco Assn. v. Ashley*, 7 Ky. L. Rep. 297.

[b] If the claim (1) is for principal and interest to a certain date it is error for the court to enter judgment for the gross sum as bearing interest from the date of the attachment as the charge of interest on interest is not warranted under such circumstances. *Boarman v. Patterson*, 1 Gill (Md.) 372; *Hasting v. Johnson*, 1 Nev. 613. (2) But a stipulation in a judgment that the interest on it shall bear interest if not paid is void and does not make such judgment usurious. *In re Fuller*, 1 Sawy. 243, 9 Fed. Cas. No. 5,148.

[c] **Compare**, *Baer's Sons Grocer Co. v. Fruit Packing Co.*, 42 W. Va. 359, 26 S. E. 191, holding that in all cases where a judgment or decree is rendered for the payment of money it should be for the aggregate of principal and interest due at the date of verdict, if there be one, otherwise at the date of judgment or decree with interest thereon from such date, except in cases where it is otherwise provided.

sums, except where a statute provides for a separate statement thereof, as is sometimes the case.<sup>47</sup>

A judgment allowing interest must fix the date at which it is to commence and end;<sup>48</sup> and it is erroneous if it does not state the rate of interest recovered.<sup>49</sup>

(II.) On the Judgment. — Under statutes providing what rate of interest a judgment shall bear, a recital of the rate in the judgment is unnecessary,<sup>50</sup> unless required by the statute,<sup>51</sup> although sometimes made.<sup>52</sup> Where the legal rate of interest is given, the words giving it are surplusage, being merely expressive of the general rate to which the party would have been entitled without the insertion.<sup>53</sup> But if a rate of interest in excess of that allowed by law is given, the judgment is defective, and will be reversed on appeal.<sup>54</sup>

d. *Use of Words or Figures.* — There must be some designation of the standard or denomination of a money judgment by either some

47. See generally the statutes, and *March v. Wright*, 14 Ill. 248; *Mager v. Hutchinson*, 7 Ill. 266; *Williams v. Bank of Illinois*, 6 Ill. 667.

48. *Pumphrey v. Rafferty*, 5 Ky. L. Rep. 773.

[a] A judgment (1) for a sum certain and interest will be reversed unless the interest is from a day certain. *Tankersley v. Silburn*, Minor (Ala.) 185; *Wooster v. Clarke*, 2 Ark. 101. (2) But a judgment for a specified sum bearing interest from a day certain is not void for uncertainty. *Lightsey v. Harris*, 20 Ala. 409.

49. *Depew v. Bank of Limestone*, 1 J. J. Marsh. (Ky.) 378; *Troxwell v. Fugate*, Hard. (Ky.) 2; *Hardin v. Major*, 4 Bibb (Ky.) 104; *Harper v. Bell*, 2 Bibb (Ky.) 221; *Cotton v. Reavill*, 2 Bibb (Ky.) 99.

50. U. S.—*Byrd v. Gasquet*, Hempst. 261, 4 Fed. Cas. No. 2,268a. Cal.—*San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 33 Pac. 928; *Burke v. Carruthers*, 31 Cal. 467. Miss.—*McCutchen v. Dougherty*, 44 Miss. 419. Mo.—*State ex rel. Walsh v. Vogel*, 14 Mo. App. 187.

[a] In rendering a judgment for money, the court should fix the amount then due and render judgment therefor, saying nothing about subsequent interest. *Simmons v. Garrett*, McCahan (Kan.) 82.

[b] Under a statute providing that "all judgments for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts and all other

judgments shall bear six per cent per annum," the courts have held that it is not necessary that the court rendering the judgment should make such a statement in the judgment, but it is the duty of the clerk in issuing an execution upon the judgment to look to the record to determine the legal effect of the judgment, and that where a contract bears compound interest a judgment on it will bear the same interest. *Cairon v. Lafayette County*, 125 Mo. 67, 28 S. W. 331.

[c] A memorandum by the clerk at the foot of a judgment that the judgment shall bear interest at a certain rate is not a part of the judgment. *Fugate v. Glasscock*, 7 Mo. 577.

51. A judgment on a contract bearing a certain rate of interest shall conform to the contract and the rate of interest shall be specified in the judgment. Ark.—*Wooster v. Clarke*, 2 Ark. 101. Cal.—*Mount v. Chapman*, 9 Cal. 294. Ind.—*Smith v. Tatman*, 71 Ind. 171.

52. *Smith v. Martin*, 7 Coldw. (Tenn.) 272; *Cruger v. Sullivan & Co.*, 11 Tex. Civ. App. 377, 32 S. W. 448 (holding that it is not error to stipulate in the judgment that it shall bear interest at a certain rate).

53. *Byrd v. Gasquet*, Hempst. 261, 4 Fed. Cas. No. 2,268a; *Burke v. Carruthers*, 31 Cal. 467.

Effect of surplusage generally, see *supra*, XI, C, 3.

54. *Byrd v. Gasquet*, Hempst. 261, 4 Fed. Cas. No. 2,268a; *Pearsons v. Hamilton*, 2 Ill. 415.

word or character;<sup>55</sup> the omission of such designation in a money judgment will be fatal thereto.<sup>56</sup> This rule, however, is not universal, and in some jurisdictions such judgments will be upheld when the denomination of the standard intended can be ascertained from the record.<sup>57</sup> It is the better practice to express the amount of a money

55. Cal.—*People v. San Francisco Sav. Union*, 31 Cal. 132. Ill.—Pittsburgh, Ft. W. & C. Ry. Co. v. Chicago, 53 Ill. 81; *Elston v. Kennicott*, 46 Ill. 187, 189; *Avery v. Babcock*, 35 Ill. 175; *Lawrence v. Fast*, 20 Ill. 338. Ind.—*Hopper v. Lucas*, 86 Ind. 43. Miss.—*Carr v. Anderson*, 24 Miss. 188. N. Y.—*Brown v. Smith*, 3 Caines 81.

[a] In *Avery v. Babcock*, 35 Ill. 175, "the ground relied upon for a reversal is, that the judgment is indefinite and uncertain. There is no word, mark or character, which, in any manner, indicates for what the judgment is rendered. It is true that there are figures '383.18,' but whether they are intended to represent that number of American, English or German coins, we are left entirely to conjecture. Nor is anything found in the record from which it can be certainly inferred. It may be said, that indebtedness is usually for dollars and decimal fractions of a dollar, but we know it is not of unfrequent occurrence that agreements are made for sums in other coins, especially when made in other countries. The decisions of this court are uniform, that in a judgment for money, the sum must be specified in words or figures with some mark or character designating the precise sum. . . ."

56. U. S.—*Woods v. Freeman*, 1 Wall. 398, 17 L. ed. 543; *In re Boyd*, 4 Sawy. 262, 3 Fed. Cas. No. 1,746. Cal.—*People v. Empire Gold*, etc. Min. Co., 33 Cal. 171; *People v. San Francisco Sav. Union*, 31 Cal. 132; *Brady v. Seaman*, 30 Cal. 610, 619. Ill.—*Carpenter v. Sherfy*, 71 Ill. 427; *Elston v. Kennicott*, 46 Ill. 187, 189; *Potin v. Oades*, 45 Ill. 366; *Avery v. Babcock*, 35 Ill. 175; *Baily v. Doolittle*, 24 Ill. 577; *Dukes v. Rowley*, 24 Ill. 210; *Eppinger v. Kirby*, 23 Ill. 521; *Lane v. Bommelmenn*, 21 Ill. 143; *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274; *Peter v. Hill*, 13 Ill. App. 36. Ind.—*Hopper v. Lucas*, 86 Ind. 43. Ia.—*Giddings v. Giddings*, 70 Iowa 486, 30 N. W. 869. Mich.—*Nowlen v. Hall*, 128 Mich. 274, 87 N. W. 222; *Morgan v.*

*Tweddle*, 119 Mich. 350, 78 N. W. 121. Minn.—*Fagan v. Huntress*, etc. Lumb. Co., 80 Minn. 441, 83 N. W. 382; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497. Miss.—*Easterling v. State*, 35 Miss. 210. N. H.—*Cahoon v. Coe*, 52 N. H. 518, 524. Tenn.—*Randolph v. Metcalf*, 6 Coldw. 400.

[a] A judgment is a nullity unless it be for a specific sum in dollars and cents. The omission of the word "dollars" from the figures employed in the alleged judgment destroys its legal force. *Boyne v. Vandalia R. R. Co.*, 128 Ill. App. 191.

[b] Where in a column of figures, the dollar mark is prefixed to some, but not to all of the items, all the figures standing in the same column and in the same relation to similar items must be construed to be dollars without a repetition of the mark before each. *People v. Empire Gold*, etc. Min. Co., 33 Cal. 171.

57. U. S.—*Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. ed. 523. Ill.—*Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206. Minn.—*Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. 344. Miss.—*Carr v. Anderson*, 24 Miss. 188. Utah.—*Snow v. West*, 37 Utah 528, 110 Pac. 52.

Reference to record generally as aid in construction of judgment, see *infra*, XII, B, 3.

[a] Where the verdict was for "one hundred and seventy-five dollars," and the judgment was for "one hundred and seventy-five," omitting the word "dollars," it was held not void for uncertainty. *Dyer v. Hatch*, 1 Ark. 339. To same effect, *Gregory v. Gregory*, 10 Mo. App. 589.

[b] A statement of the amounts of a judgment entered in the judgment docket by placing the figures under the heading "Amount of judgment," one of the amounts being preceded by the word "costs" and the last two figures of each amount being separated from the others in the usual manner of account books is sufficient even without the dollar mark. *Dyke v. Bank of Orange*, 90 Cal. 397, 27 Pac. 304.



judgment in words rather than figures;<sup>58</sup> and in some jurisdictions, it has been held that a judgment expressing the amount of a judgment in figures only is insufficient,<sup>59</sup> though by the weight of authority such judgments are not open to collateral attack, some cases even holding that they are not erroneous.<sup>60</sup>

## 2. Specification of Medium of Payment.<sup>61</sup> — a. *In General.*

Where the contract is silent as to the medium of payment, the judgment should be entered generally; a judgment specifying payment in gold coin will not be upheld.<sup>62</sup> But where the contract is for payment in gold coin the judgment should specify payment in gold

58. *Tankersley v. Silburn*, Minor (Ala.) 185; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400.

[a] The amounts in the judgment of a court should not be entered in figures but in all cases in letters. There is no safety in using figures for such purpose. *Linder v. Monroe's Exrs.*, 33 Ill. 388.

[b] **Variance Between Words and Figures.**—If the amount of recovery stated in figures differs from that stated in writing, but the recitals in the judgment show the former to be the true amount, the error is not sufficient cause for the reversal of the judgment. *Cave v. City of Houston*, 65 Tex. 619.

59. *Linder v. Monroe's Exrs.*, 33 Ill. 388; *Lloyd v. Hance*, 16 N. J. L. 127; *Smith v. Miller*, 8 N. J. L. 175, 14 Am. Dec. 418; *Steelman v. Ackley*, 2 N. J. L. 99; *Falkenburg v. Woodmansie*, 2 N. J. L. 92; *McCalla v. Wood*, 2 N. J. L. 86; *Neal v. Collins*, 2 N. J. L. 85; *Potter v. Platt*, 2 N. J. L. 74; *Walton v. Vanderhoof*, 2 N. J. L. 73; *Cole v. Petty*, 2 N. J. L. 60.

60. Ala.—*Tankersley v. Silburn*, Minor 185, use of figures instead of words will not invalidate a judgment if the idea is clearly conveyed. Cal. *Dyke v. Orange Bank*, 90 Cal. 397, 27 Pac. 304. Ind.—*Hopper v. Lucas*, 86 Ind. 43. Mo.—*Moore v. Whitcomb*, 48 Mo. 543; *Fullerton v. Kelliher*, 48 Mo. 542. Tenn.—*Warder v. Millard*, 8 Lea 581. Tex.—*Cave v. Houston*, 65 Tex. 619.

[a] It is not a valid objection to a judgment that the amount for which it was rendered is expressed only in figures preceded by the dollar mark. *Davis v. McCary*, 100 Ala. 545, 13 So. 665; *Hopper v. Lucas*, 86 Ind. 43. And see *Tankersley v. Silburn*, Minor (Ala.) 185.

61. **Directions as to payment or enforcement**, see *infra*, XI, J.

**Conformity with pleadings as to specification of medium of payment**, see *supra*, XI, D, 2, b, (VI), (C).

62. U. S.—*Thompson v. Butler*, 95 U. S. 694, 24 L. ed. 540. Cal.—*Williston v. Perkins*, 51 Cal. 554; *McDonald v. Mission View Homestead Assn.*, 51 Cal. 210; *North Pac. R. Co. v. Reynolds*, 50 Cal. 280; *Noonan v. Hood*, 49 Cal. 293; *Belloc v. Davis*, 38 Cal. 242; *Howard v. Brunagim*, 33 Cal. 394; *Fox v. Minor*, 32 Cal. 111; *Spencer v. Prindle*, 28 Cal. 276; *Curiae v. Abadie*, 25 Cal. 502. Colo.—*Hittson v. Davenport*, 4 Colo. 169. Ill.—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097. La.—*Gumbel v. Abrams*, 20 La. Ann. 568, 96 Am. Dec. 426. Mass.—*Tufts v. Plymouth Gold Min. Co.*, 14 Allen 407. Nev.—*Miller v. Cherry*, 2 Nev. 165; *Hastings & Co. v. Burning Moscow Co.*, 2 Nev. 93; *Sigismund v. Troianovich*, 1 Nev. 612; *Mitchell v. Bromberger*, 1 Nev. 604; *Burling v. Goodman*, 1 Nev. 314. N. Y.—*Fabbri v. Kalbflasch*, 52 N. Y. 28. Ore.—*Davis v. Mason*, 3 Ore. 154. Tex.—*Calhoun v. Pace*, 37 Tex. 454; *Gilleland v. Drake*, 36 Tex. 676; *Leer & Hucherson v. Sutherland*, 36 Tex. 151; *Central Railway Co. v. George*, 32 Tex. 568. Vt.—*Davis v. Field*, 43 Vt. 221.

[a] If one having a deed absolute on its face but intended as a mortgage, goes into possession thereunder and receives gold coin for rent and sells the property and receives gold coin in payment therefor, the money is received in a fiduciary capacity and may be recovered in coin. *Gay v. Hamilton*, 33 Cal. 686.

[b] Where the value of damages are found both in gold coin and currency by the court, a general judgment rendered for the currency value will



coin.<sup>63</sup> Where the contract is payable in United States gold and silver coin, the judgments should specify both kinds of money, or it will be erroneous.<sup>64</sup> Although the contract calls for payment in "gold" instead of "gold coin" the judgment should be rendered for the amount due in dollars.<sup>65</sup>

**Contract Payable in Coin or Its Equivalent in Currency.** — There is a conflict in the authorities as to the form of judgment on contracts payable in "coin or its equivalent in currency," some holding that the judgment should be in the alternative,<sup>66</sup> others that the judgment

be upheld. *Carpentier v. Small*, 35 Cal. 346.

[c] **Where Jury Returns Verdict in Gold Coin.**—If there is no allegation in the complaint that there was an agreement to pay in gold coin the court cannot render a judgment in gold coin even though the jury return such a verdict. *Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523.

63. **U. S.**—*Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *Dewing v. Sears*, 11 Wall. 379, 20 L. ed. 189; *Butler v. Horwitz*, 7 Wall. 258, 19 L. ed. 149; *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141; *The Surplus and Remnants of the Ship Edith*, 5 Ben. 144, 8 Fed. Cas. No. 4281. **Ala.**—*Holt v. Given & Co.*, 43 Ala. 612. **Cal.**—*Sheehy v. Chalmers*, 102 Cal. xviii, 36 Pac. 514; *Meyer v. Kohn*, 29 Cal. 278; *Harding v. Cowing*, 28 Cal. 212; *Otis v. Haseltine*, 27 Cal. 82; *Carpentier v. Atherton*, 25 Cal. 564.

**Ill.**—*McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122, *overruling Whetstone v. Colley*, 36 Ill. 328; *Hull v. Kohlsaat*, 36 Ill. 130; *Humphreys v. Clement*, 44 Ill. 299. **Md.**—*Chesapeake Bank v. Swain*, 29 Md. 483. **Mass.**—*Stark v. Coffin*, 105 Mass. 328; *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Sears v. Dewing*, 14 Allen 413. **Mo.**—*Foster v. Atlantic & Pacific R. Co.*, 1 Mo. App. 390. **Nev.**—*Jones v. Childs*, 8 Nev. 121. **N. Y.**—*Wild v. New York & A. Silver Min. Co.*, 59 N. Y. 644; *Chrysler v. Renois*, 43 N. Y. 209; *Quinn v. Lloyd*, 1 Sweeney 253; *Cram v. Webb*, 9 Abb. Pr. (N. S.) 245; *Bank of Prince Edward's Island v. Trumbull*, 53 Barb. 459. **Ohio.**—*Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66. **Pa.**—*Mather v. Kinike*, 51 Pa. 425. **Tex.**—*Smith v. Wood*, 37 Tex. 616.

[a] A contract which provides for payment in gold of a specified fineness, and weight is a contract for a specific article and can be discharged only by

payment in such article. *Dutton v. Pailaret*, 52 Pa. 109.

[b] If the complaint alleges that the contract sued on called for payment in gold coin and the answer admits it, the plaintiff if he recovers is entitled to a judgment payable in gold coin, even though the jury did not specify the kind of money to be recovered. *Winnans v. Hassey*, 48 Cal. 634.

[c] In an action upon an unpaid promissory note payable "in gold coin of the United States," a condition expressed therein that "if this note is paid before maturity or before suit is brought thereon then it shall be payable in any lawful money of the United States" does not preclude the plaintiff's right to recover judgment payable in gold coin. *Churchman v. Martin*, 54 Ind. 380.

[d] A judgment for work and labor performed may specify gold coin where there is a promise to pay in gold coin. *Bradbury v. Cronise*, 46 Cal. 287.

[e] **Oral Contract.**—A judgment in gold coin may be rendered on an oral contract payable in such coin if the contract is so alleged and proven. *Emery v. Langley*, 1 Idaho 694.

[f] Where a contract is payable in "specie," the judgment should specify gold. *Webb v. Moore*, 4 Mon. (Ky.) 483.

[g] **Action on a Judgment Payable in Gold Coin.**—Where the complaint in an action alleges that the action is brought on a judgment payable in gold coin judgment thereon should be rendered in the same kind of money. *Wallace v. Eldredge*, 27 Cal. 498.

64. *Burnett v. Stearns*, 33 Cal. 468.

65. *Brown v. Welch*, 26 Ind. 116, *citing and approving Thayer v. Hedges*, 23 Ind. 141.

66. *Wells Fargo & Co. v. Van Sickie*, 6 Nev. 45. *Compare, The Mary J.*

should be in currency to a sufficient amount to equal the face value of the contract together with the premium thereon in gold,<sup>67</sup> while still others hold that the judgment should be for gold.<sup>68</sup>

**Judgment for Lost Gold.** — Where gold coin which is deposited with a bailee, is lost, a judgment for such loss should be rendered in gold coin,<sup>69</sup> or for an amount in currency equal to the par value and the premium on the gold.<sup>70</sup>

**Effect of Legal Tender Acts.** — While some cases held after the passage of the legal tender act that the judgment on a contract made payable in a specified medium of payment, such as "gold or silver coin," should be for a certain number of dollars and not in "gold or silver coin,"<sup>71</sup> and others, that a judgment on a contract providing for payment in gold or silver should be for the value of the coin in currency,<sup>72</sup> and still others that the judgment should be in the alternative either for gold or silver coin or its currency value,<sup>73</sup> under the later federal decisions contracts to pay in a specified coin are sustained, and it is held that the judgment in suits on such contracts should be entered in coined dollars, regardless of the legal tender act;<sup>74</sup> and these decisions have been followed in the state courts until it is the settled

Vaughn, 14 Wall. (U. S.) 258, 20 L. ed. 807.

[a] If a note is made payable in the alternative either in gold or legal tender notes, a judgment on it may also be in the alternative. *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121.

**Alternative or conditional judgments generally**, see *supra*, XI, C, 2.

67. **N. Y.**—*Church v. Howard*, 17 Hun 5, *overruling Jones v. Smith*, 48 Barb. 552. **H. C.**—*Dunn v. Barnes*, 73 N. C. 273; *Mitchell v. Henderson*, 63 N. C. 643. **Tenn.**—*Bond v. Greenwold*, 4 Heisk. 453.

68. *Burnett v. Stearns*, 33 Cal. 468; *Reese v. Stearns*, 29 Cal. 273; *Atkinson v. Lanier*, 69 Ga. 460, 466.

69. *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Phillips v. Speyers*, 49 N. Y. 653; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333.

[a] If one making a special deposit of gold coin afterwards contracts with the bailee to pay him interest thereon, the special deposit is turned into an open account and a judgment payable in gold coin cannot be rendered on an open account. *Howard v. Roeten*, 33 Cal. 399.

70. **Ind.**—*The Bank of the State v. Burton*, 27 Ind. 426. **Mass.**—*Cushing v. Wells Fargo & Co.*, 98 Mass. 550. **N. Y.**—*Kellogg v. Sweeney*, 1 Lans. 397.

71. **Ala.**—*Munter & Faber v. Rogers*,

50 Ala. 283; *Glover v. Robbins*, 49 Ala. 219, 20 Am. Rep. 272. **Idaho.**—*Betts v. Butler*, 1 Idaho 185. **Ill.**—*Whetstone v. Colley*, 36 Ill. 328. **Ky.**—*Johnson's Admr. v. Vickers*, 1 Duv. 266. **La.**—*Olanyer v. Blanchard*, 18 La. Ann. 616. **Mass.**—*Tufts v. Plymouth Gold Min. Co.*, 14 Allen 407. **Mich.**—*Buchegger v. Shultz*, 13 Mich. 420. **Mo.**—*Appel v. Woltmann*, 38 Mo. 194; *City of St. Louis v. Hardy*, 35 Mo. 261. **Nev.**—*Milliken v. Sloat*, 1 Nev. 573. **N. Y.**—*Jones v. Smith*, 48 Barb. 552. **N. C.**—*Mitchell v. Henderson*, 63 N. C. 643, *approving Gibson v. Groner*, 63 N. C. 10. **Ore.**—*Davis v. Mason*, 3 Ore. 154. **Pa.**—*Shollenberger v. Brinton*, 52 Pa. 9. **Tenn.**—*Bond v. Greenwold*, 4 Heisk. 453. **Tex.**—*Killaugh v. Alford*, 32 Tex. 457, 5 Am. Rep. 249 (wherein the judgment was upheld but the court said the judgment could be discharged by payment of the specified sum in legal tender notes); *Flournoy v. Healy*, 31 Tex. 590.

72. **Mass.**—*Cushing v. Wells*, 98 Mass. 550; *Sears v. Dewing*, 14 Allen 413; *Essex Co. v. Pacific Mills*, 14 Allen 389. **N. Y.**—*Bank of Prince Edward's Island v. Trumbull*, 53 Barb. 459, 35 How. Pr. 8. **Pa.**—*Dutton v. Pailaret*, 52 Pa. 109.

73. *Holt v. Given & Co.*, 43 Ala. 612; *Glass v. Pullen*, 6 Bush (Ky.) 346, 351.

74. *Trebilecock v. Wilson*, 12 Wall.

rule in nearly every jurisdiction that judgments founded on contracts specifying payment in gold or silver coin should be entered in the amount and kind of money specified.<sup>75</sup> The creditor may, however, consent to the rendition of the judgment in currency for the value of the coin.<sup>76</sup>

A judgment in a tort action, which requires payment in gold coin is erroneous,<sup>77</sup> except where such a judgment is authorized by statute.<sup>78</sup>

(U. S.) 687, 20 L. ed. 460; *Bronson v. Kimpton*, 8 Wall. (U. S.) 444, 19 L. ed. 433; *Butler v. Horwitz*, 7 Wall. (U. S.) 258, 19 L. ed. 149; *Bronson v. Rodes*, 7 Wall. (U. S.) 229, 19 L. ed. 141.

75. **U. S.**—*Thompson v. Butler*, 95 U. S. 694, 24 L. ed. 540; *The Emily Souder*, 17 Wall. 666, 21 L. ed. 683; *The Mary J. Vaughan*, 14 Wall. 258, 20 L. ed. 807; *Dewing v. Sears*, 11 Wall. 379, 20 L. ed. 189; *Bronson v. Kimpton*, 8 Wall. 444, 19 L. ed. 433; *Butler v. Horwitz*, 7 Wall. 258, 19 L. ed. 149; *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *Cheang-Kee v. United States*, 3 Wall. 320, 18 L. ed. 72. **Cal.**—*Bradbury v. Cronise*, 46 Cal. 287; *Meyer v. Kohn*, 29 Cal. 278; *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121; *Harding v. Cowing*, 28 Cal. 212; *Wallace v. Eldredge*, 27 Cal. 498. **Colo.**—*Hittson v. Davenport*, 4 Colo. 169. **Ga.**—*Whitaker v. Dye*, 56 Ga. 380; *Myers & Marcus v. Kaufman*, 37 Ga. 600, 95 Am. Dec. 367. **Idaho.**—*Emery v. Langley*, 1 Idaho 694. **Ill.**—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097; *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122. **Ind.**—*Churchman v. Martin*, 54 Ind. 380. **Ky.**—*Webb v. Moore*, 4 Mon. 483. **La.**—*Lafitte v. Rivera*, 23 La. Ann. 32. **Md.**—*Chesapeake Bank v. Swain*, 29 Md. 483, 506. **Mass.**—*Stark v. Coffin*, 105 Mass. 328; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Independent Ins. Co. v. Thomas*, 104 Mass. 192. **Mo.**—*Foster v. Atlantic R. Co.*, 1 Mo. App. 390. **Mont.**—*Knox v. Gerhauser*, 3 Mont. 267. **Nev.**—*Jones v. Childs*, 8 Nev. 121; *Wells Fargo & Co. v. Van Sickle*, 6 Nev. 45; *Linn v. Minor*, 4 Nev. 462. **N. Y.**—*Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333; *Chrysler v. Renois*, 43 N. Y. 209; *Bank of Commonwealth v. Van Vleck*, 49 Barb. 508; *Quinn v. Lloyd*, 1 Sweeney 253; *Cram v. Webb*, 9 Abb.

Pr. (N. S.) 245. **Ohio.**—*Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66. **Ore.**—*Davis v. Mason*, 3 Ore. 154. **Pa.**—*McCalla v. Eley*, 64 Pa. 254. **Tex.** *Smith v. Wood*, 37 Tex. 616; *Calhoun v. Pace*, 37 Tex. 454.

[a] A contract, made prior to the passage of the act, for payment in gold, does not entitle a party to a judgment of gold or silver; but the judgment should be for dollars without regard to the kind of currency. But a contract since the passage of that act for the payment of gold would be entitled to a judgment in gold. *Smith's Admr. v. Dilland's Admr.*, 2 Duvall (Ky.) 152.

[b] Where a mortgage is to pay a specified sum, in lawful silver money with lawful interest the proper form of judgment should be in "lawful silver money of the United States" and interest should be paid in the same kind of money. *McCalla v. Ely*, 64 Pa. 254.

[c] When from the judgment record it appears that the complaint was upon a contract which by law was payable in coin, the term "dollars" without the prefix "coined" or "gold or silver" in the subsequent part of the record will be taken to mean coined dollars. *Ransford v. Marvin*, 8 Abb. Pr. N. S. (N. Y.) 432.

76. **U. S.**—*Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740. **Ill.**—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097. **N. Y.**—*Greentree v. Rosenstock*, 61 N. Y. 583; *Bank of Prince Edward's Isl. v. Trumbull*, 53 Barb. 459.

77. *Livingston v. Morgan*, 53 Cal. 23; *Gilleland v. Drake*, 36 Tex. 676.

[a] If a jury in a tort action assess the damages in gold coin, the judge may disregard so much of the verdict as relates to coin and enter a judgment which does not specify any kind of money. *Chamberlin v. Vance*, 51 Cal. 75.

78. *Treadway v. Sharon*, 7 Nev. 37;



**Costs Payable in Currency.** — Though the judgment for the principal sum is rendered for gold, the costs should be made payable in currency.<sup>79</sup>

**Interest.** — Where a demand is payable in a specific kind of money, a judgment, enforcing it, may make the interest payable in the kind of money mentioned in the contract.<sup>80</sup>

b. *Domestic or Foreign Money.* — The amount of a money judgment should be expressed in terms of the domestic money.<sup>81</sup> So where the debt or obligation sued on is expressed in terms of foreign currency, the judgment should be for its equivalent in domestic money,<sup>82</sup> though some of the early cases hold that the assessment of damages in foreign currency will not invalidate a judgment.<sup>83</sup>

H. DESCRIPTION OF PROPERTY.<sup>84</sup> — Where specific property is the

Clark v. Nevada Land Co., 6 Nev. 203.

79. Cal.—More v. Del Valle, 28 Cal. 170. N. Y.—Wild v. New York & A. Silver Min. Co., 59 N. Y. 644; Phillips v. Speyers, 49 N. Y. 653. Ohio.—Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66.

Compare, Carpentier v. Atherton, 25 Cal. 564, holding that the costs are an integral part of the judgment and where the judgment is payable in coin the costs should be payable in like medium.

80. Carpentier v. Atherton, 25 Cal. 564.

[a] **Interest a Part of Debt.**—Unless the contrary is expressed interest is a mere portion of the principal debt and is to be paid in the same kind of money. McCalla v. Ely, 64 Pa. 254.

81. U. S.—The Mary J. Vaughn, 16 Fed. Cas. No. 9,217. La.—Erlanger v. Avengo, 24 La. Ann. 77. Mass.—Warren v. Franklin Ins. Co., 104 Mass. 518. N. J.—Coxe v. Hankinson, 1 N. J. L. 85, 98; Warder v. Whittall, 1 N. J. L. 84. N. C.—Mitchell v. Henderson, 63 N. C. 643. Va.—Patten's Case, 15 Ct. Cl. 288.

82. U. S.—Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. ed. 495; Rives v. Duke, 105 U. S. 132, 26 L. ed. 1031; Bissell v. Heyward, 96 U. S. 580, 24 L. ed. 678; Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275; Forbes v. Murray, 3 Ben. 497, 9 Fed. Cas. No. 4,928. Idaho.—Betts v. Butler, 1 Idaho 185. Ia.—Ransom & Co. v. Stanberry, 22 Iowa 334. Ky.—Pollock v. Colglazure, Sneed 2. Md.—Marburg v. Marburg, 26 Md. 8, 90 Am. Dec. 84. Mich.—Sheehan v. Dalrymple, 19 Mich. 239. N. Y.—Fabbri v. Kalb-

fleisch, 52 N. Y. 28; Cotton v. Dunham, 2 Paige 267; Robinson v. Hall, 28 How. Pr. 342. Pa.—Benners v. Clemens, 58 Pa. 24; Mather v. Kinike, 51 Pa. 425. Va.—Taylor & Co. v. McClean, 3 Call. (7 Va.) 557; Scott v. Hornsby, 1 Call. (5 Va.) 41.

[a] When a contract was payable in confederate notes, it was held that the judgment should be for their value in United States legal tender, at the date and place of payment. Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

[b] **Judgment in Francs.**—A judgment given by the court for a certain amount of francs is erroneous and will be amended on appeal so as to express the amount in dollars and cents. Erlanger v. Avengo, 24 La. Ann. 77.

[c] **The value of the foreign currency** is to be estimated here at its real market value. Robinson v. Hall, 28 How. Pr. (N. Y.) 342; Colton v. Dunham, 2 Paige (N. Y.) 267; Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48.

83. Telfair v. Stead, 2 Cranch (U. S.) 407, 2 L. ed. 320; Bond v. Grace, 1 Cranch (C. C.) 96, 3 Fed. Cas. No. 1,622; Butts v. Shreve, 1 Cranch (C. C.) 40, 4 Fed. Cas. No. 2,258; Scott's Exrs. v. Call, 1 Wash. (1 Va.) 115.

84. In decrees, see generally 6 STANDARD PROC. 776; in decrees upon foreclosure of mortgages, see the title "Mortgages."

In judgment in forcible entry and detainer suit, see 8 STANDARD PROC. 1125.

In judgment in replevin, see the title "Replevin."

In suit to quiet title, see the title "Quieting Title."



subject of a judgment, it should be set out and described with such a degree of certainty that it can be readily identified.<sup>85</sup> But a failure to specifically describe the property in the judgment will not render the judgment invalid if its identity can be made certain by reference

85. **Ala.**—*Gayle v. Singleton*, 1 Stew. 566. **Cal.**—*Rosenthal v. Matthews*, 100 Cal. 81, 34 Pac. 624. **D. C.**—*Anderson v. Tinney*, 5 Mackey 335. **Ga.**—*Allen v. Sharp*, 62 Ga. 183. **Ill.**—*Tilton v. Pearson*, 67 Ill. App. 372. **Ind.**—*Thain v. Rudisill*, 126 Ind. 272, 26 N. E. 46; *Cincinnati H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Ruston v. Grimwood*, 30 Ind. 364. **Ia.**—*Citizens' Savings Bank v. Stewart*, 90 Iowa 467, 57 N. W. 957. **Ky.**—*Ross v. Adams*, 13 Bush 633; *Tribble v. Davis*, 3 J. J. Marsh. 633; *Harrison's Exrs. v. Taylor*, 19 Ky. L. Rep. 1191, 43 S. W. 723; *McClure v. Bigstaff*, 18 Ky. L. Rep. 601, 37 S. W. 294, 38 S. W. 431; *McGuire v. Kirk*, 16 Ky. L. Rep. 87, 26 S. W. 585. **La.**—*McManus v. Stevens*, 10 La. Ann. 177. **Mass.**—*Chamberlain v. Bradley*, 101 Mass. 188; *Adams v. Frothingham*, 3 Mass. 352, 364, 3 Am. Dec. 151. **S. C.**—*State v. Pinckney*, 22 S. C. 484, 510. **Tex.**—*Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S. W. 652; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563; *Devine v. Keller*, 73 Tex. 364, 11 S. W. 379; *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794; *Brønsson v. McDougal*, 63 Tex. 193; *Rogers v. McLaren*, 53 Tex. 423; *Slater v. Wilkins*, 37 Tex. 667; *Hearne v. Erhard*, 33 Tex. 60; *Miller v. Moss (Tex.)*, 9 S. W. 257; *Knowles v. Torbitt*, 53 Tex. 557 (holding that a general description of the land is good unless a different rule is prescribed by statute); *Murray v. Land*, 27 Tex. 89; *Hurt v. Moore*, 19 Tex. 269; *Barrow v. Gridley*, 25 Tex. Civ. App. 13, 59 S. W. 602, 913. **Utah.**—*Wilson v. Hull*, 7 Utah 90, 24 Pac. 799.

Description of property in judgment should follow that of complaint. See *supra*, XI, D, 2, b, (V).

[a] **Description Need Not Be by Metes and Bounds.**—A description of land in a judgment need not be by metes and bounds; but it is sufficient if the description is sufficiently clear to identify the land. *Turner v. Dixon*, 150 Mo. 416, 51 S. W. 725.

**Certainty in judgment generally**, see *supra*, XI, C.

[b] **Descriptions of Property Held**

**Sufficiently Definite.**—A decree describing the property to be sold as "a lot with a livery stable thereon" situated on a certain street and naming the person who conveyed it to the defendant is sufficient. *McCue v. Sharp*, 20 Ky. L. Rep. 216, 45 S. W. 770.

[c] A judgment that plaintiff recover all the marsh lands except what was included in a certain deed is not rendered uncertain because the lands included in such deed would have to be located. *State v. Pinckney*, 22 S. C. 484.

[d] **Description of Patent.**—The description of a patent is sufficiently definite if it give the number and name of the patentee and the decree is not void for uncertainty because it fails to give a description of the invention in the language of the title head of the patent. *Maginn v. Standard Equipment Co.*, 150 Fed. 139, 80 C. C. A. 15.

[e] **Descriptions of land held insufficient in the following cases:** **Cal.**—*Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199. **Ga.**—*Napier v. Saulsbury*, 63 Ga. 477. **Ky.**—*Meyer v. City of Covington*, 103 Ky. 546, 45 S. W. 769; *Runyon v. Darnall*, 10 Bush 67; *Lawless v. Barger*, 9 Bush 665; *Wallace v. Friend*, 20 Ky. L. Rep. 1270, 49 S. W. 181; *Smith v. Cornett*, 18 Ky. L. Rep. 818, 38 S. W. 689. **Mass.**—*Chamberlain v. Bradley*, 101 Mass. 188. **Minn.**—*Fagan v. Huntress*, etc. *Lumb. Co.*, 80 Minn. 441, 83 N. W. 382; *Kern v. Clarke*, 59 Minn. 70, 60 N. W. 809; *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495. **Tex.**—*Devine v. Keller*, 73 Tex. 364, 11 S. W. 379; *Davis v. Wilson*, 31 Tex. 136; *Hurt v. Moore*, 19 Tex. 269. **W. Va.**—*Miller v. Holt*, 47 W. Va. 7, 34 S. E. 956. **Wis.**—*Blair v. Milwaukee L. H. Tr. Co.*, 110 Wis. 64, 85 N. W. 675.

[f] A judgment for certain articles of personal property which merely gives their number, without any description or reference to the pleadings is bad for uncertainty. *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5.

to the pleadings or other parts of the record,<sup>86</sup> though where the record is so vague that the property cannot be identified, a judgment referring thereto will not cure the defect.<sup>87</sup> A wrong description will render the judgment void,<sup>88</sup> unless the mistake can be cured by reference to the pleadings.<sup>89</sup> If the description be impossible, the judgment will not be upheld.<sup>90</sup>

I. SHOWING RELIEF GRANTED.—A judgment must show what relief, if any, has been granted, or that the defendant has been dismissed without day.<sup>91</sup>

J. DIRECTIONS AS TO PAYMENT OR ENFORCEMENT.—It is not neces-

86. U. S.—Haws v. Victoria Mining Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. ed. 436. Cal.—Hogue v. Fanning, 73 Cal. 54, 14 Pac. 560. Ill.—Gage v. People, 225 Ill. 144, 80 N. E. 90. Ind.—Thain v. Rudisill, 126 Ind. 272, 26 N. E. 46; Ruston v. Greenwood, 30 Ind. 364. Ia.—Bank of St. Louis v. Stewart, 90 Iowa 467, 57 N. W. 957; Foster v. Bowman, 55 Iowa 237, 7 N. W. 513. Md.—Jones v. Belt, 2 Gill 106. Mo.—Lemmon v. Hartsook, 80 Mo. 13. Tex.—Sanger v. Roberts, 92 Tex. 312, 48 S. W. 1; Martin v. Teal (Tex. Civ. App.), 29 S. W. 691.

Reference to record for purpose of construction, see generally *infra*, XII, B, 3.

[a] Thus (1) a description of the property as "the property in controversy" has been held sufficient even where the petition claimed several articles but the record showed that the controversy was reduced to two of them. *Coleman v. Reel*, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484. (2) But where the judgment was for "the tract of land described in the petition," and there were two tracts described therein, the judgment was held void, for uncertainty. *Lawless v. Barger*, 9 Bush (Ky.) 665.

[b] Reference to the complaint would include a reference to all the amendments thereof. *Kelly v. McKibben*, 54 Cal. 192.

[c] Reference to Referee's Report. Reference may be had to the report of the referee's findings for the purpose of describing the identity of the property. *Posey v. Green*, 78 Ky. 162.

[d] In Kentucky, (1) reference to the pleadings or other parts of the record is permitted to overcome an uncertainty existing in the description of the property as set forth in the judgment (*Neff v. Covington Stone*, etc.

Co., 108 Ky. 457, 55 S. W. 697; Four Mile Land Co. v. Slusher, 107 Ky. 664, 55 S. W. 555; *Brumley v. Nichols Shepherd Co.*, 29 Ky. L. Rep. 139, 92 S. W. 548); (2) but it is not permissible to merely make a reference in the judgment to the pleadings or other papers for the entire description. *Latham v. Lindsay*, 130 Ky. 669, 113 S. W. 878; *Ross v. Adams*, 13 Bush (Ky.) 370; *Lawless v. Barger*, 9 Bush (Ky.) 665; *Brumley v. Nichols and Shepherd Co.*, 29 Ky. L. Rep. 139, 92 S. W. 548; *Smith v. Cornett*, 18 Ky. L. Rep. 818, 38 S. W. 689; *Hillard v. Rountree*, 15 Ky. L. Rep. 556, 24 S. W. 607; *Pumpbre v. Rafferty*, 5 Ky. L. Rep. 773.

[e] Defect in Description May Be Cured by Motion.—Where an insufficient description of property in a judgment may be perfected by reference to the pleadings and no injustice results, the judgment is erroneous but not void and it may be corrected by the court rendering it on motion of either party to the action or any person interested. *Latham v. Lindsay*, 130 Ky. 669, 113 S. W. 878.

87. *Williams v. Kelso*, 7 La. 406; *Miller v. Moss* (Tex.), 9 S. W. 257.

88. *Kennedy's Heirs v. Duncan*, Hard. (Ky.) 365.

89. *Mitchell v. Fidelity T. & Sav. Co.*, 20 Ky. L. Rep. 713, 47 S. W. 446.

Reference to pleadings in aid of construction of judgment, see *infra*, XII, B, 3, b.

[a] An obvious mistake in the description of property in a judgment where the property can be otherwise identified will be treated as surplusage and will not invalidate the judgment. *Laverty v. Moore*, 33 N. Y. 658.

90. *Gerlach v. Walsh*, 41 Ill. App. 83.

91. Ala.—*Spence v. Simmons*, 16 Ala. 828. Colo.—*Dusing v. Nelson*, 7

sary for the judgment to command the judgment debtor to pay the amount of the judgment,<sup>92</sup> or to direct the issuance of execution, or otherwise to state the manner of its enforcement.<sup>93</sup> Generally the judgment should not limit the collection thereof to a particular fund or property.<sup>94</sup> It has been held, however, that where a contract makes

Colo. 184, 2 Pac. 922. Ill.—*Coats v. Barrett*, 49 Ill. App. 275. Ind.—*Hord Tr. v. Bradbury*, 156 Ind. 30, 59 N. E. 31. Mo.—*Moody v. Deutsch*, 85 Mo. 237.

Language of judgment, see generally *supra*, XI, B, 2.

Specification of amount and medium of payment, see *supra*, XI, G.

92. *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717.

93. U. S.—*Richards v. Harrison*, 218 Fed. 134. Cal.—*Reed v. Eldredge*, 27 Cal. 346. Conn.—*Bradley v. Clark*, 3 Day 502. Idaho.—*Kerns v. McAulay*, 8 Idaho 558, 69 Pac. 539. Ill.—*Comrs. of Highways v. Drainage Comrs.*, 127 Ill. 581, 21 N. E. 206; *McBane v. People*, 50 Ill. 503; *Livingston v. People*, 48 Ill. App. 109. Kan.—See *Greeno v. Barnard*, 18 Kan. 518. Ky.—*Morgan's Exrx. v. Morgan*, 2 Bibb 388. Mo.—*Houck v. Cross*, 67 Mo. 151. See *State v. Vogel*, 14 Mo. App. 187. Neb.—*Knotts v. Crossly*, 1 Neb. (Unof.) 730, 95 N. W. 848; *Sturtevant Co. v. Bohn Sash & Door Co.*, 57 Neb. 671, 78 N. W. 265. Tex.—*Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717; *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072; *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

See also the title "Judgments and Decrees, Enforcement of."

[a] **A Judgment Has Nothing To Do With Its Enforcement.**—An order for execution or other process or means of enforcement provided by law is not an integral part of a judgment. *Livingston v. People*, 48 Ill. App. 109.

[b] "At common law, when an action was brought on a judgment or any contract for the payment of money, the judgment of the court was, that the plaintiff recover his debt or damages, or debt and damages, without any order or direction specifying how the money should be paid by the debtor, or made by the officer. The court adjudged that the plaintiff do have and recover of the defendant the specified sum of money, and from that point the law—not the court—directed what proceedings should be had for the purpose

of satisfying the amount adjudged to be due." *Reed v. Eldredge*, 27 Cal. 346.

[c] "A judgment has nothing to do with the means provided by law for its enforcement. An order for execution or other process or means of enforcement provided by law is not an integral part of a judgment, and need not be therein set out." *Livingston v. People*, 48 Ill. App. 109.

[d] When a judgment is to be executed without any relief from appraisal laws, it shall be so ordered in the judgment. *Smith v. Tatman*, 71 Ind. 171, under 2 Rev. St., 1876, p. 188.

[e] **An execution issues as a matter of course** upon a judgment for a specific sum of money without awarding or directing its issuance in express terms. The judgment is in and of itself an award of execution. *Hyder v. Butler*, 103 Tenn. 289, 52 S. W. 876.

[f] **A decree for alimony** which orders the sale of specific real estate for payment thereof is erroneous. *Nygren v. Nygren*, 42 Neb. 408, 60 N. W. 885.

[g] **In a judgment against a municipal corporation** it is error to award execution. *Danville v. Mitchell*, 63 Ill. App. 647. See *Comrs. of Highways v. Drainage Comrs.*, 127 Ill. 581, 21 N. E. 206; *McBane v. People*, 50 Ill. 503 (wherein it was contended that the judgment was informal and inoperative in awarding execution, the court said: "At most, the award of execution is but an error that may be availed of in an appellate court. It does not render an otherwise valid judgment void, and it is valid and binding until reversed for error. It being binding until reversed, no question can be raised as to its legal validity in a collateral proceeding, which this is").

94. *City of East St. Louis v. Canty*, 65 Ill. App. 325, limitation rejected as surplusage.

[a] **In an action against a receiver**, the judgment should not prescribe the particular fund out of which it should be paid; the judgment should be against the receiver in his official



a claim payable out of a special fund, the judgment may direct that the same be paid out of that particular fund.<sup>95</sup>

**K. JOINT AND SEVERAL PARTIES AND JUDGMENTS. — 1. Joint Plaintiffs.** — Where there are several plaintiffs in an action, it is the rule at common law that all must recover, and if part of them fail to establish their right of action the suit must fail as to all.<sup>96</sup> The common-law rule is not operative in all jurisdictions, however, as the statutes of several states allow the rendition of judgment in favor of any plaintiff who establishes his right of recovery, even though part of the plaintiffs fail so to do.<sup>97</sup> And even in the absence of statute, where the claims of the several plaintiffs are distinct and they are simply united through a common interest, a different rule would apply.<sup>98</sup>

capacity, "leaving the method of its enforcement to be determined by the court having jurisdiction of the receivership, in view of the rights of all persons interested in the proper application of the fund in that court's custody." *Brown v. Brown*, 71 Tex. 355, 9 S. W. 261. See generally the title "Receivers."

[b] In an action on a claim against an estate, "it was not necessary for the judgment to define what property should be levied upon, further than to indicate that it should be satisfied out of property belonging to the estate, rather than that belonging to the executors individually." *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

**Specification of medium of payment,** see *supra*, XI, G, 2.

95. *Cicero v. People*, 105 Ill. App. 406.

[a]. Where judgment is rendered in favor of a member of a mutual fire-insurance company, divided into several distinct and independent classes, for a loss by fire of property insured in a particular class, and for which only those members having property insured in that class are, by the provisions of the charter and by-laws of the company, responsible, the court will limit the operation of the execution issued, to run only against the goods, chattels and lands, the property and fund of the company, belonging to that class. *Judkins v. Union Mut. Fire Ins. Co.*, 39 N. H. 172.

96. *Ala.*—*Prestwood v. McGowin*, 128 Ala. 267, 29 So. 386; *McLeod v. McLeod*, 73 Ala. 42; *Kelley v. Kelley*, 9 Ala. App. 306, 63 So. 740. *Ga.*—*Walker v. Pope*, 101 Ga. 665, 29 S. E. 8. *Kan.*—*Dempster Mill Mfg. Co. v.*

*Fitzwater*, 6 Kan. App. 24, 49 Pac. 624. *Mo.*—*McLaran v. Wilhelm*, 50 Mo. App. 658. *N. Y.*—*Sheldon v. Van Slyke*, 16 Barb. 26. *Tex.*—*Wells v. Moore*, 15 Tex. 521. *Wis.*—*Egaard v. Dalilke*, 109 Wis. 366, 85 N. W. 369.

97. See generally the statutes of the several states, and the following: *U. S.*—*Meldrin v. United States*, 7 Ct. Cl. 595. *Cal.*—*Johnson v. Phoenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719. *Ind.*—*Mississinewa Min. Co. v. Andrews*, 22 Ind. App. 523, 54 N. E. 146; *Louisville, etc. R. R. v. Lange*, 13 Ind. App. 337, 41 N. E. 609. *N. Y.*—*Chambovet v. Cagney*, 3 Jones & S. 474. *Pa.*—*Frisbie v. McFarlane*, 196 Pa. 110, 46 Atl. 359; *Hinckle v. Riffert*, 6 Pa. 196. *Tex.*—*Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

[a] Thus statutes sometimes provide that where the action is for the recovery of the possession of premises, in which two or more plaintiffs are joined, any one or more may recover any interest to which he or they may be entitled, in the same manner as if he or they had brought separate actions even though the others fail to prove any interest. *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Barton v. Petit*, 7 Cranch (U. S.) 194, 3 L. ed. 313; *Mo. Rev. St.*, 1909, §2382; *Norton v. Reed (Mo.)*, 161 S. W. 842.

[b] Where one of the parties plaintiff has not authorized the action, no relief should be granted to him. *Toole v. Johnson*, 61 S. C. 34, 39 S. E. 254.

98. *Ga.*—*Steam Laundry Co. v. Thompson*, 91 Ga. 47, 16 S. E. 198. *Ill.*—*Helmuth v. Bell*, 150 Ill. 263, 37 N. E. 230. *Tex.*—*Hamilton Brown Shoe Co. v. Whittaker*, 4 Tex. Civ. App. 380, 23 S. W. 520.

[a] Several persons having separate



**2. Joint Defendants.**—*a. In General.*—Under the common law, in actions *ex contractu*, where several defendants are joined and all are properly before the court either by service or appearance, recovery must be had against all or none,<sup>39</sup> unless a personal plea is interposed

claims against a common debtor may unite in an action to enforce protection of their common rights, but their recovery will be limited to their common rights, and their several claims cannot be adjudicated by one judgment. *Grant v. Schmidt*, 22 Minn. 1.

[b] Nor can one of a class of plaintiffs by suing alone procure a judgment which will be binding upon the others unless they come in and join in the action as plaintiffs. *Williams v. Williams*, 74 N. C. 1.

[c] Where several plaintiffs begin proceedings simultaneously against a common fund, they would stand on an equal basis and would be entitled in the event of recovery to share equally in the fund. *Davis v. Davis*, 2 Cush. (Mass.) 111.

[d] Where several creditors join in a creditor's suit to set aside an attachment of the common debtor's property, it is not necessary that all should recover to uphold a judgment in favor of a part of them. *Henderson v. Brown Co.*, 125 Ala. 566, 28 So. 79.

99. **U. S.**—*Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485; *United States v. Leffler*, 11 Pet. 86, 9 L. ed. 642; *Schofield v. Palmer*, 134 Fed. 753; *Mack v. Sloteman*, 21 Fed. 109; *Milne v. Huber*, 17 Fed. Cas. No. 9,617. **Ala.**—*Park v. Edge*, 42 Ala. 631. **Ark.**—*Parke v. Meyer*, 28 Ark. 281. **Cal.**—*Schultz v. McLean*, 76 Cal. 608, 18 Pac. 775. **Colo.**—*Bissell v. Cushman*, 5 Colo. 76; *Godding v. Decker*, 3 Colo. App. 198, 32 Pac. 832. **Fla.**—*Somers v. Florida Pebble Phosphate Co.*, 50 Fla. 275, 39 So. 61; *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Hale v. Crowell's Admx.*, 2 Fla. 534, 50 Am. Dec. 301. **Ga.**—*Millhiser v. McAllister*, 103 Ga. 798, 30 S. E. 661; *Austell v. McLarin*, 51 Ga. 467. **Ill.**—*Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. 48; *Cairo & St. L. R. Co. v. Easterly*, 89 Ill. 156; *Jansen v. Varnum*, 89 Ill. 100; *Felsenthal v. Durand*, 86 Ill. 230; *Boehm v. Boehm*, 61 Ill. 140; *Thomas v. Lowry*, 60 Ill. 512; *Barbour v. White*, 37 Ill. 164; *Flake v. Carson*, 33 Ill. 518; *Griffith v. Flurry*, 30 Ill. 251, 83 Am. Dec. 186; *People*

*v. Organ*, 27 Ill. 27; *Beidler v. Richardson*, 107 Ill. App. 536; *Connelly v. Cover*, 102 Ill. App. 426; *Kosciuszko Bldg. Assn. v. Dudek*, 101 Ill. App. 353; *Joyce v. Spafford*, 94 Ill. App. 554; *Smith v. Condon*, 90 Ill. App. 314; *Bedwell v. Ashton*, 87 Ill. App. 272; *Schmelzer v. Chicago, etc. Mfg. Co.*, 85 Ill. App. 596; *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Penn. Finance Co. v. Hanlon*, 75 Ill. App. 188; *Vanston v. Boughton*, 71 Ill. App. 627; *Brady v. Madden*, 67 Ill. App. 637; *Green v. Shaw*, 66 Ill. App. 74; *Indiana Millers' Mut. L. Insurance Co. v. People*, 65 Ill. App. 355; *Cooper v. McNeil*, 43 Ill. App. 350; *Davis v. Johnson*, 41 Ill. App. 22; *Enterprise Distilling Co. v. Bradley*, 17 Ill. App. 509; *Goodale v. Cooper*, 6 Ill. App. 81; *Rosenberg v. Barrett*, 2 Ill. App. 386. **Ind.**—*Valentine v. Duff*, 7 Ind. App. 196, 33 N. E. 529; *Helm v. Van Vleet*, 1 Blackf. 342, 12 Am. Dec. 248. **Kan.**—*Syracuse v. Reed*, 5 Kan. App. 806, 49 Pac. 259. **Ky.**—*Duckworth v. Lee*, 10 Bush 51; *Fernold v. Speer*, 3 Mete. 459; *Brown v. McKee*, 1 J. J. Marsh. 471, 475; *Johnson v. Vaughan*, 9 B. Mon. 217; *Warren v. Lewis*, 1 B. Mon. 119; *O'Hara v. Lannier*, 1 B. Mon. 100; *Erwin v. Devine*, 2 Mon. 124; *Buford v. McDaniel*, 1 A. K. Marsh. 426; *Long v. Carlyle*, 1 A. K. Marsh. 401; *Johnson v. Bonfield*, 19 Ky. L. Rep. 300, 40 S. W. 697. **La.**—*Francis v. Martin*, 28 La. Ann. 403; *Reynolds v. Feliciana Steam Boat Co.*, 17 La. 397. **Md.**—*Barker v. Ayers*, 5 Md. 202. **Mass.**—*Gurrish v. Cummings*, 4 Cush. 391; *Woodward v. Newhall*, 1 Pick. 500. **Minn.**—*Johnson v. Lough*, 22 Minn. 203; *Petz v. Clark*, 7 Minn. 217; *Carlton v. Chouteau*, 1 Minn. 102. **Miss.**—*Prewett v. Caruthers*, 7 How. 304; *Jones v. McGahey*, 1 How. 128. **Mo.**—*McCoy v. Green*, 83 Mo. 626; *Spalding v. Citizens Bank*, 78 Mo. App. 374; *Miller v. Bryden*, 34 Mo. App. 602. **N. J.**—*Stehr v. Ollbermann*, 49 N. J. L. 633, 10 Atl. 547; *Wills v. Shinn*, 42 N. J. L. 138; *Patterson v. Loughbridge*, 42 N. J. L. 21. **N. M.**—*Rupe v. New Mexico Lumb. Assn.*, 3 N. M. 261, 5 Pac. 730. **N. Y.**—*Williams v. Horgan*, 6 Duer 658; *Birk-*

by one of the defendants, which goes to his discharge,<sup>1</sup> or to his disability to contract,<sup>2</sup> or would bar the action as to him but not as to the other defendants.<sup>3</sup> In actions founded on tort, however, a different rule prevails at common law. In such actions, the plaintiff may recover against only such defendants as may be found guilty, and all those against whom the proof is insufficient are entitled to a verdict.<sup>4</sup> But where there are several joint defendants to a tort action,

beck *v.* Tucker, 2 Hall 121; Sager *v.* Nichols, 1 Daly 1; Britton's Estate, 15 N. Y. St. 445; Platner *v.* Johnson, 3 Hill 476; Jewett *v.* Schmidt, 45 Misc. 34, 90 N. Y. Supp. 848. See Stimson *v.* Van Pelt, 66 Barb. 151; Hopkins *v.* Lane, 4 Thomp. & C. 311, 2 Hun 38. Pa.—Cook *v.* Mackrell, 70 Pa. 12; Rowan *v.* Rowan, 29 Pa. 181; Mosher *v.* Small, 5 Pa. 221. S. C.—Lucas *v.* Sanders, 1 McMull. 311. S. D.—Anderson *v.* Chilson, 8 S. D. 64, 65 N. W. 435. But see Ross *v.* Wait, 4 S. D. 584. Tex.—Wootters *v.* Kauffman, 67 Tex. 488, 3 S. W. 465; Rodrigues *v.* Trevino, 54 Tex. 198. Vt.—Metropolitan, etc. Machine Co. *v.* Morris, 39 Vt. 393. Va.—Rohr *v.* Davis, 9 Leigh (36 Va.) 30; Jenkins *v.* Hurt's Comrs., 2 Rand. (23 Va.) 446. W. Va.—Creigh *v.* Hedrick, 5 W. Va. 140.

But see Brugman *v.* McGuire, 32 Ark. 733.

[a] Where all the defendants are properly before the court a judgment rendered by agreement against one is equivalent to a dismissal of the others. Henry *v.* Gibson, 55 Mo. 570. See also Bailey *v.* McWilliams, 111 Mo. App. 35, 85 S. W. 618.

[b] A statute providing that "though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants, if the action had been against them alone," does not change the common-law rule that where the action is upon a joint contract only a recovery must be had against all or none. Fetz *v.* C. S. Clark & Co., 7 Minn. 217.

As to necessity for joinder of all joint contractors in action on joint contract or obligation, see 11 STANDARD PROC. 975, et seq.

1. U. S.—Sweeney *v.* Hanley, 126 Fed. 97. Ill.—Seymour *v.* Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716; Frink *v.* Jones, 5 Ill. 170; Aten *v.*

Brown, 14 Ill. App. 451; Goodale *v.* Cooper, 6 Ill. App. 81. Ky.—Brown *v.* Warner, 2 J. J. Marsh. 37; Barlow *v.* Wiley, 3 A. K. Marsh. 457. Mass. Tuttle *v.* Cooper, 10 Pick. 281; Hathaway *v.* Crocker, 7 Mete. 262 (discharge in bankruptcy or insolvency). N. H. Peebles *v.* Rand, 43 N. H. 337. N. Y. Sperry *v.* Miller, 2 Barb. Ch. 632. Ohio. Sprague *v.* Childs, 16 Ohio St. 107.

2. Coe *v.* Hamilton, Morris (Iowa) 319; McGuire *v.* Johnson, 2 Lans. (N. Y.) 305.

3. Robinson *v.* Brown, 82 Ill. 279.

[a] In case a defendant shows that he was surety on a note and that the payee granted an extension of the time of payment without his knowledge or consent judgment may be rendered in his favor and against the maker as this would be a personal defense. Ritchie *v.* Gibbs, 7 Ill. App. 149.

[b] And where a defendant has been improperly or unnecessarily joined judgment may be rendered against the others and in favor of such an one. Stevens Co. *v.* Kehr, 93 Ill. App. 510.

4. U. S.—Albright *v.* McTighe, 49 Fed. 817; Milne *v.* Huber, 17 Fed. Cas. No. 9,617. Ala.—Cooper *v.* Turrentine, 17 Ala. 13; Blackburn *v.* Baker, 7 Port. 284; Sprowl *v.* Kellar, 4 Stew. & P. 382. Ark.—Criner *v.* Brewer, 13 Ark. 225. Colo.—Dewoody *v.* Guertin, 13 Colo. App. 517, 58 Pac. 794. Ga. Howard *v.* Dayton Coal Co., 94 Ga. 416, 20 S. E. 336. Ill.—Jansen *v.* Var-num, 89 Ill. 100; Winslow *v.* Newlan, 45 Ill. 145; Baker *v.* Michigan S. & N. J. R. R. Co., 42 Ill. 73; Davis *v.* Taylor, 41 Ill. 405; Illinois Cent. R. R. *v.* Foulks, 92 Ill. App. 391; Vieths *v.* Skinner, 47 Ill. App. 325. Ind.—Chicago I. & L. R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943. Ky.—Shelton *v.* Harlow, 15 B. Mon. 547; Prince *v.* Flynn, 2 Litt. 240; Pfaffinger *v.* Gilman, 18 Ky. L. Rep. 1071, 38 S. W. 1088. Me.—Gillerson *v.* Small, 45 Me. 17; Thacher *v.* Jones, 31 Me. 528.

the plaintiff must establish a joint tort to entitle him to any judgment.<sup>5</sup>

Under statutes providing that judgment may be given for or against one or more of several defendants, whenever a several judgment may be proper, judgment may be rendered against one or more of the parties to the suit, where their liability is established,<sup>6</sup> though the others

**Md.**—*Hambleton v. McGee*, 19 Md. 43. **Miss.**—*Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152. **Neb.**—*Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345. **N. Y.**—*Turner v. McCarthy*, 4 E. D. Smith 247; *Lockwood v. Bull*, 1 Cow. 322, 13 Am. Dec. 539; *Lansing v. Montgomery*, 2 Johns. 382; *Layton v. McConnell*, 61 App. Div. 447, 70 N. Y. Supp. 679. **Pa.**—*Wiest v. Electrical Traction Co.*, 200 Pa. 148, 49 Atl. 891; *McCall v. Forsyth*, 4 Watts & S. 179; *Magee v. Penn. S. V. R. R. Co.*, 13 Pa. Super. 187. **S. C.**—*Chanet v. Parker*, 1 Mill. 333. **Tenn.**—*McCully v. Malcolm*, 9 Humph. 187. **Tex.**—*Kinkler v. Junica*, 84 Tex. 116, 19 S. W. 359; *Dunn v. Newberry* (Tex. Civ. App.), 86 S. W. 626; *Gulf R. R. Co. v. Lee* (Tex. Civ. App.), 65 S. W. 54; *Emerson v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671. **Vt.**—*Wright v. Cooper*, 1 Tyler 425. **Wash.**—*Doremus v. Root*, 23 Wash. 710, 63 Pac. 572.

[a] Where an action is brought against a minor and an adult as joint tort-feasors, and it is not discovered until after verdict that one of the parties is a minor, the court may enter a nolle prosequi as to the minor and permit the verdict to stand against the adult. *Crane v. Lynch*, 27 Pa. Super. 565.

**5. Ark.**—*Little Rock, etc. R. Co. v. Stevenson*, 62 Ark. 354, 35 S. W. 787. **Ia.**—*Barnes v. Ennenga*, 53 Iowa 497, 5 N. W. 597. **Pa.**—*Wiest v. Electric Traction Co.*, 200 Pa. 148, 49 Atl. 891. **6. U. S.**—*Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. ed. 819. **Ala.**—*Burns & Co. v. Moore*, 76 Ala. 339, 52 Am. Rep. 332; *Longstreet v. Rea*, 52 Ala. 195. **Ark.**—*Parke v. Myers*, 28 Ark. 281. **Cal.**—*Hanna v. De Garmo*, 140 Cal. 172, 73 Pac. 830; *Dobbs v. Purington*, 136 Cal. 70, 68 Pac. 323; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826; *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686; *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56; *Lewis v. Clarkin*, 18 Cal. 399; *Stoddart v. Van Dyke*, 12 Cal. 437; *Rowe v. Chand-*

*ler*, 1 Cal. 167. **Colo.**—*Shafer v. Hewitt*, 6 Colo. App. 374, 41 Pac. 509. **Conn.**—*Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716; *Dean v. Savage*, 28 Conn. 359. **Del.**—*Cunningham v. Dixon*, 1 Marv. 163, 41 Atl. 519. **D. C.**—*Presbrey v. Thomas*, 1 App. Cas. 171. **Ill.**—*Neal v. Pennington*, 65 Ill. App. 68. **Ind.**—*Hassler v. Hefele*, 151 Ind. 391, 50 N. E. 361; *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630; *Richardson v. Jones*, 58 Ind. 240; *Stafford v. Nutt*, 51 Ind. 535; *Murray v. Ebright*, 50 Ind. 362; *Rose v. Constock*, 17 Ind. 1; *Hubbell v. Woolf*, 15 Ind. 204; *Valentine v. Duff*, 7 Ind. App. 196, 33 N. E. 529, 34 N. E. 453. **Ia.**—*Poole v. Hintrager*, 60 Iowa 180, 14 N. W. 223; *Eyre v. Cook*, 10 Iowa 586. **Kan.**—*Smith v. Straub*, 41 Kan. 7, 20 Pac. 516. **Ky.**—*Patton v. Shanklin*, 14 B. Mon. 15. **La.**—*Smith v. New Orleans & N. E. R. Co.*, 109 La. 782, 33 So. 769; *Hornor v. McDonald*, 52 La. Ann. 396, 27 So. 91; *Minor v. Hart*, 52 La. Ann. 395, 27 So. 99. **Me.**—*Gleason v. Sanitary Milk Co.*, 93 Me. 544, 45 Atl. 825. **Md.**—*Westheimer v. Craig*, 76 Md. 399, 25 Atl. 419. **Minn.**—*First Nat. Bank v. Burkhardt*, 71 Minn. 185, 73 N. W. 858; *Yellow Medicine County Bank v. Wiger*, 59 Minn. 384, 61 N. W. 452; *Miles v. Wann*, 27 Minn. 56, 6 N. W. 417; *Reed v. Pixley*, 22 Minn. 540. **Mo.**—*Crews v. Lackland*, 67 Mo. 619. **Mont.**—*Knatz v. Wise*, 16 Mont. 555, 41 Pac. 710. **Neb.**—*School Dist. No. 34 v. Kountze Bros.*, 3 Neb. (Unof.) 690, 92 N. W. 597; *Roggenkamp v. Hargreaves*, 39 Neb. 540, 58 N. W. 162; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467. **Nev.**—*Mayenbaum v. Murphy*, 5 Nev. 383. **N. J.**—*Elliott v. Bodine*, 59 N. J. L. 567, 36 Atl. 1038. **N. Y.**—*Barker v. Cocks*, 50 N. Y. 689; *McIntosh v. Ensign*, 28 N. Y. 169; *Brumskill v. James*, 11 N. Y. 294; *Fielden v. Lahens*, 6 Abb. Pr. (N. S.) 341; *McGuire v. Johnson*, 2 Lans. 305; *Stimson v. Van Pelt*, 66 Barb. 151; *Dillaye v. Wilson*, 43 Barb. 261; *Brown v. Richardson*, 4 Rob. 603; *Moss v. Jerome*, 10 Bosw. 220; *Claffin*



are not liable. And this is true in all actions, whether founded upon contract or upon tort.<sup>7</sup>

b. *Effect of Death of One of Defendants.*—Where one of the defendants dies before the rendition of judgment, or is not served with process, there is a conflict of authority as to the power of the court to render judgment against joint, or joint and several defendants. In some jurisdictions such judgments are at most erroneous and are held valid until reversed by some appropriate proceeding;<sup>8</sup> and, if reversed, must be reversed as to all the defendants according to some

*v. Butterly*, 5 Duer 327; *People v. Cram*, 8 How. Pr. 151; *Fullerton v. Taylor*, 6 How. Pr. 259; *Galligan v. De Lorenzo*, 92 N. Y. Supp. 268; *Owen v. Conner*, 11 N. Y. Supp. 352; *Barth v. Amberg*, 9 N. Y. St. 522. **Ohio.** *Lampkin v. Chisom*, 10 Ohio St. 450; *Lennig & Co. v. Burgoyne*, 12 Ohio Dec. (Reprint) 36. **Ore.**—*Hayden v. Pearce*, 33 Ore. 89, 52 Pac. 1049; *Hamm v. Basche*, 22 Ore. 513, 30 Pac. 501; *Ah Lep v. Gong Choy*, 13 Ore. 205, 9 Pac. 483; *Sears v. McGrew*, 10 Ore. 48. **Pa.**—*Campbell v. Floyd*, 153 Pa. 84, 25 Atl. 1033; *Van Zandt v. Winters*, 22 Pa. Super. 181. **S. C.** *Bedenbaugh v. Southern R. Co.*, 69 S. C. 1, 48 S. E. 53; *Roberts v. Pawley*, 50 S. C. 491; *Freeman v. Clark*, 3 Strobb. 281. **S. D.**—*Merchants' Nat. Bank v. Stebbins*, 15 S. D. 280, 89 N. W. 674; *Ross v. Wait*, 4 S. D. 584, 57 N. W. 497. **Tenn.**—*Carpenter v. Lee*, 5 Yerg. 265; *Darwin v. Cox*, 5 Yerg. 257. **Tex.**—*Coleman v. Colgate*, 69 Tex. 88, 6 S. W. 553; *Stevens & Andrews v. Gainesville Nat. Bank*, 62 Tex. 499; *Congdon v. Monroe*, 51 Tex. 109; *Willis & Bros. v. Morrison*, 44 Tex. 27; *Kuykendall v. Coulter*, 7 Tex. Civ. App. 399, 26 S. W. 748. **Utah.**—*Blythe, etc. Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027. **Vt.**—*Reynolds v. Field*, 41 Vt. 225; *Hurlburt v. Hendy*, 27 Vt. 245. **Va.** *Muse v. Farmers Bank*, 27 Gratt. (68 Va.) 252; *Moffett v. Bickle*, 21 Gratt. (62 Va.) 280; *Stephoe v. Read*, 19 Gratt. (60 Va.) 1. **W. Va.**—*Hoffman v. Birchler*, 22 W. Va. 537. **Wis.**—*Bacon v. Bicknell*, 17 Wis. 523.

[a] The federal courts sitting in states where such statutes are in force will always regard them. *Sawin v. Kenney*, 93 U. S. 289, 23 L. ed. 926; *Witters v. Sowles*, 34 Fed. 119.

[b] If defendants who are sued jointly join in pleading the general issue, and no defense is made personal

to one of them it has been held in some states that the statute would not apply. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785.

[c] In Mississippi, the statute applies only to actions or promissory note and bills of exchange, and in all other actions the common-law rule prevails. *Mhoon v. Colment*, 51 Miss. 60.

[d] Where the statute permits affirmative relief to be granted to the defendant, one defendant may have judgment against another if it will not be to the injury of the plaintiff. *Beattie v. Latimer*, 42 S. C. 313, 20 S. E. 53.

Whether judgment must be joint or several, see *infra*, XI, K, 3.

7. Lower *v. Franks*, 115 Ind. 334, 17 N. E. 630; *Murray v. Ebright*, 50 Ind. 362; *Fitzgerald v. Genter*, 26 Ind. 238; *Hubbell v. Woolf*, 15 Ind. 204; *Blodget v. Morris*, 14 N. Y. 482.

8. Ill.—*Clafin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Aldrich v. Housh*, 71 Ill. App. 607. **Ia.**—*Bowen v. Troy Portable Mill Co.*, 31 Iowa 460. **Ky.**—*Fuqua v. Mullen*, 13 Bush 467. **Md.**—*Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077. **Mo.**—*Boyd v. Ellis*, 107 Mo. 394, 18 S. W. 29; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261; *Holton v. Townner*, 81 Mo. 360; *Bailey v. McGinnis*, 57 Mo. 362; *Lenox v. Clarke*, 52 Mo. 115. **Ore.** *Stivers v. Byrckett*, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386; *Mitchell v. Schoonover*, 16 Ore. 211, 17 Pac. 867. **Pa.**—*Donnelly v. Graham*, 77 Pa. 274; *Lewis v. Ash*, 2 Miles 110. **Tex.**—*Holman v. Stowers Furniture Co.* (Tex. Civ. App.), 30 S. W. 1120. **Vt.**—*Holt & Co. v. Thacher*, 52 Vt. 592.

[a] In Alabama and California, (1) when the liability is joint or joint and several and one defendant dies pending judgment, judgment may be rendered against the survivors. *Downs v. Allen*, 23 Blatch. 54, 22 Fed. 805; *Cox v. Harris*, 48 Ala. 538; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198. (2) Nor does



authorities.<sup>9</sup> Other authorities, however, hold that such erroneous judgments will be reversed, only as to the party or parties over whom the court did not have jurisdiction.<sup>10</sup> When the liability is several

the failure to suggest the death of the other on the record affect the judgment against the survivor. *Fabel v. Boykin*, 55 Ala. 383.

[b] Judgment on a forfeited forthcoming bond is rendered by operation of law; and if one of the obligors die before the bond is forfeited, the judgment will be against the survivors only and will be valid as to them. *Moody v. Harper*, 38 Miss. 599.

[c] Where judgment (1) is rendered against a principal and surety on a forfeited recognizance after the death of the principal, the judgment may be vacated as to the principal but not as to the surety. *McLaughlin v. State*, 17 Kan. 283. *Compare*, *Weis v. Aaron*, 75 Miss. 138, 21 So. 763, holding a judgment against a principal and surety after the death of the surety absolutely void. (2) So where the surety on an appeal bond is dead judgment in an action on the bond which is entered against the principal alone is not void. *Lewis v. Maulden*, 93 Ga. 758, 21 S. E. 147.

9. **Colo.**—*Streeter v. Marshall Silver Min. Co.*, 4 Colo. 535; *Gargan v. School District*, 4 Colo. 53. **Ill.**—*Supreme Lodge, etc. v. Goldberg*, 175 Ill. 19, 51 N. E. 647; *Claflin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Williams v. Chalfant*, 82 Ill. 218; *Kimball v. Tanner*, 63 Ill. 519; *Stoetzel v. Fullerton*, 44 Ill. 108; *Brockman v. McDonald*, 16 Ill. 112; *Lovejoy v. Raymond*, 127 Ill. App. 519. *Compare*, *Aldrich v. Housh*, 71 Ill. App. 607. **Ind.**—*Boor v. Lowry*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519. **Ky.**—*Joyes v. Hamilton*, 10 Bush 544, judgment against person jointly liable, void as to one, void as to all. **Me.**—*Winslow v. Lambard*, 57 Me. 356; *Puffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589. **Mich.**—*Powers v. Irish*, 23 Mich. 429. **Mo.**—*Holton v. Towner*, 81 Mo. 360; *Covenant Mut. Life Ins. Co. v. Clover*, 36 Mo. 392; *Dickerson v. Chrisman*, 28 Mo. 134; *Randalls v. Wilson*, 24 Mo. 76. *Compare*, *Bailey v. McGinniss*, 57 Mo. 362. **N. H.**—*Burt v. Stevens*, 22 N. H. 229; *Sargeant v. French*, 10 N. H. 444. **Ohio.**—*Frazier v. Williams*, 24 Ohio St. 625; *Swasey & Co. v. Antram & Co.*, 24 Ohio St. 87; *Douglass' Lessee v. Massie*, 16 Ohio St.

271, 47 Am. Dec. 375. **Ore.**—*Stivers v. Byrket*, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386. **S. C.**—*Roberts v. Pawley*, 50 S. C. 491; *Stenhouse v. Bonum*, 12 Rich. L. 620. **Tex.**—*Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. 465; *Long v. Garnett*, 45 Tex. 400; *Dickson v. Burke*, 28 Tex. 117; *Wood v. Smith*, 11 Tex. 367; *Hulme v. Janes*, 6 Tex. 242, 55 Am. Dec. 774. *Compare*, *Saf-fold v. Navarro*, 15 Tex. 76, holding that when one of several defendants is not served the action may be dismissed against him and judgment rendered against those served. **Vt.**—*Holt & Co. v. Thacher*, 52 Vt. 592. **W. Va.**—*King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687.

[a] The general rule is that a judgment is an entirety and if reversed as to one it must be reversed as to all the parties appealing. However, if the judgment be distinct it may be reversed as to some and affirmed as to others. That some of the parties are adults and others infants does not change the rule. *Cavender v. Smith*, 5 Iowa 157.

10. **U. S.**—*Downs v. Allen*, 23 Blatch. 54, 22 Fed. 805. **Ala.**—*Fabel v. Boykin*, 55 Ala. 383. **Ark.**—*Cheek v. Pugh*, 19 Ark. 574. *Compare*, *Hughes v. Lindsey*, 10 Ark. 555. **Cal.**—*Ricketson v. Richardson*, 26 Cal. 149. **Ga.**—*Lewis v. Maulden*, 93 Ga. 758, 21 S. E. 147; *Kitchens v. Kitchens*, 44 Ga. 620. *Compare*, *Tedlie v. Dill*, 3 Ga. 104, holding that when judgment is given against joint defendants when one of them is dead the judgment will be reversed as to all. **Ia.**—*North v. Mudge & Co.*, 13 Iowa 496. *Compare*, *Cavender v. Smith*, 5 Iowa 157. **Minn.**—*Engstrand v. Kleffman*, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. Rep. 359. **Neb.**—*Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376; *Mercer v. James*, 6 Neb. 406. **Nev.**—*Wood v. Olney*, 7 Nev. 109. **Ore.**—*Stivers v. Byrket*, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386. **Tenn.**—*Collins v. Knight*, 3 Tenn. Ch. 183; *Crank v. Flowers*, 4 Heisk. 629; *Winchester v. Beardin*, 10 Humph. 247, 51 Am. Dec. 702. *Compare*, *Draper v. State*, 1 Head 262, holding that it must be reversed as to all

the judgment may be affirmed as to some and reversed as to others;<sup>11</sup> but such a judgment is regarded as a nullity by some courts and void as to all the defendants.<sup>12</sup>

c. *Effect of Dismissal or Discontinuance as to One or More Defendants.*<sup>13</sup>—While it is true that the plaintiff must usually recover against all or none of the defendants,<sup>14</sup> it is also true that he may dismiss or discontinue, as against one or more defendants and obtain judgment against the others;<sup>15</sup> but upon this proposition, there are author-

parties. **Va.**—Gray *v.* Stuart, 33 Gratt. (74 Va.) 351. **Wis.**—Keith Bros. & Co. *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

11. **Joyes v. Hamilton**, 10 Bush (Ky.) 544; **Asher v. Com.**, 23 Ky. L. Rep. 1976, 66 S. W. 759; **Whiting v. Cochran**, 9 Mass. 532.

12. **D. C.**—Jackson *v.* Hulse, 6 Mackey 548. **La.**—McCloskey *v.* Wingfield, 29 La. Ann. 144. **Mass.**—Wright *v.* Andrews, 130 Mass. 149; Knapp *v.* Abell, 10 Allen 485; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356. **Miss.**—Weis *v.* Aaron, 75 Miss. 138, 21 So. 763; Dyson *v.* Baker, 54 Miss. 24, 28; Parisot *v.* Green, 46 Miss. 747; Martin *v.* Williams, 42 Miss. 210. **N. H.**—Wilbur *v.* Abbot, 60 N. H. 40; Rangely *v.* Webster, 11 N. H. 299. **Ore.**—Stivers *v.* Byrkett, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386.

[a] In New York, the authorities are in conflict. **Holbrook v. Murray**, 5 Wend. 161, follows the rule that the judgment is void, while **St. Johns v. Holmes**, 20 Wend. 609, holds that such a judgment may be good as against one party and inoperative against the others. See also **Richards v. Walton**, 12 Johns. 434.

[b] In Ohio, where a joint judgment is rendered against several defendants, some of whom are served with process, others not being served, the judgment is void as against those not served, and voidable as to the others. **Newburg v. Munshower**, 29 Ohio St. 617. Compare, **Douglass' Lessee v. Massie**, 16 Ohio St. 271, 47 Am. Dec. 375, holding that such judgment is merely erroneous and voidable.

13. As to dismissal or discontinuance, see generally the title "Dismissal, Discontinuance and Nonsuit."

14. See *supra*, XI, K, 1.

15. **Ala.**—Hallett *v.* Allaire, Minor 360. **Ill.**—Cairo & St. L. R. Co. *v.* Easterly, 89 Ill. 156. **Ia.**—Young *v.*

**Brown**, 10 Iowa 537. **Mich.**—Root Co. *v.* Walton, etc. Assn., 140 Mich. 441, 103 N. W. 844. **Miss.**—Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152 (holding that in an action of tort against several defendants, though they all plead jointly, the plaintiff may nol. pros. as to one and a judgment against the rest will be sustained); **Harrison v. Agricultural Bank**, 2 Smed. & M. 307; **Wilkinson & Turney v. Tiffany**, 5 How. 411; **Nevitt v. Natchez Packet Co.**, 5 How. 196; **Peyton v. Scott**, 2 How. 870; **Boush v. Smith**, 2 Smed. & M. 512. **Mo.**—Jackson *v.* Bowles, 67 Mo. 609. **N. H.**—Flanders *v.* White Mountain Bank, 43 N. H. 383. **Pa.**—Weist *v.* Jacoby, 62 Pa. 110; **Chambers v. Lapsley**, 7 Pa. 24; **Commonwealth v. Nesbitt**, 2 Pa. 16; **Ward v. Taylor**, 1 Pa. 238. **R. I.**—Granite Bldg. Co. *v.* Greene, 25 R. I. 586, 57 Atl. 649. **Wash.**—Cushing *v.* Williamsburg Fire Ins. Co., 4 Wash. 538, 30 Pac. 736. **Wis.**—Hibbard *v.* Bell, 3 Pinn. 190.

[a] Where (1) there has been a misjoinder, this is the proper method of procedure (**Thompson v. Reinhard**, 11 Wis. 293), (2) as is it where through non-residence the court has no jurisdiction of one or more of the defendants (**Fla.**—**Bacon v. Green**, 36 Fla. 325, 18 So. 870. **Ky.**—**Duckworth v. Lee**, 10 Bush 51; **Applegate v. Jacoby**, 9 Dana 206; **Sebree v. Clay**, 3 A. K. Marsh. 552. **Mo.**—**January v. Rice**, 33 Mo. 409), (3) or where process has not been served on a part of the defendants. **Ala.**—**Smith v. Robinson**, 11 Ala. 270. **Ark.**—**Alston v. State Bank**, 9 Ark. 455. **Ky.**—**Combs v. Warner**, 8 Dana 87; **Violet v. Waters**, 1 J. J. Marsh. 303; **Bowmans v. Mize**, 3 B. Mon. 320. **Miss.**—**Hughes v. Evans**, 4 Smed. & M. 737; **Dennison v. Lewis**, 6 How. 517. Compare, **Wolley v. Bowie**, 41 Miss. 553; **Hunt v. Anderson**, 33 Miss. 559. **N. Y.**—**Bates v. Reynolds**, 7 Bosw. 685.

ities to the contrary.<sup>16</sup> Where there has been a discontinuance as to one or more defendants, a judgment rendered against all is reversible.<sup>17</sup>

d. *Effect of Default of One or More Defendants.*—The effect of the default of one or more defendants is treated elsewhere in this work.<sup>18</sup>

3. **Joint and Several or Separate Judgments.**—a. *In General.*<sup>19</sup> In an action brought upon a joint undertaking or obligation against several defendants who plead and defend jointly, the judgment must be against them jointly and not severally.<sup>20</sup> If the defendants in a tort action plead jointly, and a joint verdict is rendered against them,

See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

[b] The plaintiff cannot arbitrarily dismiss one or more defendants; but there must be some good cause therefor. *Ferguson v. State Bank*, 11 Ark. 512; *Trigg v. Christmill*, 4 Bibb (Ky.) 455. See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

16. *Hall v. Rochester*, 3 Cow. (N. Y.) 374.

[a] The plaintiff can only discontinue as to one or more defendants and obtain judgment against the others when the action is several as well as joint and then only by leave of court. *Fitch v. Heise, Cheves* (S. C.) 185.

[b] Under a Mississippi statute where the action is on negotiable paper, the plaintiff cannot discontinue as to the maker or makers, and take judgment against the indorsers. *Brunson v. Lea*, 5 Smed. & M. (Miss.) 149.

17. *Inglish v. Watkins*, 4 Ark. 199.

18. See 14 STANDARD PROC. 907, et seq.

19. As to plurality of judgments generally see 14 STANDARD PROC. 986.

20. Cal.—*Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39; *Stearns v. Aguirre*, 6 Cal. 176. Colo.—*Shafer v. Hewitt*, 6 Colo. App. 374, 41 Pac. 509. Ill.—*Seymour v. Richardson Fueling Co.*, 205 Ill. 77, 68 N. E. 716; *Howell v. Barrett*, 8 Ill. 433. Ind.—*Starry v. Johnson*, 32 Ind. 438. Ia.—*McArthur v. Linderman*, 62 Iowa 307, 17 N. W. 531. Ky.—*Elledge v. Bowman*, 5 J. J. Marsh. 593; *Fletcher v. Andrews*, 1 A. K. Marsh. 52; *Holmes' Heirs v. Gay's Heirs*, 6 Bush 47; *Rochester v. Anderson*, 1 Bibb 439. La.—*Wartelle v. Hudson*, 8 La. Ann. 486; *Van Wyck v. Hills*, 4 Rob. 140; *Drew v. Atchison*, 3 Rob. 140; *Comstock v. Paie*, 3 Rob. 440; *Thompson v. Chretien*, 3 Rob. 26. Minn.—*Hanlon v. Hennessy*, 87 Minn.

353, 92 N. W. 1. N. Y.—*Moss v. Jerome*, 10 Bosw. 220; *Niles v. Battershall*, 2 Rob. 146; *Fullerton v. Taylor*, 6 How. Pr. 259. Ohio.—*Dunphy v. Gilliam Mfg. Co.*, 21 Ohio Cir. Ct. 696; *Wilson v. Clare Lead, etc. Co.*, 7 Ohio Dec. (Reprint) 223. Tenn.—*Worley v. Waldran*, 3 Sneed 548. Tex.—*Murphy v. Gage* (Tex. Civ. App.), 21 S. W. 396. Wash.—*Gove v. Moses*, 1 Wash. Ter. 7. W. Va.—*State ex rel. Kloak Bros. & Co. v. Corvin*, 51 W. Va. 19, 41 S. E. 211; *Hoffman v. Bircher*, 22 W. Va. 537.

As to necessity for judgment against all the parties, see *supra*, XI, K, 2.

[a] A statute providing that judgment may be given for or against one or more of several defendants joined in an action whenever a several judgment may be proper does not change the rule as to joint or several judgments. "At common law, if any number of persons or joint contractors were sued, it was necessary to prove and establish an entire case against all the defendants in the action, or it would fail. The legislature intended simply by this section to change the rule of practice, which seemed to be erroneously founded, by allowing the plaintiff to recover against so many of the defendants against whom he can prove a joint contract, and a consequent joint liability. This was the only object of this section of the code, and this is the only change it made. It does not permit a separate judgment to be entered against one of two or more defendants, proved to be joint contractors, and therefore jointly liable, even though that defendant should be the only one served, or who appears." *Niles v. Battershall*, 2 Rob. (N. Y.) 146. See also *Fullerton v. Taylor*, 6 How. Pr. (N. Y.) 259.

[b] The fact that the judgment de-



the judgment must be joint, and not several.<sup>21</sup> But where the cause of action is founded on a joint and several obligation, or where each of the defendants might be sued severally on the same obligation, several or separate judgments against them are proper.<sup>22</sup> If the obligations or liabilities of the defendants are not coextensive, a joint judgment against them all for the whole amount of the judgment is improper; the judgment should be adapted to their respective liabilities.<sup>23</sup> Where it is improper for the jury to apportion the damages among

scribes one of the defendants as principal debtor and the other as surety will not render a judgment several. *Farney v. Hamilton Co.*, 54 Neb. 797, 75 N. W. 44.

[c] Where two defendants were sued on a joint cause of action in the same writ and service was obtained upon one only and another writ was afterwards issued and served on the other defendant and a joint judgment was rendered against both defendants it was held that the judgment was erroneous. *Goodfrey v. McColloch*, 5 Blackf. (Ind.) 178.

[d] Though the undertaking upon which action is brought is joint, if the pleadings allege an agreement by one to pay, a judgment against such defendant alone will be upheld. *Delafield v. San Francisco & S. M. Ry. Co.*, 107 Cal. xvii, 40 Pac. 958.

[e] Where a cause is not at issue as to one of two defendants, if the proofs require a joint judgment, the court cannot properly render any judgment. *Rimmele v. Huebner* (Mich.), 157 N. W. 10.

21. **Ind.**—*Pickle v. Byers*, 16 Ind. 383. **Ky.**—*Cunningham v. Dyer*, 2 Mon. 50; *Rochester v. Auderson*, 1 Bibb 439. **R. I.**—*Keegan v. Hayden*, 14 R. I. 175.

22. **Ala.**—*Williams v. Harrison*, 19 Ala. 277. **Cal.**—*Page v. Fowler*, 39 Cal. 412. **Colo.**—*Ding v. Kennedy*, 7 Colo. App. 72, 41 Pac. 1112. **Ky.**—*Gray's Admr. v. McDowell*, 5 Mon. 501. **La.** *Kuhn & Co. v. Embry*, 35 La. Ann. 488; *Turnage v. Wells*, 19 La. Ann. 135; *Bell v. Massey*, 14 La. Ann. 831. **Minn.**—*Wabasha Bank v. Burkhardt*, 71 Minn. 185, 73 N. W. 858; *Petz v. Clark*, 7 Minn. 217. **Mont.**—*Comanche Mining Co. v. Rumley*, 1 Mont. 201. **N. Y.**—*Parker v. Jackson*, 16 Barb. 33; *Harrington v. Higham*, 15 Barb. 524; *Fullerton v. Taylor*, 6 How. Pr. 259. **Ore.**—*Sears v. McGrew*, 10 Ore. 48. **Pa.**—*Croas-*

*dell v. Tallant*, 83 Pa. 193. **Tenn.** *Chenshaw v. Smith*, 10 Heisk. 1. **Tex.** *Kuykendall v. Coulter*, 7 Tex. Civ. App. 399, 26 S. W. 748; *Missouri Pac. Ry. Co. v. Groesbeck* (Tex. Civ. App.), 24 S. W. 702. **Wis.**—*Van Ness v. Corkins*, 12 Wis. 186; *Phillips v. Bridges*, 3 Wis. 270.

[a] Where an action is against two defendants to recover mesne profits on two separate pieces of land a joint judgment against them is erroneous unless there has been a joint possession. *Kennedy v. Christian*, 2 Ind. 503.

[b] Where one of two defendants is liable individually and the other in a representative capacity the judgment should be several. *Nelson v. Humes*, 12 Ill. App. 52.

[c] A several judgment may be entered against the makers and indorsers of a note where the suit is against them jointly. *Van Ness v. Corkins*, 12 Wis. 186.

[d] A joint judgment for costs is proper where the defendants were sued jointly even though they answer separately. *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686.

23. **U. S.**—*Germania F. Ins. Co. v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *Chambers v. Upton*, 34 Fed. 473. **Ind.** *Hassler v. Hefeke*, 151 Ind. 391, 50 N. E. 361. **Ky.**—*Ransdell v. Threlkeld*, 4 Bush 347; *Henry v. Sennett*, 3 B. Mon. 311. **Mo.**—*Smith v. Sims*, 77 Mo. 269. **N. H.**—*City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645. **N. Y.**—*Van Rensselaer v. Layman*, 39 How. Pr. 9. **Vt.**—*Murray v. Mattison*, 67 Vt. 553, 32 Atl. 479. **Wis.**—*Payne v. Jelleff*, 67 Wis. 246, 30 N. W. 526.

[a] "A court of chancery always had power to adapt its judgment in a cause to the different liabilities of the defendants. The same flexibility is now given to the proceedings at law, as formerly existed in those in chancery, and a court of law may now adapt its judgment in a cause to the



several defendants, all being jointly liable therefor, the judgment, in case of such an apportionment, may be against all the defendants for the largest amount allowed.<sup>24</sup>

If the interest of the plaintiffs in the recovery is joint the judgment should be in their favor jointly,<sup>25</sup> but where their interests are different the judgment should apportion the recovery amongst them in accordance with their differing interests.<sup>26</sup>

b. *Effect of Invalidity of Joint Judgment.* — While some courts hold that a judgment is an entirety as to all the parties against whom it is rendered, and cannot be reversed and remanded as to some and affirmed as to others,<sup>27</sup> but that if void as to one defendant, it is void as to all,<sup>28</sup> there are authorities which hold that a judgment may be enforced as to a part of the defendants, though void or voidable as to the others.<sup>29</sup>

**XII. OPERATION, EFFECT AND CONSTRUCTION. — A. OPERATION AND EFFECT.**<sup>1</sup> — 1. In General. — The final judgment of a court of competent jurisdiction is binding and conclusive upon all the parties to the suit and their privies until reversed or set aside.<sup>2</sup> Judgments derive their force and effect from what is decreed by the court,<sup>3</sup> not from the admissions of the parties,<sup>4</sup> nor from matters<sup>5</sup>

respective liabilities of the parties. 2 R. S., p. 121." *Douglass v. Howland*, 11 Ind. 554.

24. *Sodonsky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Cox v. Cooke*, 1 J. J. Marsh. (Ky.) 360; *Rochester v. Anderson*, 1 Bibb (Ky.) 439.

25. *Wheeler v. Hawkins*, 116 Ind. 515, 19 N. E. 470.

[a] A severance of their interest in the land after the institution of an ejectment suit does not deprive joint plaintiffs of a right to a joint judgment for the possession. *Alford v. Dewin*, 1 Nev. 207.

As to necessity for recovery by all the parties, see *supra*, XI, K, 1.

26. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *School Dist. v. Edwards*, 46 Wis. 150, 49 N. W. 968.

27. *Mahoning County Bank's Appeal*, 32 Pa. 158; *Linn v. Arambould*, 55 Tex. 611, 624; *Robinson v. Schmidt*, 48 Tex. 13. See *Cunningham v. Dyer*, 2 T. B. Mon. (Ky.) 50.

[a] Where a joint judgment is set aside as to one of two or more defendants, it should be set aside as to both and not only as to the one making the application. *Storm Lake v. Iowa Falls R. Co.*, 62 Iowa 218, 17 N. W. 489.

28. *Ill.*—*Cummings v. Smith*, 114 Ill. App. 35; *Larsen v. Ditto*, 90 Ill. App.

284. N. H.—*Rangely v. Webster*, 11 N. H. 299. Pa.—*Mahoning County Bank's Appeal*, 32 Pa. 158. S. C.—*Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913. Tenn.—*Williams v. Duffy*, 7 Humph. 255, 273.

29. Kan.—*School Dist. No. 63 of Wabauensee County v. Chicago Lumb. Co.*, 41 Kan. 618, 21 Pac. 599. Minn. Neb.—*Council Bluff Sav. Bank v. Gris-Engstrand v. Kleffman*, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. Rep. 359. wold, 50 Neb. 753, 70 N. W. 376. Tex. *Reynolds v. Adams*, 3 Tex. 167.

As to enforcement of judgments, see generally the title "Judgments and Decrees, Enforcement of."

1. Operation and effect of judgments by default, see 14 STANDARD PROC. 912; of judgments by consent, see 14 STANDARD PROC. 920; of judgments on the pleadings, see 14 STANDARD PROC. 957.

2. See generally the title "Res Judicata;" also *infra*, XVII, A; XVII, B.

Pleading judgment as estoppel, see *infra*, XVII, D.

3. *Cuebas v. Venas*, 8 Mart. N. S. (La.) 465.

4. *Cuebas v. Venas*, 8 Mart. N. S. (La.) 465.

5. *Attorney General v. New York*,

not included in the litigation. A judgment does not create, add to, nor detract, from the indebtedness of a party.<sup>6</sup>

**2. As Between Codefendants.**—A judgment against two or more defendants decides only the question of their liability to the plaintiff,<sup>7</sup> and not the relative liabilities of the defendants inter sese,<sup>8</sup> unless the respective rights of the defendants, as between themselves, are put in issue by the pleadings and adjudicated.<sup>9</sup>

**3. Of Conflicting Judgments.**—If there is an apparent conflict between successive adjudications between the same parties, procured in courts of concurrent jurisdiction on the same cause of action, that which is later in point of time will prevail.<sup>10</sup>

**4. As Affected by Subject-Matter of Suit.**—A judgment which is general in its terms will be presumed to include all matters and issues raised by the pleadings.<sup>11</sup> Where a judgment awards a recovery upon one of two causes of action, but is silent as to the other, such judgment is prima facie an adjudication against such cause of action.<sup>12</sup>

**5. As Affected by Conditions Imposed.**—A successful litigant, by

N. H. & H. R., 201 Mass. 370, 87 N. E. 621; Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499.

6. It only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment. *Gustine v. Union Bank*, 10 Rob. (La.) 412.

[a] A judgment obtained against a surety does not change the character of his debt nor the relation in which he stands to the principal debtor. *Gustine v. Union Bank*, 10 Rob. (La.) 412.

7. Ala.—*Buffington v. Cook*, 35 Ala. 312. Ia.—*Palmer v. Stacy*, 44 Iowa 340. N. C.—*Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070; *Baugert v. Blades*, 117 N. C. 221, 23 S. E. 179.

8. Ala.—*Buffington v. Cook*, 35 Ala. 312. Ia.—*Palmer v. Stacy*, 44 Iowa 340. N. C.—*Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070; *Baugert v. Blades*, 117 N. C. 221, 23 S. E. 179.

9. *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070; *Baugert v. Blades*, 117 N. C. 221, 23 S. E. 179; *Hall v. Younts*, 87 N. C. 285.

10. Ill.—*Bank of Montreal v. Griffin*, 190 Ill. App. 221. Ia.—*Wood v. Wood*, 143 Iowa 440, 121 N. W. 1090; *Cooley v. Brayton*, 16 Iowa 10. Tex.—*Stoltz v. Coward*, 10 Tex. Civ. App. 295, 30 S. W. 935.

See also *Bateman v. Grand Rapids*, etc. R. Co., 96 Mich. 441, 56 N. W. 28.

11. Cal.—*Miller v. More*, 170 Cal. 557, 150 Pac. 775. Ill.—*People v. Becker*, 253 Ill. 131, 97 N. E. 269; *Rhoads v. Metropolis*, 144 Ill. 580, 33 N. E.

1092; *Palmer v. Sanger*, 143 Ill. 34, 32 N. E. 390. Ky.—*United States Fidelity & Guaranty Co. v. Martin*, 143 Ky. 241, 136 S. W. 200.

See also *infra*, XVII, B.

[a] Where the complaint declared upon six warrants and the record of the proceeding failed to show that any one of these warrants were withdrawn, in the absence of extrinsic evidence, the presumption that each warrant declared on entered into the consideration of the court in making up its general judgment will obtain. *People v. Becker*, 253 Ill. 131, 97 N. E. 269.

12. Cal.—*Thompson v. McKay*, 41 Cal. 221. Ia.—*Schmidt v. Zahensdorf*, 30 Iowa 498. La.—*Spencer v. Banister*, 12 La. Ann. 766; *Rice v. Garrett*, 12 La. Ann. 755. Tex.—*Davies v. Thomson*, 92 Tex. 391, 49 S. W. 215; *Rackley v. Fowlkes*, 89 Tex. 613, 36 S. W. 77; *Kendrick v. Lunsford* (Tex. Civ. App.), 150 S. W. 480.

See also *infra*, XVII, B.

[a] A judgment which is silent as to one of the counts declared upon but awards damages to plaintiff upon the other count, is, in effect, a determination against the plaintiff upon the cause of action set up in the former count. *Miller v. More*, 170 Cal. 557, 150 Pac. 775.

[b] A judgment entered for the amount of a note, determines that there was no fraud proved as to the indebtedness but that it was for a valid indebtedness. *Hudson v. Childree* (Tex. Civ. App.), 156 S. W. 1154.

failing to comply with the conditions imposed in a judgment, may lose the benefit of it.<sup>13</sup>

B. CONSTRUCTION.<sup>14</sup> — 1. **In General.** — It is a general rule, applicable to judgments, that, if possible, effect should be given to every word and clause therein.<sup>15</sup> Such words and clauses should be construed according to their natural and legal import,<sup>16</sup> and the whole context should be considered.<sup>17</sup> And when a judgment admits of two or more possible constructions, that interpretation will be adopted which is consistent with the judgment that should have been rendered on the facts and law of the case.<sup>18</sup> An ambiguous judgment must be construed with reference to the law regulating the rights of the parties,<sup>19</sup> or the subject-matter before the court pronouncing judg-

13. *Smith v. George*, 52 Cal. 341. And see *Aubry v. Folse*, 11 Mart. (O. S.) (La.) 306 (wherein it was held that even though the court had decreed that a judgment was null and void for want of compliance with its conditions, yet as the court had issued an execution and the conditions had then been complied with, the benefit of the adjudication was not lost); *Bank of Old Dominion v. McVeigh*, 32 Gratt. (73 Va.) 530.

14. **Construction of decrees**, see 6 STANDARD PROC. 783.

15. **Ala.**—*Ex parte Beavers*, 34 Ala. 71. **La.**—*Trepagnier v. Williams*, 4 La. 99. **N. M.**—*Stalick v. Wilson*, 154 Pac. 708. **N. C.**—*Lamb v. Major*, 146 N. C. 531, 60 S. E. 425. **S. C.**—*Wood v. Ross*, 85 S. C. 309, 67 S. E. 449.

16. **La.**—*Succession of Regan*, 12 La Ann. 156. **P. R.**—*Puente v. Puente*, 17 Porto Rico 1125. **S. C.**—*Wood v. Ross*, 85 S. C. 309, 67 S. E. 449.

17. **La.**—*Ingram v. Richardson*, 2 La. Ann. 839. **Mich.**—*Barnes v. Michigan Air Line Ry. Co.*, 54 Mich. 243, 20 N. W. 36. **Minn.**—*Simons v. Munch*, 127 Minn. 266, 149 N. W. 304.

[a] In arriving at the meaning of a judgment, it is improper to rely wholly on the literal reading of clauses severed from the sentence in which they are placed. The judgment as a whole should be considered in interpreting any particular clause or sentence therein. *Simons v. Munch*, 127 Minn. 266, 149 N. W. 304.

18. **Cal.**—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961. **Kan.**—*Sharp v. McColm*, 79 Kan. 772, 101 Pac. 659; *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. 466. **La.**—*Sharp v. Zeller*, 114 La. 549, 38 So. 449; *Peniston v. Somers*, 15 La. Ann. 679; *Copley v. Robertson*,

6 La. Ann. 181; *Trepagnier v. Williams*, 4 La. 99; *Harrison v. Godbold*, McGloin 178. **Minn.**—*Simons v. Munch*, 127 Minn. 266, 149 N. W. 304. **N. M.**—*Stalick v. Wilson*, 154 Pac. 708. **Okla.**—*Hale v. Independent Power Co.*, 148 Pac. 715. **S. C.**—*Wood v. Ross*, 85 S. C. 309, 67 S. E. 449.

[a] "It has long been the law of this state that a judgment open to two interpretations should be given that meaning which will make it correct, proper and valid, rather than the one which will make it incorrect, improper and erroneous." *Sharp v. McColm*, 79 Kan. 772, 101 Pac. 659; *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. 466; *Hale v. Independent Power Co. (Okla.)*, 148 Pac. 715.

19. *Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961; *Burnett v. Whitesides*, 15 Cal. 35; *Lally v. Lally*, 152 Wis. 56, 138 N. W. 651.

[a] "It must be presumed that the court intended to adjudge correctly in law upon the facts of the case. Hence, an interpretation of the general language of the judgment which would make it contrary to the law applicable to the facts must be rejected." *Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961.

[b] Where the allottees of Indian lands were prohibited by the statutes from alienating their lands for twenty-five years, but were permitted to lease the land for three years, a judgment that certain allottees had a right to convey their interest in the land and ordering that a good and valid title be conveyed would be interpreted as merely referring to a leasehold interest. *Goodrum v. Buffalo*, 7 Ind. Ter. 711, 104 S. W. 942.



ment,<sup>20</sup> and in such a way as to exclude error, if possible.<sup>21</sup> The jurisdiction of the court must be considered in the construction of a judgment.<sup>22</sup> Where the meaning of a judgment is clear and certain, acquiescence in an erroneous construction will not control its effect;<sup>23</sup> but where the parties have adopted or acquiesced in the meaning of a judgment which is uncertain, such construction will not be lightly disregarded, especially where such acquiescence has lasted for a long period of time.<sup>24</sup>

**2. Of Conflicting Recitals.** — Where some of the recitals in a judgment purport to show that the defendant made default, but further recitals tend to show that the case was heard on its merits, the judgment will be construed as one rendered on the merits of the case.<sup>25</sup>

**3. Reference to Record.** — a. *Generally.* — Where the language of a judgment is clear and unambiguous, its meaning cannot be changed by reference to the record, pleadings, findings or verdict.<sup>26</sup> But if a judgment or any part thereof is obscure or ambiguous in its terms, the whole record may be examined to remove the doubt.<sup>27</sup>

**20. Fla.**—*Atkinson v. Schilman*, 60 Fla. 301, 53 So. 844, 56 So. 274. **La.**—*Sharp v. Zeller*, 114 La. 549, 38 So. 449; *Barus v. Bidwell*, 23 La. Ann. 296; *Bell v. Massey & Poultney*, 14 La. Ann. 831; *Succession of Regan*, 12 La. Ann. 156. **Minn.**—*Simons v. Munch*, 127 Minn. 266, 149 N. W. 403. **N. Y.**—*Spier v. Hyde*, 47 Misc. 443, 95 N. Y. Supp. 952. **Va.**—*Newberry v. Dutton*, 114 Va. 95, 75 S. E. 785. **Wis.**—*Childs v. Dahlke*, 160 Wis. 184, 151 N. W. 378.

[a] A judgment requiring defendants to do filing upon land is sufficiently definite if, with the aid of an engineer, the limits of the filing may be determined from the description in the judgment, construed according to the physical condition of the premises at the time the judgment is entered. *Childs v. Dahlke*, 160 Wis. 184, 151 N. W. 378.

[b] A judgment based upon a contract which did not provide for interest upon an agreed sum, will not be construed as providing for interest where it is for "the full amount agreed" upon. *Hamilton v. Hamer* (S. C.), 88 S. E. 28.

**21.** *Maxey v. McCord*, 120 Wis. 571, 98 N. W. 529, 98 N. W. 923.

**22. La.**—*Succession of Durnford*, 1 La. Ann. 92. **N. M.**—*Staliek v. Wilson*, 154 Pac. 708. **S. C.**—*Wood v. Ross*, 85 S. C. 309, 67 S. E. 449. **Tex.**—See *Williamson v. Wright*, 1 Unrep. Cas. 711; *Jones v. Gough* (Tex. Civ. App.), 175 S. W. 1107.

[a] "Whenever a judgment is susceptible of two interpretations, one of which is within the power of the judge, and the other would exceed it, the first must be preferred." *Copley v. Robertson*, 6 La. Ann. 181.

**23.** *Bank of Old Dominion v. McVeigh*, 32 Gratt. (73 Va.) 530.

**24.** *Rodee v. City of Ogdensburg*, 86 Misc. 229, 148 N. Y. Supp. 826; *Mooney v. Mooney*, 10 Misc. 386, 31 N. Y. Supp. 118; *Bank of Old Dominion v. McVeigh*, 32 Gratt. (73 Va.) 530.

**25.** *Todd v. State* (Tex. Civ. App.), 134 S. W. 761.

**26. U. S.**—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 152 Fed. 849, 81 C. C. A. 643. **Minn.**—*Simons v. Munch*, 127 Minn. 266, 149 N. W. 304; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 301, 50 N. W. 82, 930. **N. Y.**—*Rodee v. City of Ogdensburg*, 86 Misc. 229, 148 N. Y. Supp. 826. **Tex.**—*Hightower v. Bennight*, 53 Tex. Civ. App. 120, 115 S. W. 875. See also *infra*, XII, B, 3, b and c.

[a] A judgment "must speak for itself, and the courts must be able, by reading it, to determine what it means, without other aid than a knowledge of the ordinary and usual meaning of the words and characters employed, as the same are used in judicial proceedings." *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495.

**27. Cal.**—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961; *Atlantic, Gulf & Pac. Co. v. Wright*, 11 Cal. App. 179, 104 Pac. 460. **Fla.**—*State v. S. A. L.*



b. *Reference to Pleadings.*—Whenever a judgment is ambiguous or obscure and so fails to express the exact determination of the court, reference may be had to the pleadings and the issues joined thereunder as an aid to dispel such ambiguity or obscurity.<sup>28</sup> Where the original complaint has been superseded by an amended complaint a judgment which recites that the court finds the allegations of the com-

- Ry., 56 Fla. 670, 47 So. 986; Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 So. 255; Taylor v. Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362. **Ill.**—Hofferbert v. Klinkhardt, 58 Ill. 450; Hagemann v. Schoelkopf, 157 Ill. App. 313; Adams v. Pacini, 119 Ill. App. 428. **Ind.**—Fleenor v. Driskill, 97 Ind. 27; May v. George, 53 Ind. App. 259, 101 N. E. 393. **Ia.**—Fowler v. Doyle, 16 Iowa 534; Finnagan v. Manchester, 12 Iowa 521. **Ky.**—Four Mile Land & C. Co. v. Slusher, 107 Ky. 664, 55 S. W. 555. **La.**—Trepagnier v. Williams, 4 La. 99. **Mich.**—Thayer v. McGee, 20 Mich. 195, stipulation of parties. **Minn.**—Simons v. Munch, 127 Minn. 266, 149 N. W. 304. **Neb.**—Burke v. Unique Print. Co., 63 Neb. 264, 88 N. W. 488. **N. Y.**—Rodee v. City of Ogdensburg, 86 Misc. 229, 148 N. Y. Supp. 826. **Okla.**—Hale v. Independent Powder Co., 148 Pac. 715; Reaves v. Turner, 20 Okla. 492, 94 Pac. 543. **Pa.**—Reidenauer v. Killinger, 11 Serg. & R. 119. **Utah.**—Snow v. West, 37 Utah 528, 110 Pac. 52.
28. **Ala.**—Coffey v. Cross, 185 Ala. 86, 64 So. 95; Alexander v. Wheeler, 69 Ala. 332. **Cal.**—Watson v. Lawson, 166 Cal. 235, 135 Pac. 961; Pomono, etc. Co. v. San Antonio, etc. Co., 152 Cal. 618, 93 Pac. 881; Etter v. Hughes, 5 Cal. Unrep. Cas. 148, 41 Pac. 790; Le Breton v. Stanley Contract. Co., 15 Cal. App. 429, 114 Pac. 1028. **Fla.**—Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 So. 255; Taylor v. Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362. **Ill.**—Adams v. Pacini, 119 Ill. App. 428. **Ind.**—Fleenor v. Driskill, 97 Ind. 27; May v. George, 53 Ind. App. 259, 101 N. E. 393. **Ia.**—Fowler v. Doyle, 16 Iowa 534. **Kan.**—Sharp v. McCole, 79 Kan. 772, 101 Pac. 659; Clay v. Hildebrand, 34 Kan. 694, 9 Pac. 466. **Ky.**—Four Mile Land & C. Co. v. Slusher, 107 Ky. 664, 55 S. W. 555. **La.**—Sharp v. Zeller, 114 La. 549, 38 So. 449; Barus v. Bidwell, 23 La. Ann. 296; Peniston v. Somers, 15 La. Ann. 679; Bell v. Massey & Poultney, 14 La. Ann. 831; Succession of Regan, 12 La. Ann. 156; Succession of Durnford, 1 La. Ann. 62. **Mass.**—Attorney General v. New York, N. H. & H. R. R., 201 Mass. 370, 87 N. E. 621. **Minn.**—Simons v. Munch, 127 Minn. 266, 149 N. W. 304. **Mo.**—In re Siegel, 263 Mo. 375, 173 S. W. 1. **N. Y.**—Rodee v. City of Ogdensburg, 86 Misc. 229, 148 N. Y. Supp. 826. **Okla.**—Reaves v. Turner, 20 Okla. 492, 94 Pac. 543; Hale v. Independent Powder Co., 148 Pac. 715. **Tenn.**—East Tennessee V. & G. Ry. Co. v. Nashville, C. & St. L. Ry. Co., 51 S. W. 202. **Tex.**—Richardson v. Trout (Tex. Civ. App.), 135 S. W. 677; Croom v. Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072. **Utah.**—Snow v. West, 37 Utah 528, 110 Pac. 52.
- [a] The facts stated in the bill and proved or admitted at the hearing should always be considered in the construction of a judgment. Attorney General v. New York, N. H. & H. R. R., 201 Mass. 370, 87 N. E. 621.
- [b] In determining the force and effect of a judgment, the pleadings must be consulted to see what the matter in controversy was. Newberry v. Dutton, 114 Va. 95, 75 S. E. 785.
- [c] To interpret and construe the legal effect of a judgment in the light of the pleadings is not an attack upon nor an amendment of the judgment. Croom v. Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072.
- [d] Failure of the judgment to recite the real property involved in the litigation may be supplied by a reference to the pleadings or entire record. **Il.**—Adams v. Pacini, 119 Ill. App. 428. **Ia.**—Coleman v. Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484; Foster v. Bowman, 55 Iowa 237, 7 N. W. 513. **Md.**—Jones v. Belt, 2 Gill 106. **Tex.**—Martin v. Teal (Tex. Civ. App.), 29 S. W. 691. But see Neff v. Covington Stone & Sand Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723; Meyer v. City of Covington, 103 Ky. 546, 45 S.

plaint to be true, will be construed as referring to the amended complaint.<sup>29</sup>

c. *Reference to Verdict or Findings.*—Where the judgment is ambiguous as to the amount of the recovery,<sup>30</sup> or the relief granted,<sup>31</sup> or against whom granted,<sup>32</sup> reference may be had to the verdict or findings of the court to remedy the defect.

d. *Reference to Opinion.*—The opinion of the court may properly be consulted to determine, in case of doubt, the meaning and proper construction of the judgment;<sup>33</sup> but if the judgment is definite and certain, the opinion cannot be used to aid in its construction.<sup>34</sup>

4. *As to Parties.*—a. *In General.*—When a judgment is in favor of the plaintiffs and against the defendants in general terms, the parties affected are to be ascertained by reference to the whole record.<sup>35</sup> So a judgment which does not recite that it is rendered for the

W. 769 (holding that a judgment for sale of real property must describe the property without requiring a reference to the pleadings); *Harrison v. Taylor* (Ky.), 43 S. W. 723.

[e] A misdescription may be so corrected. *Sharp v. McCollm*, 79 Kan. 772, 101 Pac. 659; *Sanger v. Roberts*, 92 Tex. 312, 48 S. W. 1 (reference to deed).

[f] In criminal cases, a judgment of guilty "as charged" is sufficient as it may be tested by a reference to the indictment upon which it is based. *In re Siegel*, 263 Mo. 375, 173 S. W. 1. See generally the title "Sentence and Judgment."

29. *Stalick v. Wilson* (N. M.), 154 Pac. 708.

30. *Ellis v. Dunn*, 3 Ala. 632.

[a] The absence of a dollar mark or sign before the amount of the recovery does not render the judgment insufficient, for the pleadings and the verdict may be looked to to supply the defect. *Snow v. West*, 37 Utah 528, 110 Pac. 52.

[b] Necessity for reciting amount of recovery, see *supra*, XI, G, 1.

31. Cal.—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961; *Treat v. Laforge*, 15 Cal. 41. Kan.—*Armell v. Layton*, 29 Kan. 576. Miss.—*Kelly v. Davis*, 37 Miss. 76.

32. See *infra*, XII, B, 4, c.

33. U. S.—*D'Arcy v. Staples & Hanford Co.*, 161 Fed. 733, 88 C. C. A. 606. Ky.—*Pepper v. Donnelly*, 87 Ky. 259, 8 S. W. 441. La.—*Avery v. Police Jury*, 15 La. Ann. 223, 35 Am. Dec. 202, judge required by state constitution to state reasons for judgment. Ore.—*Gentry v. Pacific Live Stock Co.*,

45 Ore. 233, 77 Pac. 115. P. R.—*Puente v. Puente*, 17 Porto Rico 1125. Tenn. *State v. Bank of Commerce*, 96 Tenn. 591, 36 S. W. 719; *Fowlkes v. State*, 14 Lea 14.

[a] Where the judgment refers to the opinion of the trial judge and makes it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes a part of the record, and must be looked to to explain what was in issue and what was determined by the judgment or decree in question. *Legrand v. Rixey's Admr.*, 83 Va. 862, 3 S. E. 864.

34. *Gentry v. Pacific Livestock Co.*, 45 Ore. 233, 77 Pac. 115.

35. Ala.—*Adams v. Bibby*, 69 So. 588; *Fletcher v. Riley*, 169 Ala. 433, 53 So. 816; *Blackman v. Moore-Handly Hdw. Co.*, 106 Ala. 458, 17 So. 629; *Bolling v. Speller*, 96 Ala. 269, 11 So. 300; *Collins & Co. v. Hyslop & Son*, 11 Ala. 508. Fla.—*Taylor v. Branham*, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362. Ind.—*Hendry v. Crandall*, 131 Ind. 42, 30 N. E. 789. Ia.—*Finnagan v. Manchester*, 12 Iowa 521. Ky.—*Four Mile Land & C. Co. v. Slusher*, 107 Ky. 664, 55 S. W. 555. Mich.—*Aldrich v. Maitland*, 4 Mich. 205. Minn.—*City Nat. Bank v. Hager*, 52 Minn. 18, 53 N. W. 867; *Banning v. Sabin*, 41 Minn. 477, 43 N. W. 329. Neb.—*Burke v. Unique Print Co.*, 63 Neb. 264, 88 N. W. 488. N. J.—*Nordstrom v. Payne*, 86 N. J. L. 361, 91 Atl. 592. Pa.—*Erdman v. Stahlnecker*, 12 Serg. & R. 325. Tenn.—*Wilson & Wheeler v. Nance*, 11 Humph. 189. Tex.—*Dunlap v. Southerlin*, 63 Tex. 38; *Little v. Birdwell*, 27

plaintiff and against the defendant may be remedied by reference to the declaration.<sup>36</sup>

b. *Parties Plaintiff*.—The word "plaintiff" in a judgment may be read in the plural.<sup>37</sup>

c. *Parties Defendant*.—The word "defendants" in a judgment, with the aid of the record, will be construed to apply to those defendants only who were brought within the jurisdiction of the court.<sup>38</sup> Thus, it may be construed to mean the singular,<sup>39</sup> or a less number than all.<sup>40</sup> Likewise, the singular may be read in the plural.<sup>41</sup>

Tex. 688; *Hays v. Yarborough*, 21 Tex. 487; *Davie v. Green* (Tex. Civ. App.), 132 S. W. 874; *Easterwood v. Burnett*, 59 Tex. Civ. App. 521, 126 S. W. 934. **W. Va.**—*Perry v. McHuffman*, 7 W. Va. 306.

36. *Adams v. Walker*, 59 Ga. 506.

[a] A judgment which merely declares that the plaintiff shall have a specified sum, but does not declare the person from whom he is to recover it, can only be made valid by the aid of the record showing the person who is liable. *Maxey v. McCord*, 120 Wis. 571, 98 N. W. 529, 98 N. W. 923.

37. *Ellis v. Dunn*, 3 Ala. 632; *Hagmann v. Schoelkopf*, 157 Ill. App. 313 (omission of "s" clerical mistake). *Contra*, *Aultman & Co. v. Wirth*, 45 Ill. App. 614; *Sharp v. Zeller*, 114 La. 549, 38 So. 449.

38. **Ala.**—*Adams v. Bibby* (Ala.), 69 So. 588; *Ice v. Manning*, 3 Ala. 121. **Ark.**—*Neal v. Singleton*, 26 Ark. 491. **Ill.**—*Gardner v. Hall*, 29 Ill. 277; *Dawson v. Bridges*, 19 Ill. App. 280. **Ky.** *Walker v. Martin*, 17 B. Mon. 181; *Kountz v. Brown*, 16 B. Mon. 577; *Clark v. Finnell*, 16 B. Mon. 329, 334; *Morgan v. Morgan*, 2 Bibb 388. **Mich.** *Holcomb v. Tift*, 54 Mich. 647, 20 N. W. 627. **N. J.**—*Malaney v. Hughes*, 50 N. J. L. 546, 14 Atl. 748. **Okla.**—*Hale v. Independent Powder Co.*, 148 Pac. 715. **Pa.**—*Rockwell v. Tupper*, 7 Pa. Super. 174. **Tenn.**—*Wilson & Wheeler v. Nance*, 11 Humph. 189; *Winchester v. Beardin*, 10 Humph. 247; *Boyd v. Baynham*, 5 Humph. 386. **Va.**—*Bank of Dominion v. McVeigh*, 32 Gratt. (73 Va.) 530; *Moss v. Moss's Admr.*, 4 Hen. & Mun. (14 Va.) 293. **W. Va.** *Perry v. McHuffman*, 7 W. Va. 306. *Contra*.—*Langley v. Grill*, 1 Colo. 71.

39. **U. S.**—*Forsyth v. Van Winkle*, 9 Fed. 247. **Ala.**—*Renfro & Andrews v. Willis*, 67 Ala. 488. **Ind.**—*Taylor v. Taylor*, 64 Ind. 356. **Ky.**—*Kountz v. Brown*, 16 B. Mon. 577. **Mich.**—*Barnes*

*v. Michigan Air Line Ry. Co.*, 54 Mich. 243, 20 N. W. 36. **Minn.**—*City Nat. Bank v. Hager*, 52 Minn. 18, 53 N. W. 867. **Neb.**—*Burke v. Unique Print. Co.*, 63 Neb. 264, 88 N. W. 488. **N. M.** *New Mexico & S. P. R. Co. v. Madden*, 7 N. M. 215, 34 Pac. 50. **Okla.** *Hale v. Independent Powder Co.*, 148 Pac. 715.

*Contra*.—*Langley v. Grill*, 1 Colo. 71.

40. **Minn.**—*Banning v. Sabin*, 41 Minn. 477, 43 N. W. 329. **Miss.**—*Lamar v. Williams*, 39 Miss. 342, reference to verdict. **Wis.**—See *Winner v. Kuehn*, 97 Wis. 394, 72 N. W. 227.

[a] Although an action is brought against a partnership and the individuals composing it, and a corporation, and there is nothing upon the face of the record showing any disposition made of the action against the partnership and individuals composing it, yet nevertheless if it clearly appears, by the finding of the trial judge, that the corporation had assumed all the liabilities of the partnership and of the individuals composing it, a judgment rendered against the defendant generally will be construed to be against the defendant corporation solely. *Nordstrom v. Payne*, 86 N. J. L. 361, 91 Atl. 592.

41. **Cal.**—*Atlantic Gulf & Pac. Co. v. Wright*, 11 Cal. App. 179, 104 Pac. 460. **Ill.**—*Hofferbert v. Klinkhardt*, 58 Ill. 450. **Ky.**—*Clagget v. Blanchard*, 8 Dana 41. **Neb.**—*Burke v. Unique Print. Co.*, 63 Neb. 264, 88 N. W. 488. **N. M.**—*New Mexico & S. P. R. Co. v. Madden*, 7 N. M. 215, 34 Pac. 50. **Okla.**—*Hale v. Independent Powder Co.*, 148 Pac. 715. **R. I.** *McMahon v. Perkins*, 22 R. I. 116, 46 Atl. 405. **Tenn.**—*Myers v. Hammond*, 6 Baxt. 61. **Tex.**—*Turner v. City of Houston* (Tex. Civ. App.), 43 S. W. 69. **Va.**—*Roach v. Blakey*, 89 Va. 767, 17 S. E. 228.



d. *Jointly or Severally Liable*.—A judgment upon an obligation which is joint and several will be construed as a joint and several judgment, or in solido, where it does not specifically state otherwise;<sup>42</sup> but a judgment providing that the plaintiff have judgment against the "defendants and each of them," is a several and not a joint judgment.<sup>43</sup>

e. *Capacity in Which Liable*.—The force and effect of a personal judgment against a party will not be changed by the use and addition of words merely descriptio personae showing a representative capacity.<sup>44</sup> And where a judgment is rendered against a person in a representative capacity, its effect will not be changed by the use of words indicating a personal liability.<sup>45</sup> If there is doubt as to whether or not a judgment, rendered for or against a party, is in an individual or representative capacity, the records may be resorted to to clear the doubt or ambiguity.<sup>46</sup>

5. *Of Judgment as to Costs*.—Where an action, instituted against several codefendants, is afterwards dismissed as to all but one, a judgment against him for all costs incurred therein will be construed to mean only the costs incurred as against him,<sup>47</sup> and not the costs incurred in the prosecution of the action against the other parties.<sup>48</sup>

6. *Extrinsic Aid*.<sup>49</sup>—If the language of a judgment be uncertain, the condition of the cause in which it was entered, and the circumstances surrounding its making, may be referred to and considered;<sup>50</sup> but the understanding of the parties as to the scope of the judgment is not a proper subject of inquiry.<sup>51</sup> Nor can any subsequent ex-

42. *Barus v. Bidwell*, 23 La. Ann. 296; *Bell v. Massey & Poultney*, 14 La. Ann. 831; *Pemberton v. Grass*, 1 La. 81; *United States v. Hawkins*, 4 Mart. (N. S.) 317.

[a] *Recognition by Parties*.—Where a judgment rendered in a common-law state against two persons does not state that it is not rendered against them in solido, a subsequent recognition by a party of its solidarity, will sanction that interpretation of the judgment. *Bonnafé & Co. v. Lane*, 5 La. Ann. 225.

43. *Spier v. Hyde*, 47 Misc. 443, 95 N. Y. Supp. 952.

44. Ill.—*Corzine v. Brents*, 123 Ill. App. 613. Ky.—*Herndon's Exr. v. Bartlett's Exr.*, 7 B. Mon. 449. W. Va. *Thomson & Lively v. Mann*, 53 W. Va. 432, 44 S. E. 246.

See also *supra*, XI, F, 5, note 17.

45. N. Y.—*Beers v. Shannon*, 73 N. Y. 292, 297. Tex.—*Lane v. Hewgley* (Tex. Civ. App.), 156 S. W. 911. Wis. *Prichard v. Bixby*, 71 Wis. 422, 37 N. W. 228.

46. *Lansing v. Bever Land Co.* (Iowa), 132 N. W. 177; *Davie v. Green*

(Tex. Civ. App.), 132 S. W. 874; *Texas Savings-Loan Assn. v. Banker*, 26 Tex. Civ. App. 107, 61 S. W. 724; *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072.

47. *Lumpkin v. Woods* (Tex. Civ. App.), 135 S. W. 1139.

48. *Lumpkin v. Woods* (Tex. Civ. App.), 135 S. W. 1139.

49. *Use of extrinsic evidence* where there is uncertainty as to the matter adjudicated, see 7 ENCY. OF EV. 855, et seq.; in aid of construction of decrees, see 6 STANDARD PROC. 783.

[a] *Parol evidence in aid of construction or interpretation of judgment*, see the title "Records," 10 ENCY. OF EV. 936, et seq.

50. *Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961; *Ex parte Ambrose*, 72 Cal. 398, 14 Pac. 33.

[a] *Judgments may be construed and carried into effect by inquiries outside the judgment where there is a latent ambiguity therein*. *Lea v. Terry*, 15 La. Ann. 159.

51. *Hartson v. Dill*, 151 Cal. 137, 90 Pac. 530.



planation of the trial court as to what its intentions were at the time of the rendition of judgment be resorted to.<sup>52</sup>

### XIII. AMENDMENT. — A. BY COURTS OF ORIGINAL JURISDICTION.

**1. Authority.** — The power of courts of general jurisdiction to amend their judgments is a natural and inherent one,<sup>53</sup> which has, since an early date, been recognized and confirmed by statute in many states.<sup>54</sup> With regard to the intrinsic character of the tribunal there is no distinction as to the possession of this power, it being exercised alike by courts of law and equity,<sup>55</sup> and the rules controlling the remedy are generally the same in either case.<sup>56</sup>

**2. General Qualifications and Restrictions.** — In a proper case the granting or withholding of an amendment to a judgment is a matter resting to some extent in the discretion of the court,<sup>57</sup> the power being

**52. La.**—Succession of Regan, 12 La. Ann. 156. **P. R.**—Puente v. Puente, 17 Porto Rico 1125. **Tex.**—Hightower v. Bennight, 53 Tex. Civ. App. 120, 115 S. W. 875.

**53. U. S.**—*Ex parte* Marks, 136 Fed. 168, 69 C. C. A. 80; Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317. **Ala.**—*Ex parte* Henderson, 84 Ala. 36, 4 So. 284. **Cal.**—Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; Forrester v. Lawler, 14 Cal. App. 171, 111 Pac. 284; *Ex parte* Von Vetsera, 7 Cal. App. 136, 93 Pac. 1036. **Conn.**—Dunn's Appeal, 81 Conn. 127, 70 Atl. 703. **Ga.**—Williams v. Merritt, 109 Ga. 217, 34 S. E. 1012; Brady v. Brady, 71 Ga. 71. **Ind.**—Ryon v. Thomas, 104 Ind. 59, 3 N. E. 653; Jenkins v. Long, 23 Ind. 460; Silher v. Butterfield, 2 Ind. 24; Indianapolis, etc. Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Pursley v. Wickle, 4 Ind. App. 382, 30 N. E. 1115. **Ia.**—Fuller & Co. v. Stebbins, 49 Iowa 376; Shepherd v. Brenton, 15 Iowa 84. **Ky.**—Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678. **Minn.**—Chase v. Whitten, 62 Minn. 498, 65 N. W. 84. **Miss.**—Wilson v. Town of Handsboro, 76 Miss. 578, 54 So. 845. **Mo.**—Kansas City v. Woerishoeffter, 249 Mo. 1, 155 S. W. 779; Turner v. Christy, 50 Mo. 145; Cauthorn v. Berry, 69 Mo. App. 404; State v. Leonard (Mo. App.), 116 S. W. 14. **Neb.**—School Dist. v. Bishop, 46 Neb. 850, 65 N. W. 902. **N. H.**—Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189. **N. Y.**—Bohlen v. Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932; Hatch v. Cent. Nat. Bank, 78 N. Y. 487; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Martin v. Martin, 138 App. Div. 758,

123 N. Y. Supp. 509; Cooper v. Cooper, 51 App. Div. 595, 64 N. Y. Supp. 901; Wood v. Wesley, 75 Misc. 521, 135 N. Y. Supp. 876. **N. C.**—Harrison v. Harrison, 114 N. C. 219, 19 S. E. 232; Ashe v. Streater, 53 N. C. 256. **Tex.**—Coleman v. Zapp, 105 Tex. 491, 151 S. W. 1040; Varn v. Varn, 58 Tex. Civ. App. 595, 125 S. W. 639. **Wash.**—State v. Fletcher, 50 Wash. 303, 97 Pac. 242.

See also **Ala.**—Commissioner's Court v. Holland, 177 Ala. 60, 58 So. 270. **N. Y.**—Bohlen v. Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932; Conklin v. New York El. R. Co., 103 N. Y. Supp. 782. **Tex.**—Burnett v. State, 14 Tex. 455, 65 Am. Dec. 131.

**54.** See the statutes of the various states and especially the following: **Conn.**—Gen. St., §1119, Rev. 1902, §746. **Fla.**—§97 McC's Dig., p. 834. **Ga.**—Code §4644. And see Moses v. Eagle, etc. Mfg. Co., 68 Ga. 241. **Ky.**—Smith v. Mullens, 3 Mete. 182. **Me.**—Bean v. Ayers, 70 Me. 421. **N. Y.**—Code Civ. Proc., §724; Hunt v. Grant, 19 Wend. 90; Cooper v. Cooper, 51 App. Div. 595, 64 N. Y. Supp. 901. **Tex.**—Coleman v. Zapp, 105 Tex. 491, 151 S. W. 1040.

**55. Ga.**—Perkins v. Castleberry, 119 Ga. 702, 46 S. E. 825, involving Act of 1887, p. 64. **Ky.**—Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678. **Md.**—Lovejoy v. Ireland, 19 Md. 56. **Miss.**—Guise v. Middleton, Smed. & M. Ch. 89. **N. J.**—Day v. Argus Printing Co., 47 N. J. Eq. 594, 22 Atl. 1056.

**56.** Guise v. Middleton, Smed. & M. Ch. (Miss.) 89.

**57. U. S.**—*Ex parte* Morgan, 114 U. S. 174, 5 Sup. Ct. 825, 29 L.

exercised whenever the dictates of justice require and the facts of the case permit.<sup>58</sup> Stated conversely, the rule is that where the amendment sought would be barren of results,<sup>59</sup> or would, under the circumstances be inequitable,<sup>60</sup> or would, in effect, create a judgment which could not be justified by the facts, it will be refused.<sup>61</sup> To say that this matter is discretionary, however, does not mean that this relief may be granted or withheld according to the whim or caprice of the court. It is only when intervening equities are in evidence that this discretion attaches; where no innocent third parties will suffer thereby, it is the legal duty of a court to amend its judgment in conformity with the truth.<sup>62</sup> This power is most frequently employed in

ed. 135; *Ex parte* Marks, 136 Fed. 168, 69 C. C. A. 80. **Ala.**—*Ex parte* Woodruff, 123 Ala. 99, 26 So. 509; *Tanner v. Hayes*, 47 Ala. 722. **Ark.**—*Lowe v. Hart*, 93 Ark. 548, 125 S. W. 1030. **Cal.**—*Lewis v. Rigney*, 21 Cal. 268. **Colo.**—*Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579. **Conn.**—*Wooster v. Glover*, 37 Conn. 315; *Waldo v. Spencer*, 4 Conn. 71. **Ga.**—*Saffold v. Keenan*, 2 Ga. 341. **Ill.**—*Desnoyers Shoe Co. v. Litchfield First Nat. Bank*, 89 Ill. App. 579, *affirmed*, 188 Ill. 312, 58 N. E. 994. **Ia.**—*Chapman v. Allen*, Morris 23. **Ky.**—*Chester v. Graves*, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678. **Mass.**—*Rugg v. Parker*, 7 Gray 172. **Minn.**—*Wright v. Krabbenhoft*, 104 Minn. 460, 116 N. W. 940. **Mo.**—*Becher v. Deuser*, 169 Mo. 159, 69 S. W. 363. **Neb.**—*Wise v. Frey*, 9 Neb. 217, 2 N. W. 375. **N. H.**—*Wendell v. Mugridge*, 19 N. H. 109. **N. M.**—See also *Secou v. Leroux*, 1 N. M. 388. **N. Y.**—*Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122; *Sexton v. Bennett*, 17 N. Y. Supp. 437. And see *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932. **N. C.**—*Brooks v. Stephens*, 100 N. C. 297, 6 S. E. 81; *Bagley v. Wood*, 34 N. C. 90; *Jones v. Lewis*, 30 N. C. 70, 47 Am. Dec. 338; *Brady v. Beason*, 28 N. C. 425. See also *Ashe v. Streater*, 53 N. C. 256. **Ohio.**—*Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735. **Pa.**—*Com. v. Hultz*, 6 Pa. 469. **Tenn.**—*Rickman v. Rickman*, 6 Lea 483. **Tex.**—*Austin & Clapp v. Jordan*, 5 Tex. 130. **Wash.**—*Bryan v. American, etc. Co.*, 50 Wash. 371, 97 Pac. 241.

[a] "Whether the court would order the completion of those records (a judgment entry) was a matter of judicial discretion." *Rugg v. Parker*, 7 Gray (Mass.) 172.

58. **Conn.**—*Dunn's Appeal*, 81 Conn.

127, 70 Atl. 703; *Brown v. Clark*, 81 Conn. 562, 71 Atl. 727. **Ga.**—*Wright v. Boyd*, 96 Ga. 745, 22 S. E. 379. **Ky.**—*Chester v. Graves*, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678. **Me.**—*Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49. **N. Y.**—*Martin v. Martin*, 138 App. Div. 758, 123 N. Y. Supp. 509. **Tex.**—*Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Varn v. Varn*, 58 Tex. Civ. App. 595, 125 S. W. 639.

[a] In an action for divorce where the decision of the court fixed the date of the marriage and awarded the custody of a minor child to the plaintiff, but, through clerical error this date was misstated and no provision made for the custody of the child the court may correct a final judgment entered therein, based upon this interlocutory decree so that it may recite the true and entire action of the court. *Martin v. Martin*, 138 App. Div. 758, 123 N. Y. Supp. 509.

59. *Hurley v. Robinson*, 85 Me. 400, 27 Atl. 270. And see *Burns v. Stanton*, 2 Smed. & M. (Miss.) 457.

60. *Gove v. Lyford*, 44 N. H. 525; *Wendell v. Mugridge*, 19 N. H. 109.

61. *Lovelace v. Smith*, 39 Ga. 130; *Scotton v. Mann*, 89 Ind. 404.

62. **U. S.**—*Cromwell v. Bank of Pittsburg*, 6 Fed. Cas. No. 3,409. **Ala.**—*Garner v. Garner*, 107 Ala. 242, 18 So. 169; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Scales v. Swan*, 9 Port. 163, 168. **Ga.**—*Baynes v. Billups*, 48 Ga. 347. **Ill.**—*Consolidated, etc. Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600; *Mains v. Cosner*, 67 Ill. 536; *Denhard v. Dunbar*, 98 Ill. App. 266, 270. **Me.**—*White v. Blake*, 74 Me. 489; *Lewis v. Ross*, 37 Me. 230, 235, 59 Am. Dec. 49. **Mo.**—*Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779; *Nave v. Todd*, 83 Mo. 601. **N. C.**—*Mayo v. Whitson*, 47 N.

civil cases,<sup>63</sup> but is, by no means, restricted to them, being exercised in criminal cases in the same manner.<sup>64</sup> In the exercise of this power the court may properly act through any one of its several judges, in the event there are more than one,<sup>65</sup> although the better practice is to have the motion determined by the judge who tried the case, if he be not disqualified or for any other reason incapable of acting,<sup>66</sup> and some courts have held that it is only in such a case, *i. e.*, where the judge who rendered the judgment to which the amendment is asked is thus disqualified or incapacitated, that another judge of the same tribunal may entertain an application for this relief.<sup>67</sup>

**3. Particular Limitations.** — *a. As to Time.* — (I.) During the Term. It is a well settled rule that, during the term at which a judgment is rendered, the court, in a proper case, may amend<sup>68</sup> or otherwise cor-

C. 231. **Tex.**—*Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040. **Wash.** *O'Bryan v. American, etc. Co.*, 50 Wash. 371, 97 Pac. 241; *Seattle & Montana Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567. **Tex.**—See also *Westall v. Marshall*, 16 Tex. 182.

[a] This is often stated conversely as the aggrieved party's "undoubted right." **Ala.**—*Garner v. Garner*, 107 Ala. 242, 18 So. 169; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159. And see *Scales v. Swan*, 9 Port. 163, 168. **Minn.**—*Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981. **N. C.**—*Mayo v. Whitson*, 47 N. C. 231.

See also *Sherry v. Priest*, 57 Ala. 410; *Modawell v. Hudson*, 57 Ala. 75; *Pettus v. McClannahan*, 52 Ala. 55; *Nave v. Todd*, 83 Mo. 601. But compare **Ala.**—*Acre v. Ross*, 3 Stew. 288. **Cal.**—*Dreyfus v. Tompkins*, 67 Cal. 339, 7 Pac. 732. **Ill.**—*Consolidated, etc. Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600.

[a] "No discretion is involved in the correction of an entry which concededly does not speak the judgment of the court. To correct such an order is an imperative duty when no innocent third person will suffer thereby." *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241.

63. See cases herein cited.

64. **Ark.**—*Hydrick v. State*, 103 Ark. 4, 145 S. W. 542. **Cal.**—*People v. Ward*, 141 Cal. 628, 75 Pac. 306. **Ga.**—*Richards v. McHan*, 139 Ga. 37, 76 S. E. 382. **Mo.**—*State ex rel. Graves v. Primm*, 61 Mo. 166; *State v. Clark*, 18 Mo. 432; *Harrison v. State*, 10 Mo. 686. See also *State v. Leonard* (Mo. App.), 116 S. W. 14. **Neb.**—*Harris v. State*, 24 Neb. 803, 40 N. W. 317. **Pa.** *Com. v. Chauncey*, 2 Ashm. 90. **Tex.**

*State v. Womack*, 17 Tex. 237; *Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131.

65. *Deutermann v. Pollock*, 30 App. Div. 378, 51 N. Y. Supp. 928; *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588.

66. *Oakley v. Cokalet*, 6 App. Div. 229, 39 N. Y. Supp. 1001. See also *Wells v. Vanderwerker*, 45 App. Div. 155, 60 N. Y. Supp. 1089; *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588.

On appeal, this question raised. See *infra*, XIII, D, 2, I, (II).

[a] In **Texas**, art. 1357, Rev. St. 1895, provides that in a proper case the amendment may be made by "the court in which such judgment or decree shall be rendered and the judge thereof . . ."

67. *New York Security & Trust Co. v. Lipman*, 83 Hun 569, 32 N. Y. Supp. 65. See also *Barrett v. James*, 30 S. C. 329, 9 S. E. 263.

[a] But one judge may thus correct clerical errors in a judgment rendered by his predecessor (*Henlein v. Graham*, 32 S. C. 303, 10 S. E. 1012; *Carroll v. Tompkins*, 14 S. C. 223), and, conversely, the judge who rendered the judgment, having left the bench, may not entertain such an application. *Hughes v. Shingle Co.*, 51 S. C. 1, 25, 28 S. E. 2.

68. **U. S.**—*Barrell v. Tilton*, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. ed. 511; *Alabama, etc. Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. ed. 915; *Cheong-Kee v. United States*, 3 Wall. 320, 18 L. ed. 72; *Smith v. Jackson*, 1 Paine 468, 22 Fed. Cas. No. 13,065. **Ala.**—*Acre v. Ross*, 3 Stew. 288; *Neale v. Caldwell*, 3 Stew. 134. **Alaska.**



rect it, as by revision, modification or alteration,<sup>69</sup> the propriety of exercising this power at such a time, *i. e.*, during the current term,

- Banks *v.* Wilson, 1 Alaska 241. Ark. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739. Cal.—Brackett *v.* Banegas, 99 Cal. 623, 626, 34 Pac. 344; De Castro *v.* Richardson, 25 Cal. 49. See also Allison *v.* Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89; *Ex parte* Von Vetsera, 7 Cal. App. 136, 93 Pac. 1036. Conn.—Weed *v.* Weed, 25 Conn. 337. Ga.—Perkins *v.* Castleberry, 119 Ga. 702, 46 S. E. 825; Oliver *v.* Ross, 27 Ga. 363; Jones *v.* Garage Co., 16 Ga. App. 596, 85 S. E. 940; Mathews *v.* Swatts, 16 Ga. App. 208, 84 S. E. 980. Ill.—Bartak *v.* Isvolt, 261 Ill. 279, 103 N. E. 967; Goucher *v.* Patterson, 94 Ill. 525; People *ex rel.* McCrea *v.* Quick, 92 Ill. 580; Becker *v.* Sauter, 89 Ill. 596; Edwards *v.* Irons, 73 Ill. 583; Cook *v.* Wood, 24 Ill. 295; Coughran *v.* Gutcheus, 18 Ill. 390; People *ex rel.* Hoyne *v.* Northup, 184 Ill. App. 638; McLaughlin *v.* Chicago, Rock Island & P. R. R. Co., 115 Ill. App. 262; Werner *v.* Evans, 94 Ill. App. 328; Marine Bank *v.* Mallers, 58 Ill. App. 232; Stoney Island Hotel Co. *v.* Johnson, 57 Ill. App. 608. Ind.—Torr *v.* Torr, 20 Ind. 118; Pursley *v.* Wickle, 4 Ind. App. 382, 30 N. E. 1115. Ia. Hull *v.* Eby, 123 Iowa 257, 98 N. W. 774; Hartley *v.* Bartruff, 112 Iowa 592, 84 N. W. 704; Wolmerstadt *v.* Jacobs, 61 Iowa 372, 16 N. W. 217; Porter *v.* McBride, 44 Iowa 479; Dawson *v.* Wisner, 11 Iowa 6; Lind *v.* Adams, 10 Iowa 398, 77 Am. Dec. 123; Chapman *v.* Allen, Morris 23. See also Streeter *v.* Gleeson, 120 Iowa 703, 95 N. W. 242. Kan.—Cornell Univ. *v.* Parkinson, 59 Kan. 365, 53 Pac. 138. Ky.—Talbot *v.* Krahwinkle, 124 S. W. 323; Scroggins *v.* Scroggins, 1 J. J. Marsh. 362; Holeman *v.* Coleman, 1 A. K. Marsh. 296; Brown *v.* U. S. Home, etc. Assn., 12 Ky. L. Rep. 283, 13 S. W. 1085; Worthington *v.* Campbell, 8 Ky. L. Rep. 416, 1 S. W. 714. Md.—Robinson *v.* Commissioners, 12 Md. 132. Miss.—Sagory *v.* Bayless, 13 Smed. & M. 153; McRaven *v.* McGuire, 9 Smed. & M. 34. Mo.—Kansas City *v.* Woerishoeffer, 249 Mo. 1, 155 S. W. 779; Bergen *v.* Bolton, 10 Mo. 658; State *v.* Leonard (Mo. App.), 116 S. W. 14. Neb.—Harris *v.* State, 24 Neb. 803, 40 N. W. 317; Wise *v.* Frey, 9 Neb. 217, 2 N. W. 375; Cox *v.* Omaha, etc. Co., 4 Neb. (Unof.) 412, 94 N. W. 519; Colby *v.* Maw, 1 Neb. (Unof.) 478, 95 N. W. 677. Nev. Marshall *v.* Golden Fleece G. & S. M. Co., 16 Nev. 156. N. H.—Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189. N. Y.—Cooper *v.* Cooper, 51 App. Div. 595, 64 N. Y. Supp. 901; Gough *v.* McFall, 31 App. Div. 578, 52 N. Y. Supp. 221; Swift *v.* Swift, 34 N. Y. Supp. 852; Conklin *v.* New York El. R. Co., 13 N. Y. Supp. 782. N. C. Hobbs *v.* Bland, 124 N. C. 284, 32 S. E. 683; Moore *v.* Hinnant, 90 N. C. 163; Simmons *v.* Dowd, 77 N. C. 155. Ore. Silliman *v.* Silliman, 66 Ore. 402, 133 Pac. 769; Hall *v.* Darth, 62 Ore. 97, 122 Pac. 898. Pa.—Larkin *v.* Glover S. & G. Fitting Co., 2 Del. Co. Rep. 453. P. R.—Capo *v.* Fernandez, 16 Porto Rico 332. R. I.—Bishop *v.* Aborn, 16 R. I. 568, 18 Atl. 803; Richardson *v.* Hunt, 7 R. I. 543. Tenn. Ocoee Bank *v.* Hughes, 2 Coldw. 52; State *v.* Disney, 5 Sneed 598. Tex. Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145; Lane *v.* Ellinger, 32 Tex. 369; Wood *v.* Wheeler, 7 Tex. 13. Wis. Weber *v.* Weber, 153 Wis. 132, 140 N. W. 1052, 45 L. R. A. (N. S.) 875; Frost *v.* Meyer, 137 Wis. 255, 118 N. W. 811.
- [a] "The court has absolute control of its decrees and judgments during the term at which they are rendered." Cornell Univ. *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.
- [b] Obviously, this may be done with the consent of the parties. Scanlon *v.* Jacobs, 24 Cal. App. 101, 140 Pac. 292.
- [c] The Rule Is the Same in Criminal Cases.—Ala.—*In re* Newton, 94 Ala. 431, 10 So. 549; *Ex parte* Jones, 61 Ala. 399. See Minton *v.* State, 9 Ala. App. 95, 64 So. 369. Ga.—Mathews *v.* Swatts, 16 Ga. App. 208, 84 S. E. 980. Md.—Robinson *v.* Commissioners, 12 Md. 132. Miss.—See Barber *v.* Biloxi, 76 Miss. 578, 25 So. 298. Neb. Harris *v.* State, 24 Neb. 803, 40 N. W. 317. Tex.—*Ex parte* Ogden, 63 Tex. Crim. 380, 140 S. W. 345. See generally the title "Sentence and Judgment."
69. U. S.—Henderson *v.* Carbondale, etc. Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. ed. 332; Barrell *v.* Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30



having been recognized at common law,<sup>70</sup> and confirmed by statutes in most states as well.<sup>71</sup>

(II.) At a Subsequent Term. — Although frequently altered by statutes,<sup>72</sup> especially with respect to judgments in divorce proceedings,<sup>73</sup> the general rule is that the power of a court over its judgments is lost with the closing of the term at which such judgments were rendered and it may not thereafter amend them in any matter of substance or to correct a judicial, as distinguished from a mere clerical, error.<sup>74</sup> This rule is, however, no impediment to the correction by

L. ed. 511; *Memphis v. Brown*, 94 U. S. 715, 24 L. ed. 244; *United States ex rel. Animarium Co. v. Circuit Court*, 129 Fed. 897, 64 C. C. A. 329. **Ark.** Wells, Fargo & Co. v. Lumber Co., 107 Ark. 415, 155 S. W. 122. **Cal.**—*De Castro v. Richardson*, 25 Cal. 48; *Ex parte Van Vetsera*, 7 Cal. App. 136, 93 Pac. 1036. **Ga.**—*Latimer v. Sweat*, 125 Ga. 475, 54 S. E. 673; *Jones v. Garage, etc. Co.*, 16 Ga. App. 596, 85 S. E. 940. **Ill.**—*Bartak v. Isvolt*, 261 Ill. 279, 103 N. E. 967. **Kan.**—*Chapman v. Western Irr. Co.*, 75 Kan. 765, 90 Pac. 284; *Cornell Univ. v. Parkinson*, 59 Kan. 365, 53 Pac. 138. **N. C.**—*Hobbs v. Bland*, 124 N. C. 284, 32 S. E. 683; *Moore v. Hinnant*, 90 N. C. 163; *Simmons v. Dowd*, 77 N. C. 155. **N. D.** Plano Mfg. Co. v. Doyle, 17 N. D. 386, 116 N. W. 529, 17 L. R. A. (N. S.) 606. **Okla.**—*Carey Co. v. Vickers*, 38 Okla. 643, 134 Pac. 851. **Ore.**—*Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769; *Hall v. Dartt*, 62 Ore. 97, 122 Pac. 898. **Pa.**—*Larkin v. Glover Steam & Gas Fitting Co.*, 2 Del. Co. Rep. 453. **R. I.**—*Richardson v. Hunt*, 7 R. I. 543. **Tex.**—*Henderson v. Banks*, 70 Tex. 298, 7 S. W. 815; *Wood v. Wheeler*, 7 Tex. 13; *Ex parte Ogden*, 63 Tex. Crim. 380, 140 S. W. 345. **W. Va.**—*Manion v. Fahy*, 11 W. Va. 482, 496. **Can.** *Canadian, etc. Co. v. Municipality of Dysart*, 9 Ont. 495.

[a] During the term, judicial as well as clerical errors are thus under the control of the court. **Miss.**—*McRaven v. McGuire*, 9 Smed. & M. 34, 55. **N. Y.**—*Granite State Provident Assn. v. M'Hugh*, 34 N. Y. Supp. 341. **R. I.** *Bishop v. Aborn*, 16 R. I. 568, 18 Atl. 203; *Richardson v. Hunt*, 7 R. I. 543. **Tex.**—*Wood v. Wheeler*, 7 Tex. 13.

See *infra*, XIII, A, 3, b, (I) and (II).

70. **Ala.**—*Whorley v. Memphis & Charleston R. Co.*, 72 Ala. 20. **Cal.** *Brackett v. Bonegas*, 99 Cal. 623, 34

Pac. 344. **Eng.**—*Philips v. Smith*, 1 Strange 139, 93 Eng. Reprint 433.

71. *Dearing v. Smith*, 4 Ala. 432.

See generally the statutes of the various states and *infra*, XIII, A, 3, b, (II).

72. In *Greazel v. Price*, 135 Iowa 364, 112 N. W. 827, in construing §244 of the code which provides that "entries made and signed at a previous term can be altered only to correct an evident mistake," the court declared that under such a statute a substantial change might be effected in the judgment in this manner, provided the error was "evident."

See generally the statutes of the various states.

73. *Buzzo v. Buzzo*, 45 Utah 625, 148 Pac. 362, involving Comp. Laws 1907, §1212; *State ex rel. Jones v. Superior Court*, 78 Wash. 372, 139 Pac. 42.

[a] In divorce matters, the rule obtains in some states, that the court retains control over its judgments and may, at any time, make any proper order affecting the subject-matter of the suit. *State ex rel. Jones v. Superior Court*, 78 Wash. 372, 139 Pac. 42.

74. **U. S.**—*Wetmore v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. ed. 1013; *City of Des Moines v. Water Co.*, 218 Fed. 939. **Ala.**—*Campbell v. Beyers*, 189 Ala. 307, 66 So. 651; *Southern Ry. Co. v. Griffith*, 177 Ala. 364, 58 So. 425; *Briggs v. Tennessee, etc. Co.*, 175 Ala. 130, 57 So. 882; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123; *Hastings v. Alabama Co.*, 124 Ala. 608, 26 So. 881; *Browder v. Faulkner*, 82 Ala. 257, 3 So. 30; *Whorley v. Memphis & Charleston R. Co.*, 72 Ala. 20; *Randolph v. Little*, 62 Ala. 396; *Pettus v. McClannahan*, 52 Ala. 55; *Gibson v. Wilson*, 18 Ala. 63. **Alaska.**—*Banks v. Wilson*, 1 Alaska 241. **Ark.**—*St. Louis*

amendment of mere clerical errors in a judgment. That is to say, a

& N. A. R. Co. v. Bratton, 93 Ark. 234, 124 S. W. 752; *Melpas v. Lowenstiene*, 46 Ark. 552. **Cal.**—*Takekawa v. Hole*, 170 Cal. 323, 149 Pac. 593; *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225; *Calkins v. Monroe*, 17 Cal. App. 324, 119 Pac. 680. **Conn.**—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727; *Taylor v. Starr*, 2 Root 293. **Ga.**—*Richards v. McHan*, 139 Ga. 37, 76 S. E. 382. **Ill.** *Cramer v. Com. Men's Assn.*, 260 Ill. 516, 103 N. E. 459; *Pisa v. Rezek*, 206 Ill. 344, 69 N. E. 67; *Goucher v. Patterson*, 94 Ill. 525; *Becker v. Sauter*, 89 Ill. 596; *Hibbard v. Mueller*, 86 Ill. 256; *Robinson v. Brown*, 82 Ill. 279; *Smith v. Wilson*, 26 Ill. 186; *Cook v. Wood*, 24 Ill. 295; *Bill Board Co. v. McCarahan*, 180 Ill. App. 539; *Finch v. Finch*, 111 Ill. App. 481; *Fitzgerald v. Gore*, 105 Ill. App. 242; *Peterson v. Metropolitan Nat. Bank*, 88 Ill. App. 190; *Utley v. Cameron*, 87 Ill. App. 71; *Schmidt v. Rehwinkel*, 86 Ill. App. 267; *Ives v. Hulse*, 17 Ill. App. 30; *Baragwanath v. Wilson*, 4 Ill. App. 80. **Ind.**—*Cauthorn v. Bierhaus*, 44 Ind. App. 362, 88 N. E. 314; *Johnson v. Foreman*, 24 Ind. App. 93, 56 N. E. 254. See also *Heaton v. Grant Lodge*, 55 Ind. App. 100, 103 N. E. 488. **Ia.** *Hull v. Eby*, 123 Iowa 257, 98 N. W. 774; *Streeter v. Gleeson*, 120 Iowa 703, 95 N. W. 242. **Kan.**—*Chapman v. Western Irr. Co.*, 75 Kan. 765, 90 Pac. 284; *Barker v. Mecartney*, 10 Kan. App. 130, 62 Pac. 439; *Birmingham v. Leonardt*, 2 Kan. App. 513, 43 Pac. 996. **Ky.**—*Com. v. Shanks*, 10 B. Mon. 304; *Norton v. Sanders*, 7 J. J. Marsh. 12; *Ballard v. Davis*, 3 J. J. Marsh. 656; *Scroggin v. Scroggin*, 1 J. J. Marsh. 362; *Speed v. Hann*, 1 Mon. 16, 15 Am. Dec. 78. **La.**—*State v. Williams*, etc. Co., 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290. **Me.**—*Inhab. of Limerick, Petitioners*, 18 Me. 183. **Mo.** *Martin v. Brown*, 162 Mo. App. 223, 144 S. W. 1115; *Bishop v. Seal*, 92 Mo. App. 167; *State ex rel. Hay v. Harper*, 56 Mo. App. 611. See also *State v. Tate*, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664. **Mont.**—*Keene v. Welsh*, 8 Mont. 305, 21 Pac. 25. **Nev.** *Sparrow v. Strong*, 2 Nev. 362. **N. H.** *Chamberlain v. Crane*, 4 N. H. 115. **N. Y.**—*Heath v. New York*, etc. Co., 146 N. Y. 260, 40 N. E. 770; *Bullard v. Sherwood*, 85 N. Y. 253; *Heath v. Banking Co.*, 84 Hun 302, 32 N. Y. Supp. 454; *Dunscorn v. Poole*, 41 Misc. 335, 84 N. Y. Supp. 749; *Beitz v. Fuller*, 36 N. Y. Supp. 950. See also *Ray v. Connor*, 3 Edw. 478; *Gardner v. Dering*, 2 Edw. 131; *Petrie v. Trustees*, 36 N. Y. Supp. 636. **N. C.**—*Moore v. Hinnant*, 90 N. C. 163; *Wall v. Covington*, 83 N. C. 144. See also *Hinton v. Insurance Co.*, 116 N. C. 22, 21 S. E. 201; *Moore v. Hinnant*, 90 N. C. 163. **Ohio.**—*Botkin v. Comrs. of Pickaway County*, 1 Ohio 375, 13 Am. Dec. 630. See also *Greene v. Dodge*, 3 Ohio 486. **Ore.**—*Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769. **Pa.**—*Smith v. Hood & Co.*, 25 Pa. 218, 64 Am. Dec. 692. **Tex.** *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Perkins v. Dunlavy*, 61 Tex. 241; *Milam County v. Robertson*, 47 Tex. 222; *Chambers v. Hodges*, 3 Tex. 517; *Hamilton v. Joachim* (Tex. Civ. App.), 160 S. W. 645; *Sass v. Hirshfeld*, 23 Tex. Civ. App. 1, 56 S. W. 941; *Holland v. Preston*, 12 Tex. Civ. App. 585, 34 S. W. 975; *Rogers v. East Line Lumb. Co.*, 11 Tex. Civ. App. 108, 33 S. W. 312. **W. Va.**—*Bank v. Ralphsnnyder*, 54 W. Va. 231, 46 S. E. 206; *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954. **Wis.**—*Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302; *Van Dresar v. Coyle*, 38 Wis. 672; *Pinger v. Vandick*, 36 Wis. 141. See also *Cole, Will of*, 52 Wis. 591, 9 N. W. 664; *Note to Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70. **Wyo.**—*O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525. **Can.**—*Port Elgin School Board v. Eby*, 17 Ont. Pr. 58.

See *infra*, XIII, A, 3, b, (I) and (II).

[a] "Until the entry of the judgment the record was in the breast of the court. Afterward it was in the roll. It was only the 'record' thus made up which imported absolute verity. 'The making up of the judgment-roll is the equivalent under our practice of the entry of record at common law.'" *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

[b] "If a judgment . . . is not void for want of jurisdiction, the court rendering it, whether it is a court of superior or inferior, of general or limited jurisdiction, has not power, at a

term subsequent to its rendition, to . . . alter it. The correction of clerical misprisions is the extent of the power the court can subsequently exercise." *Pettus v. McClannahan*, 52 Ala. 55. The reason for this rule is found in the maxim, "Interest republicae ut sit finis litium." *Pettus v. McClannahan*, 52 Ala. 55.

[c] "No authorities need be cited to the proposition that, in the absence of statute, judgments regularly entered are beyond the court's control after the term has expired. A judgment procured by fraud or by irregular or improper conduct of the successful party, or one entered without jurisdiction of the person against whom it is given, can hardly be said to be *regularly* entered." *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449.

[d] In Arkansas the court has no power, after the expiration of the term, to modify a judgment, except in the mode and for the causes specified in the civil code. *Malpas v. Lowenstine*, 46 Ark. 552.

[e] It is, of course, (1) very often provided by statute that judgments may be *vacated* for prescribed reasons, after the term (*Carlow v. Aultman*, 28 Neb. 672, 44 N. W. 873), but this is not amendment. *Carlow v. Aultman*, 28 Neb. 672, 44 N. W. 873. See also *infra*, XIV. (2) This would be in effect to correct a judicial error which, after the term can only be cured by a writ of error from or appeal to some higher tribunal or their statutory equivalent. See *supra*, XIII, A, 3, b, (1).

[f] "The power (retained by the court over its records after the lapse of the term) does not authorize the entry of an order which *ought* to have been made, but only those which were *actually* made." *Evans v. Fisher*, 26 Mo. App. 541.

[g] Where a judgment was rendered in favor of a stockholder "for the use of the bank," and thereafter on appeal, affirmed, it was error for the trial court to change, by a so-called amendment, the judgment so as to direct the payment of a part of the sum recovered to the stockholder for attorney's fees. *Wickersham v. Crittenden*, 103 Cal. 582, 37 Pac. 513.

[h] The judgment cannot be changed to include costs, after the term, though costs may be retaxed.

*Jackson v. St. Louis & San Francisco R. Co.*, 89 Mo. 104. See *Gove v. Lyford*, 44 N. H. 525; and *infra*, XIII, A, 3, b, (VI), (B).

[i] "That which enters into the consideration of the court, and constitutes a part of the judgment, cannot be changed after the term. . . . Much less has a court power under the form of an amendment to render a (different) judgment." *Whitwell v. Emory*, 3 Mich. 84, 89, 59 Am. Dec. 220. And see *Reynolds v. Reynolds*, 115 Mich. 378, 73 N. W. 425.

[j] "A court may, at a subsequent term, amend so as to *effectuate*, but not so as to *materially alter* or defeat a judgment which it actually gave at a preceding term." *Norton v. Sanders*, 7 J. J. Marsh. (Ky.) 12.

[k] "' . . . no amendment is permitted at any subsequent term.' 3 Blk. Com. 407. This is good law at this day and prevails in this state, and in most, if not in all the states of the Union, except that after the term at which judgment is given is past the court may correct it so as to make it conform to what it was intended by the court to be." *Moore v. Hinnant*, 90 N. C. 163.

[l] "But the power of amendment after term does not extend to the correction of judicial errors, . . ." *Elder v. Richmond Gold, etc. Min. Co.*, 58 Fed. 536, 7 C. C. A. 354.

[m] **By Consent.**—This restriction does not apply when the modification is expressly consented to by all the parties interested (*Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898), and statutes occasionally provide for this exception. Alabama Code, 1907, §3334; *Stevenson v. Black*, 168 Mo. 549, 68 S. W. 909.

[n] In a final judgment "no change or modification can be made, after the term in which it has been rendered, which may substantially vary or affect it in any material thing." *City of Des Moines v. Des Moines Water Co.*, 218 Fed. 939.

[o] "The principal question in the case before us, . . ., is whether the mistake sought to be corrected was a judicial error, . . . which the court had no power to correct at a subsequent term, or was a clerical mistake . . . which the court might correct even at a later term." *Brown v. Clark*, 81 Conn. 562, 71 Atl. 727.



court may, at a subsequent term,<sup>75</sup> or, indeed, at any time, correct,

[p] It has also been said that where the error or mistake was one committed in the exercise of a "judicial function" it "cannot be corrected by it at a subsequent term." *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

[q] "After the close of the term, the case ceases to be in fieri, and the court has no further jurisdiction to take any action whatever in it. It may, of course, in a proper case, in a proper proceeding, correct clerical mistakes in the entry of the record of the judgment . . ." *Cauthorn v. Bierhaus*, 44 Ind. App. 362, 88 N. E. 314.

[r] In eminent domain proceedings, where the court is required to fix the time for payment, the court may, after the term, change that time since to do so would be to alter a substantial part of the judgment. *La Salle County, etc. R. Co. v. Hill*, 260 Ill. 621, 103 N. E. 624.

75. **U. S.**—*Wetmore v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Ex parte Marks*, 136 Fed. 168, 69 C. C. A. 80; *City of Manning v. Ger. Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144; *Woodruff & Co. v. United States*, 154 Fed. 861; *Morgan's La. & T. R. Co. v. Texas Cent. Ry. Co.*, 32 Fed. 525; *United States v. Fearson*, 5 Cranch C. C. 95, 25 Fed. Cas. No. 15,082; *Pierce v. Turner*, 1 Cranch C. C. 433, 19 Fed. Cas. No. 11,148; *Barnes v. Lee*, 1 Cranch C. C. 430, 2 Fed. Cas. No. 1,017; *Northern Bank v. Labitut*, 1 Woods 11, 2 Fed. Cas. No. 842; *Russell v. United States*, 15 Ct. Cl. 168. **Ala.**—*Campbell v. Beyers*, 189 Ala. 307, 66 So. 651; *Spears v. Wise*, 187 Ala. 346, 65 So. 786; *Briggs v. Tennessee, etc. Co.*, 145 Ala. 629, 57 So. 882; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123; *Burdeshaw & Co. v. Comer*, 108 Ala. 617, 18 So. 556; *Pettus v. McClannahan*, 52 Ala. 55; *Lee v. Houston*, 20 Ala. 301; *Parks v. Stonum*, 8 Ala. 752; *Dobson v. Dickson*, 8 Ala. 252; *Snelgrove v. Bank of Mobile*, 5 Ala. 295; *Yarborough's Exr. v. Scott*, 5 Ala. 221; *Brown v. Bartlett*, 2 Ala. 29; *Smyth v. Strader*, 9 Port. 446; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Ex parte Dew*, 7 Ala. App. 437, 62 So. 261. **Ark.**—*Melton v. St. Louis, etc. R. Co.*, 99 Ark. 433, 139 S. W. 289; *St. Louis, etc. R. Co. v.*

*Bratton*, 93 Ark. 234, 124 S. W. 752; *Arrington v. Conrey*, 17 Ark. 100; *King v. State Bank*, 9 Ark. 185, 47 Am. Dec. 739. **Cal.**—*De Castro v. Richardson*, 25 Cal. 49; *Branger v. Chevalier*, 9 Cal. 351; *Morrison v. Dapman*, 3 Cal. 255. **Colo.**—*Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579; *Hittson v. Davenport*, 4 Colo. 169; *Wolfley v. Lebanon Co.*, 3 Colo. 296. **Conn.**—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727; *Pelton v. Goldberg*, 81 Conn. 280, 70 Atl. 1020; *Goldreyer v. Cronan*, 76 Conn. 113, 55 Atl. 594. **Del.**—*Walker v. Walker*, 3 Harr. 502. **Fla.**—*McGourin v. De Funiak Spgs.*, 52 Fla. 556, 42 So. 186; *Adams v. Re Qua*, 22 Fla. 250, 1 Am. St. Rep. 191. **Ga.**—*Richards v. McHan*, 139 Ga. 37, 76 S. E. 382; *Latimer v. Sweet*, 125 Ga. 475, 54 S. E. 673; *Mahone v. Perkinson*, 35 Ga. 207; *Mathews v. Swatts*, 16 Ga. App. 208, 84 S. E. 980. **Ill.**—*Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242; *Baldwin v. McClelland*, 152 Ill. 42, 38 N. E. 143; *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304; *Jaansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850; *Hibbard v. Mueller*, 86 Ill. 256; *Cairo & St. Louis R. Co. v. Holbrook*, 72 Ill. 419; *Mains v. Cosner*, 67 Ill. 536; *Seely v. Pelton*, 63 Ill. 101; *McKindley v. Buck*, 43 Ill. 488; *Smith v. Wilson*, 26 Ill. 186; *Cook v. Wood*, 24 Ill. 295; *Coughran v. Gutcheus*, 18 Ill. 390; *Atkins v. Hinman*, 7 Ill. 437; *Bill Board Co. v. McCarrahan*, 180 Ill. App. 539; *Bledsoe v. Ziegenhein Co.*, 161 Ill. App. 146; *Finch v. Finch*, 111 Ill. App. 481; *Fitzgerald v. Gore*, 105 Ill. App. 242; *Denhard v. Dunbar*, 98 Ill. App. 266; *Morrison v. Stewart*, 21 Ill. App. 113; *Ives v. Hulee*, 17 Ill. App. 30; *Troutman v. Hills*, 5 Ill. App. 396; *Baragwanath v. Wilson*, 4 Ill. App. 80. See also *Baldwin v. McClelland*, 152 Ill. 42, 38 N. E. 143. **Ind.**—*Hughes v. Hinds*, 69 Ind. 93; *Sherman v. Nixon*, 37 Ind. 153; *Cauthorn v. Bierhaus* (Ind. App.), 88 N. E. 314; *Indianapolis, etc. Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145; *Pursley v. Wickie*, 4 Ind. App. 382, 30 N. E. 1115. **Ia.**—*Hurley v. Dubuque G. L. & C. Co.*, 8 Iowa 274. **Kan.**—*Chapman v. Western Irrigation Co.*, 75 Kan. 765, 90 Pac. 284; *Bank v. Stevenson*, 65 Kan. 816, 70 Pac. 865; *S. K. Ry. Co. v. Brown*, 44 Kan. 681, 24 Pac. 1100; *Clevenger v. Hansen*, 44 Kan. 182,



24 Pac. 61; *Birmingham v. Leonhardt*, 2 Kan. App. 513, 43 Pac. 996. **Ky.**—*Norton v. Sanders*, 7 J. J. Marsh. 12; *Ballard v. Davis*, 3 J. J. Marsh. 656; *Hendrix's Heirs v. Clay*, 2 A. K. Marsh. 462; *Smith v. Mullens*, 3 Mete. 182; *Johnson v. Bank of Ky.*, 2 Duval 521; *Oldham v. Brannon*, 2 Mete. 302. **Me.**—*Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49. **Md.**—*Ecker v. Bank*, 64 Md. 292, 1 Atl. 849. **Mass.**—*Capen v. Stoughton*, 16 Gray 364. **Minn.**—*Schloss v. Lennon*, 123 Minn. 420, 144 N. W. 148. **Miss.**—*Wilson v. Town of Handsboro*, 76 Miss. 578, 54 So. 845. **Mo.**—*Stevenson v. Black*, 168 Mo. 549, 68 S. W. 909; *Wand v. Ryan*, 166 Mo. 646, 65 S. W. 1025; *Jackson v. St. Louis & S. F. R. Co.*, 89 Mo. 104, 1 S. W. 224; *Nave v. Todd*, 83 Mo. 601; *State ex rel. Graves v. Primm*, 61 Mo. 166; *Gibson v. Chouteau's Heirs*, 45 Mo. 171, 100 Am. Dec. 366; *Stacker v. Circuit Court*, 25 Mo. 401; *Hanley v. Dewes*, 1 Mo. 16; *State v. Goodrich*, 159 Mo. App. 422, 140 S. W. 629; *State v. Leonard* (Mo. App.), 116 S. W. 14; *Pulitzer Pub. Co. v. Allen*, 134 Mo. App. 229, 113 S. W. 1159; *Bishop v. Seal*, 92 Mo. App. 167; *City of California v. Harlan*, 75 Mo. App. 506; *State ex rel. Brown v. White*, 75 Mo. App. 257; *Farley Bros. v. Cammann*, 43 Mo. App. 168; *Evans v. Fisher*, 26 Mo. App. 541. **Mont.**—*Barber v. Briscoe*, 9 Mont. 341, 23 Pac. 726; *Keene v. Welsh*, 8 Mont. 305, 21 Pac. 25. **Neb.**—*Hoagland v. Way*, 35 Neb. 387, 53 N. W. 207; *Brownlee v. Davidson*, 28 Neb. 785, 45 N. W. 51; *Grimes v. Grosjean*, 24 Neb. 700, 40 N. W. 137. **Nev.**—*Breckenridge v. Lamb*, 34 Nev. 275, 118 Pac. 687, Ann. Cas. 1914B, 871. **N. H.**—*Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189. **N. Y.**—*Boyd v. Campbell*, 12 Misc. 351, 33 N. Y. Supp. 557. **N. C.**—*Beam v. Bridgers*, 111 N. C. 269, 16 S. E. 391; *McDowell v. McDowell*, 92 N. C. 227; *Wall v. Covington*, 83 N. C. 144. **Ohio.**—*Ohio v. Beam*, 3 Ohio St. 508; *Hammer v. McConnell*, 2 Ohio 31; *Botkin v. Comrs. of Piekaway County*, 1 Ohio 375, 13 Am. Dec. 630. See also *Kellogg v. Churchill*, 2 Ohio Dec. (Reprint) 4. **Ore.**—*Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769. **Pa.**—*Rhoads v. Com.*, 15 Pa. 272, 276; *Beek's Appeal*, 15 Pa. 406; *In re Franklin Twp.*, 8 Pa. Super. 358. **R. I.**—See also *Trott v. Wheaton*, 5 R. I. 353. **Tex.**—*Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Whittaker v. Gee*, 63 Tex. 435; *Swift v. Faris*, 11 Tex. 18; *Chambers v. Hodges*, 3 Tex. 517; *Hamilton v. Joachim* (Tex. Civ. App.), 160 S. W. 645; *Rogers v. East Line Lumb. Co.*, 11 Tex. Civ. App. 108, 33 S. W. 312. See also *Sass v. Hirshfeld*, 23 Tex. Civ. App. 1, 56 S. W. 941. **W. Va.**—*Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954. **Wis.**—*Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302; *State v. Town Board*, etc., 69 Wis. 264, 34 N. W. 123; *Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44; *Will of Ebenezer W. Cole*, 52 Wis. 591, 9 N. W. 664; *Pringle v. Dunn*, 39 Wis. 435; *Durning v. Burkhardt*, 34 Wis. 585; *Scheer v. Keown*, 34 Wis. 349; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265; *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70. See also *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708. **Wyo.**—*O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525. **Can.**—See also *Port Elgin School Board v. Eby*, 17 Ont. Pr. 58.

[a] "The court had the inherent power, when the matter of the mistake was brought before it, to correct the (clerical) error, in the interest of common honesty and justice." *Ex parte Marks*, 136 Fed. 168, 69 C. C. A. 80.

[b] "The principle has been long regarded as settled, that a court is without power to alter, vary or annul final judgments or decrees, after the close of the term at which they are rendered, unless it be for the mere correction of clerical errors or omissions." *Hastings v. Alabama Land Co.*, 124 Ala. 608, 26 So. 881.

[c] In justices' courts this rule is also true, except that it obtains immediately upon the entry of judgment. *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95.

[d] In Nebraska the powers of and practice in the county courts in this regard are the same as in the district courts. *Grimes v. Grosjean*, 24 Neb. 700, 40 N. W. 137.

[e] Where the power of a court in this regard is dependent upon a statute which authorizes an amendment only as a "defect or want of form," the court is limited in the exercise of this power to such cases as present such errors or "defects," and a mistake of fact as to the Christian name of one of the parties is not a defect of form within the meaning of such a statute. *Albers v. Whitney*, 1 Story 310, 1 Fed. Cas. No. 137, involving §32,

in this manner,<sup>76</sup> clerical errors in its judgment to the end that its records may speak the truth and its entered judgment conform to the judgment actually rendered. It has been said that no lapse of time will divest the court of its power, or absolve it from its duty, to supply

Judiciary Act, 1789, c. 20, 1 St. at L. 91.

[f] **The Rule Is the Same in Criminal Cases.**—U. S.—Wight *v.* Nicholson, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. ed. 865. Ala.—*In re* Newton, 94 Ala. 431, 10 So. 549. Ark.—Borner *v.* Jones, 140 S. W. 22. Cal.—People *v.* Ward, 141 Cal. 628, 75 Pac. 306. Ga.—Mathews *v.* Swatts, 16 Ga. App. 208, 84 S. E. 980. Miss.—Wilson *v.* Town of Handsboro, 99 Miss. 252, 54 So. 845, Ann. Cas. 1913E, 345; Barber *v.* Biloxi, 76 Miss. 578, 25 So. 298. See generally the title "Sentence and Judgment."

[g] **A writ of habeas corpus may not be used for this purpose.** *Ex parte* Forseutt, 167 Mich. 438, 133 N. W. 315.

76. U. S.—Sibbald *v.* United States, 12 Pet. 488, 491, 9 L. ed. 1167; City of Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144; Odell *v.* Reynolds, 70 Fed. 656, 17 C. C. A. 317; Elder *v.* Richmond, Gold, etc. Min. Co., 58 Fed. 536, 7 C. C. A. 354; Woodruff & Co. *v.* United States, 154 Fed. 861; Hicklin *v.* Marco, 64 Fed. 609; Doe *v.* Waterloo Min. Co., 60 Fed. 643; Gilmer *v.* City of Grand Rapids, 16 Fed. 708; Cromwell *v.* Bank of Pittsburgh, 6 Fed. Cas. No. 3,409; Northern Bank *v.* Labitut, 1 Woods 11, 2 Fed. Cas. No. 842. See also Coelle *v.* Lockhead, Hempst. 194, 5 Fed. Cas. No. 2,943a. Ala.—McLaughlin *v.* Beyer, 181 Ala. 427, 61 So. 62; Jones *v.* Woodstock Co., 95 Ala. 551, 10 So. 635; Parks *v.* Stonum, 8 Ala. 752; Dobson *v.* Dickson, 8 Ala. 252; Snelgrove *v.* Bank of Mobile, 5 Ala. 295; Yarborough's Exr. *v.* Scott, 5 Ala. 221; Brown *v.* Bartlett, 2 Ala. 29; Smyth *v.* Strader, 9 Port. 446; Wilkerson *v.* Goldthwaite, 1 Stew. & P. 159. Cal.—Tukekawa *v.* Hole, 170 Cal. 323, 149 Pac. 593; City and County of San Francisco *v.* Brown, 153 Cal. 644, 96 Pac. 281; Canadian, etc. Co. *v.* Clarita, etc. Co., 140 Cal. 672, 74 Pac. 301; O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; Scamman *v.* Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; San Joaquin, etc. Co. *v.* West, 99 Cal. 345, 33 Pac. 928; Egan *v.* Egan, 90 Cal. 15, 27 Pac. 22; Dreyfuss *v.* Tompkins, 67 Cal. 339, 7

Pac. 732; De Castro *v.* Richardson, 25 Cal. 49; Gregory *v.* Haynes, 13 Cal. App. 592; Calkins *v.* Monroe, 17 Cal. App. 324, 119 Pac. 680; Forrester *v.* Lawler, 14 Cal. App. 171, 111 Pac. 284. Colo. Pleyte *v.* Pleyte, 15 Colo. 44, 24 Pac. 579; Hittson *v.* Davenport, 4 Colo. 169; Wolfley *v.* Lebanon Co., 3 Colo. 296. Conn.—Goldreyer *v.* Cronan, 76 Conn. 113, 55 Atl. 594. Del.—Walker *v.* Walker, 3 Harr. 502. Ga.—Rucker *v.* Williams, 129 Ga. 828, 60 S. E. 155; Williams *v.* Merritt, 109 Ga. 217, 34 S. E. 1012; Pollard *v.* King, 62 Ga. 103. Ill. Cairo & St. Louis R. Co. *v.* Holbrook, 72 Ill. 419; O'Conner *v.* Mullen, 11 Ill. 57; Harris *v.* Schilling, 108 Ill. App. 116. Ind.—Miller *v.* Royce, 60 Ind. 189; Clifton *v.* State, 5 Blackf. 224; State *v.* Hood, 3 Blackf. 351; Pritchard *v.* Mines, 56 Ind. App. 671, 106 N. E. 411. Ia.—Shelley *v.* Smith, 50 Iowa 543; Hurley *v.* Dubuque G. L. & C. Co., 8 Iowa 274. Kan.—Locke *v.* Cope, 94 Kan. 137, 146 Pac. 416; State *v.* Johnson, 91 Kan. 180, 136 Pac. 940; State *v.* Linderholm, 90 Kan. 489, 135 Pac. 564; Clevenger *v.* Hansen, 44 Kan. 182, 24 Pac. 61. Ky. Emison *v.* Walker, 17 Ky. L. Rep. 238, 31 S. W. 461; Seiler *v.* Bank, 9 Ky. L. Rep. 497, 5 S. W. 536; Smith *v.* Mullins, 3 Mete. 182. La.—State *v.* Williams, etc. Co., 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290. Me.—Lewis *v.* Ross, 37 Me. 230, 59 Am. Dec. 49. Mich.—Emery *v.* Whitwell, 6 Mich. 474; Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220. Minn.—McClure *v.* Bruck, 43 Minn. 305, 45 N. W. 438. Miss.—Wilson *v.* Town of Handsboro, 99 Miss. 252, 54 So. 845, Ann. Cas. 1913E, 345; Graves *v.* Fulton, 7 How. 592. Mo.—State *ex rel.* Graves *v.* Primm, 61 Mo. 166; Latshaw *v.* McNeese, 50 Mo. 381; State *ex rel.* Koontz *v.* Luce, 50 Mo. 361; Gibson *v.* Chouteau's Heirs, 45 Mo. 171, 100 Am. Dec. 366; Hickman *v.* Barnes, 1 Mo. 156; Hanley *v.* Dewes, 1 Mo. 16; Martin *v.* Brown, 162 Mo. App. 223, 144 S. W. 1115; Cauthorn *v.* Berry, 69 Mo. App. 404; Blize *v.* Castlio, 8 Mo. App. 290. But see Wilson *v.* Boughton, 50 Mo. 17. Neb.—Brandt *v.* Albers, 6

deficiencies in the records of its own proceedings, where justice and the truth of a case require it,<sup>77</sup> although there is authority that the lapse of such a period of time as would bar the judgment itself would operate to defeat the power to grant an amendment thereto<sup>78</sup>. But the policy of the courts in this regard has been one of indulgence and liberality, and, ordinarily, mere lapse of time has not been considered as a bar to this relief,<sup>79</sup> and amendments have been permitted after a lapse of two,<sup>80</sup> ten,<sup>81</sup> and even twenty years from the date of entry.<sup>82</sup> Wherever such a length of time has elapsed, however, that to grant an amendment would result in an injustice being done, the court should

Neb. 504. Nev.—*Sparrow v. Strong*, 2 Nev. 362. N. H.—*Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189. N. J. *Probasco v. Probasco*, 3 N. J. L. 565. N. Y.—*Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932; *Williams v. Wheeler*, 1 Barb. 48, 51; *Beitz v. Fuller*, 36 N. Y. Supp. 950. N. C. *Brooks v. Stephens*, 100 N. C. 297, 6 S. E. 81; *Strickland v. Strickland*, 95 N. C. 471; *Moore v. Hinnant*, 90 N. C. 163; *Walton v. Pearson*, 85 N. C. 34; *Simmons v. Dowd*, 77 N. C. 155; *Griffin v. Hinson*, 51 N. C. 154; *Mayo v. Whitson*, 47 N. C. 231. See also *Wall v. Covington*, 83 N. C. 144. Ore.—*Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993, 52 Am. St. Rep. 790. Pa.—*Smith v. Hood & Co.*, 25 Pa. 218, 64 Am. Dec. 692. Tex.—*Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Austin v. Jordan*, 5 Tex. 130; *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380, 23 S. W. 520. Wis.—*Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302; *State v. Town Board, etc.*, 69 Wis. 264, 34 N. W. 123; *Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44. Eng.—*Hatton v. Harris*, 67 L. T. 722; *Philips v. Smith*, 1 Str. 136, 93 Eng. Reprint 433. Can.—*McMaster v. Radford*, 16 Ont. Pr. 20.

[a] In Michigan the court has said that "under our statute, a court may at any time amend clerical errors . . ." *Whitwell v. Emory*, 3 Mich. 84, 88, 59 Am. Dec. 220.

[b] "The question (correction of a clerical error by amendment) is not one of terms. . . ." The court "has the undoubted power and its exercise only awaits the making out of the proper case." *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932.

[c] "The court has power at all times to make its records speak the

truth . . ." *Moore v. Hinnant*, 90 N. C. 163.

[d] This power "is exercised by the courts . . ., in the absence of express provision, unaffected by limitation." *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040.

[e] Statutes providing for relief from specified clerical errors within a certain time have no application to clerical errors not so specified. See generally the statutes and, in particular, *Girard Trust Co. v. Null*, 97 Neb. 324, 149 N. W. 809, involving Neb. Code Civ. Proc., §602; Rev. St. 1913, §820.

77. *Lewis v. Ross*, 37 Me. 230, 235, 59 Am. Dec. 49. And see, to the same effect, *White v. Blake*, 74 Me. 489; *Latshaw v. McNeese*, 50 Mo. 381; *Martin v. Brown*, 162 Mo. App. 223, 144 S. W. 1115. See also *infra*, XIII, D, 2, d.

[a] "The amended judgment was the correction merely of a clerical error . . . which the court could make at any subsequent time however long." *Martin v. Brown*, 162 Mo. App. 223, 144 S. W. 1115.

78. *Healy v. Just*, 53 Miss. 547. And see *Probasco v. Probasco*, 3 N. J. L. 565.

79. Ga.—*Rucker v. Williams*, 129 Ga. 828, 60 S. E. 155. Mass.—*Rugg v. Parker*, 7 Gray 172. Mont.—*Keene v. Welsh*, 8 Mont. 305, 21 Pac. 25. N. Y.—*Wight v. Alden*, 3 How. Pr. 223, 144 S. W. 1115. Pa.—*Berryhill v. Wells*, 5 Binn. 56.

80. *Brittenham v. Robinson*, 22 Ind. App. 536, 54 N. E. 133; *Fairechild v. Dean*, 15 Wis. 206.

81. *Pollard v. King*, 62 Ga. 103; *Irby v. Brown*, 59 Ga. 596. See also *Coelle v. Lockhead*, Hempst. 194, 5 Fed. Cas. No. 2,943a.

82. *Probasco v. Probasco*, 3 N. J. L. 565.



deny the relief sought.<sup>83</sup> So, under the peculiar circumstances of other cases delays ranging variously<sup>84</sup> from twenty years<sup>85</sup> to six months,<sup>86</sup> have been considered fatal. Moreover, the limitations imposed by this rule are suspended so long as the cause in which the judgment was rendered remains in fieri,<sup>87</sup> and for this reason, any motion or proceeding in the cause, which is made and continued at the current term will have the effect of extending, to the term to which the matter is thus continued, the court's plenary control over its judgment.<sup>88</sup>

(III.) In the Absence of Terms. — Where terms of court have been abolished provision is sometimes made that after the lapse of a specified time the court retains jurisdiction over its judgments solely for the purpose of correcting clerical errors therein.<sup>89</sup> Under such statutes the

83. **Ky.**—Bonar *v.* Gosney, 17 Ky. L. Rep. 92, 30 S. W. 602. **Mass.**—Snell *v.* Dwight, 121 Mass. 348. **Mich.**—See Harrington *v.* Calhoun Probate Judge, 162 Mich. 35, 127 N. W. 255. **Minn.**—Nell *v.* Dayton, 47 Minn. 257, 49 N. W. 981. **Mo.**—See Wand *v.* Ryan, 166 Mo. 646, 656, 65 S. W. 1025. **N. Y.**—Hirshbach *v.* Ketchum, 79 App. Div. 561, 80 N. Y. Supp. 143; Gall *v.* Gall, 58 App. Div. 97, 68 N. Y. Supp. 649. **Tex.**—Williamson *v.* Wright, Tex. Unrep. Cas. 711. **Eng.**—See Hatton *v.* Harris, 67 L. T. 722.

84. **One Year.**—Fitch *v.* Richard, 18 R. I. 617, 29 Atl. 689.

[a] **Five Years.**—Rogers *v.* Rogers, 1 Paige (N. Y.) 188; Hirshbach *v.* Ketchum, 79 App. Div. 561, 80 N. Y. Supp. 143.

[b] **Ten Years.**—Russell *v.* United States, 15 Ct. Cl. 168; Grant *v.* Griswold, 21 Hun (N. Y.) 509.

[c] **Fourteen Years.**—Saffold *v.* Keenan, 2 Ga. 341.

[d] **Twenty-six Years.**—Williamson *v.* Wright, 1 Tex. Unrep. Cas. 711.

85. Bonar *v.* Gosney, 17 Ky. L. Rep. 92, 30 S. W. 602.

86. Snell *v.* Dwight, 121 Mass. 348.

87. **Cal.**—Hastings *v.* Cunningham, 35 Cal. 549. **Ill.**—Cook *v.* Wood, 24 Ill. 295. **Ind.**—Torr *v.* Torr, 20 Ind. 118. See also Cauthorn *v.* Bierhaus, 44 Ind. App. 362, 88 N. E. 314. **Ky.**—Salzer *v.* Arnett, 23 Ky. L. Rep. 321, 62 S. W. 1031. **Miss.**—Shirley *v.* Conway, 44 Miss. 434. **Mo.**—See Bruner *v.* Marcum, 50 Mo. 405; McGonigle *v.* Bresnen, 44 Mo. App. 423.

[a] The length of time during which the court thus retains control over its judgments may, of course, be regulated by statute. Schwarz *v.* Oppenheimer, 90 Ala. 462, 8 So. 36.

88. **U. S.**—Waskey *v.* Hammer, 179 Fed. 273, 102 C. C. A. 629; City of New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15. See Barrell *v.* Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. ed. 511; Judson *v.* Gage, 98 Fed. 540, 39 C. C. A. 156. **Cal.**—O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; Brackett *v.* Banegas, 99 Cal. 623, 34 Pac. 344; De Castro *v.* Richardson, 25 Cal. 49. **Ill.**—Watson *v.* Le Grande, etc. Co., 177 Ill. 203, 52 N. E. 317. **Mo.**—Collier *v.* Lead Co., 208 Mo. 246, 106 S. W. 971; Guinan *v.* Donnell, 201 Mo. 173, 98 S. W. 478; McGurry *v.* Wall, 122 Mo. 614, 27 S. W. 327; Bruner *v.* Marcum, 50 Mo. 405; Weis Cornice Co. *v.* Neevel (Mo. App.), 174 S. W. 159; Breeding *v.* Nelson, 142 Mo. App. 685, 121 S. W. 1080; Houston *v.* Thompson, 87 Mo. App. 63. **Nev.**—See Marshall *v.* Golden Fleece G. & S. M. Co., 16 Nev. 156. **Ohio.**—Niles *v.* Parks, 49 Ohio St. 370, 34 N. E. 735. **Okla.**—Carey Co. *v.* Vickers, 38 Okla. 643, 134 Pac. 851. **W. Va.**—See Green *v.* Pittsburg W. & Ky. R. Co., 11 W. Va. 685. **Wis.**—Note to Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70. See Pringle *v.* Dunn, 39 Wis. 435. **Wyo.**—Luther Lumber Co. *v.* Sheldahl Savings Bank, 22 Wyo. 302, 139 Pac. 433; O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

[a] The decision upon such a motion had relation to the time within the term when the motion was made and operated as an order made at that time. Brackett *v.* Banegas, 99 Cal. 623, 34 Pac. 344.

89. Story Merc. Co. *v.* McClellan, 145 Ala. 629, 40 So. 123, involving Acts of 1894-95, p. 1227.

[a] In New Mexico, under the provisions of §2875, C. L. 1897, that the



lapse of this specified period is considered as having the same effect upon the court's power to amend its judgments as did the passing of the current term under the common-law rule.<sup>90</sup> Thus, after the expiration of this period, the court may not correct a judicial error in its own judgment,<sup>91</sup> unless a motion to that effect is properly brought to the attention of the court and continued, before the statutory time has run.<sup>92</sup> The court may, however, properly entertain a motion to amend and correct a clerical error at any time.<sup>93</sup> Where there is no statute regulating the matter, it seems that the entry of judgment is given the same effect as the end of the term at common law.<sup>94</sup>

(IV.) After and Pending an Appeal. — The power of the trial court to so amend their judgments as to make them speak the truth is not lost simply because a writ of error has been sued out or an appeal taken, and may be exercised at any time until,<sup>95</sup> but not after, an affirmance

district courts "shall be at all times in session," it is considered that, except for purposes connected with jury trials there are no terms of court, the lapse of which would affect the court's control over its judgment. *Crichton v. Storz*, 20 N. M. 195, 147 Pac. 916, following *Weaver v. Weaver*, 16 N. M. 98, 113 Pac. 599.

90. *Southern Ry. Co. v. Griffith*, 177 Ala. 364, 58 So. 425; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 125.

91. *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123. See *infra*, XIII, A, 3, b, (I) and (II).

92. *Southern Ry. Co. v. Griffith*, 177 Ala. 364, 58 So. 425. See *supra*, XIII, A, 3, a, (II).

93. *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123. See *supra*, XIII, A, 3, a, (II); *infra*, XIII, D, 2, d.

94. "Where findings are filed, which constitute the rendition of a judgment, and where, of course, the conclusions of law signed by the judge show what judgment is to be entered, it has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment." *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91, and to the same effect see *Ex parte Von Vetsera*, 7 Cal. App. 136, 93 Pac. 1036; *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932; *East New York Refrigerator Co. v. Halpern*, 140 App. Div. 201, 125

N. Y. Supp. 111; *Smith v. Smith*, 121 App. Div. 480, 106 N. Y. Supp. 137.

95. *Ala.*—*Birmingham Bank v. Mayer*, 104 Ala. 634, 16 So. 520; *Ex parte Henderson*, 84 Ala. 36, 4 So. 284; *Seymour v. Thomas Co.*, 81 Ala. 250, 1 So. 45; *Randolph v. Little*, 62 Ala. 396; *Dow v. Whitman*, 36 Ala. 604; *Moore v. Horn*, 5 Ala. 234; *Evans v. St. John*, 9 Port. 186. *Ark.*—*Freel v. State*, 21 Ark. 212. See *Hershy v. Baer*, 45 Ark. 240. *Cal.*—*Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174. *Colo.*—*Kindel v. Litho. Co.*, 19 Colo. 310, 35 Pac. 538; *Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579. *Ill.*—*Heintz v. Pratt*, 54 Ill. App. 616. *Ky.*—*Speed v. Hann*, 1 Mon. 16, 15 Am. Dec. 78. *Md.*—*Ecker v. Bank*, 64 Md. 292, 1 Atl. 849. *Mo.*—*Kansas City v. Woerishoeff*, 249 Mo. 1, 155 S. W. 779; *Nat. Bank v. Allen*, 68 Mo. 474; *De Kalb County v. Hixon*, 44 Mo. 341; *Cauthorn v. Berry*, 69 Mo. App. 404. *Neb.*—*Wise v. Frey*, 9 Neb. 217, 2 N. W. 375. *Nev.*—*Sparrow v. Strong*, 2 Nev. 362. *N. Y.*—See *Genet v. Delaware & H. C. Co.*, 136 N. Y. 217, 32 N. E. 851. *Pa.*—*Smith v. Hood & Co.*, 25 Pa. 218, 64 Am. Dec. 692; *Crutcher v. Com.*, 6 Whart. 340. *S. C.*—*Carroll v. Tompkins*, 14 S. C. 223. *Tex.*—*De Hymel v. Mortgage Co.*, 80 Tex. 493, 16 S. W. 311; *Wood v. Wheeler*, 7 Tex. 13. *Wis.*—*State v. Town Board*, 69 Wis. 264, 34 N. W. 123; *Chouteau v. Hooe*, 1 Pinn. 663.

[a] On an appeal by a garnishee from a judgment against him which does not recite the rendition of a judgment or the amount thereof against the defendant, the judgment against the garnishee may be amended by the

of the judgment by the appellate court,<sup>96</sup> although there is authority to the contrary on the latter proposition.<sup>97</sup> Accordingly, if the judgment was not affirmed, it may be amended after having been remanded, unless the amendment pertains to a question expressly adjudicated by the appellate court,<sup>98</sup> or, where the appeal is dismissed, after such dismissal.<sup>99</sup> Some courts, however, recognize as an exception to this rule, a case in which the appeal did not involve any question as to the form of the judgment,<sup>1</sup> or where there was no controversy as to the error which it was proposed to cure by amendment, holding that in such cases the trial court might properly grant a motion to amend the judgment even after an affirmance.<sup>2</sup>

(V.) In Vacation and at Chambers. — In the absence of statutory

trial court so as to contain the necessary recitals. *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520.

[b] "Nor is the right of the lower court to amend suspended or impeded by an appeal, where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records." *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174.

96. U. S.—See *Hicklin v. Marco*, 64 Fed. 609. Ala.—*Werborn v. Pinney*, 76 Ala. 291; *Randolph v. Little*, 62 Ala. 396; *Stephens v. Norris*, 15 Ala. 79. Ark.—*Schofield v. Rankin*, 86 Ark. 86, 109 S. W. 1161. Ill.—*Mains v. Cosner*, 67 Ill. 536. Ia.—*Edgar v. Greer*, 10 Iowa 279. Ky.—*Bleight v. McIlvoy*, 4 Mon. 142. N. Y.—*Meldon v. Devlin*, 39 App. Div. 581, 57 N. Y. Supp. 670; *People ex rel. Reynolds v. Council*, 69 Misc. 403, 29 N. Y. Supp. 1071. N. C.—*Harrison v. Harrison*, 114 N. C. 219, 19 S. E. 232. Va.—See *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12. Wash.—See *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144. Wis.—*McKinney v. Jones*, 57 Wis. 301, 15 N. W. 160; *Smith v. Armstrong*, 25 Wis. 517.

[a] The Reason.—A judgment which is affirmed on appeal is merged in the judgment of the appellate court, hence the rule that it cannot be thereafter amended by the trial court. *Randolph v. Little*, 62 Ala. 396.

[b] "All courts have the inherent power to correct their records, so as to make them speak the truth, even after final decree, and after appeal.

. . . And that power exists until the judgment or decree of the lower court becomes merged in the judgment of this court by affirmance." *Ex parte Henderson*, 84 Ala. 36, 4 So. 284.

97. *Conway v. Day*, 79 Ind. 318.

[a] In *Michigan*, where property was replevied from defendant and the verdict, which fixed the value of the property, was for the defendant but the judgment as entered did not adjudge recovery of the property or its value, and the judgment thereon was afterward affirmed by the Supreme Court, it was held that the defendant might, on a motion made by leave of the Supreme Court, have the judgment corrected. *Salter v. Sutherland*, 125 Mich. 662, 85 N. W. 112.

[b] In *California* it has been held that this (to amend the judgment) "may be done even after an appeal and an affirmance of the judgment." *Roussett v. Boyle*, 45 Cal. 64.

98. *Moody v. Keener*, 9 Port. (Ala.) 252.

99. *Whittaker v. Gee*, 63 Tex. 435.

1. *Salter v. Sutherland*, 125 Mich. 662, 85 N. W. 112.

[a] "It is undoubtedly true that the circuit court has no power to modify in any material respect a judgment in any manner inconsistent with the decision of this court; but in the present case it appears that the error was not discovered until after the decision of this court, and that no point decided in the case by this court turned on the form of the verdict or judgment." *Salter v. Sutherland*, 125 Mich. 662, 85 N. W. 112.

2. *Roussett v. Boyle*, 45 Cal. 64; *West Chester Plank Road Co. v. Chester County*, 21 Pa. Co. Ct. 86. See

authority the court may not amend its judgments in vacation,<sup>3</sup> or at chambers,<sup>4</sup> without the consent of all the parties.<sup>5</sup> In some states, however, statutes provide for the exercise of this power in vacation.<sup>6</sup>

(VI.) *After Execution and Satisfaction.*—The fact that an execution has been issued upon a judgment,<sup>7</sup> or it has been held that the judgment has been satisfied will not, standing alone, prohibit the granting of an amendment in a proper case,<sup>8</sup> although circumstances may arise under which the granting of an amendment at this time would be error.<sup>9</sup> Thus, in keeping with the general rule set forth above that where to grant an amendment to a judgment would, in the nature of the circumstances, be inequitable the courts will refuse to act.<sup>10</sup> An amendment of a judgment will not be granted after the satisfaction thereof where to do so would make a party liable to pay money thereunder a second time.<sup>11</sup> The courts of some jurisdictions have laid down the rule unqualifiedly that at such a time an amendment of a judgment is improper.<sup>12</sup>

b. *As to the Nature of Errors.*—(I.) *Judicial Errors.*—There is a well defined distinction between the rendition of a judgment and the entry thereof,<sup>13</sup> and in the exercise of the power to amend its judgments the court can do no more than make the entry correspond to

also *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732.

3. N. C.—*Hinton v. Ins. Co.*, 116 N. C. 22, 21 S. E. 201. S. C.—See *Middleton v. Denmark Co.*, 97 S. C. 457, 81 S. E. 157. Tex.—*Texas Co. v. Beddingfield*, 53 Tex. Civ. App. 10, 114 S. W. 894. Wash.—*Hale v. Finch*, 1 Wash. Ter. 517.

4. *Middleton v. Denmark Co.*, 97 S. C. 457, 81 S. E. 157.

5. *Hinton v. Insurance Co.*, 116 N. C. 22, 21 S. E. 201; *Middleton v. Denmark Co.*, 97 S. C. 457, 81 S. E. 157 (involving Code Laws, S. C. 1912, §8833); *Atlantic C. L. R. Co. v. Moise*, 85 S. C. 530, 67 S. E. 785.

6. Miss.—*Shirley v. Conway*, 41 Miss. 434; *Graves v. Fulton*, 7 How. 592. N. Y.—*Geller v. Hoyt*, 7 How. Pr. 265. Tex.—*Texas Co. v. Beddingfield*, 53 Tex. Civ. App. 10, 114 S. W. 894, overruling *Swift v. Paris*, 11 Tex. 18. See *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605.

7. *Thompson v. Am. Mtg. Co.*, 122 Ga. 39, 49 S. E. 751; *Dennis v. Colley*, 112 Ga. 114, 37 S. E. 119; *Sanders v. Williams*, 75 Ga. 283; *Moses v. Eagle*, etc. Mfg. Co., 68 Ga. 241; *Elliott v. Wilks*, 16 Ga. App. 466, 85 S. E. 679; *Grand Rapids Bank v. Widdicomb*, 114 Mich. 639, 72 N. W. 615.

[a] Where the judgment was rendered by default it may also be

amended after execution to conform to the pleadings. *Dennis v. Colley*, 112 Ga. 114, 37 S. E. 119.

8. Cal.—*Takekawa v. Hole*, 170 Cal. 323, 149 Pac. 593. Ga.—*Dixon v. Mason*, 68 Ga. 478. Ind.—*Sherman v. Nixon*, 37 Ind. 153. Minn.—*Schloss v. Lennon*, 123 Minn. 420, 144 N. W. 148.

9. Ind.—*Gray v. Robinson*, 90 Ind. 527. Miss.—*Burns v. Stanton*, 2 Smed. & M. 457. Pa.—*Hassler's Appeal*, 5 Watts 176. Tex.—See *Gaines v. Mensing*, 64 Tex. 325.

[a] *As Against Sureties After Satisfaction.*—Where a judgment on a promissory note was inadvertently entered for a less amount than was actually due and the sureties of the defendant, to save his property from execution, had paid such judgment, it is error to thereafter amend this judgment as against the sureties. *Gray v. Robinson*, 90 Ind. 527.

10. See *supra*, XIII, A, 2.

11. *Hassler's Appeal*, 5 Watts (Pa.) 176.

12. *D'Apremont v. Peytavin*, 5 Mart. O. S. (La.) 641; *Louisiana Bank v. Hampton*, 4 Mart. O. S. (La.) 94; *Spring v. Tidwell*, 31 Miss. 63.

13. Cal.—*Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91; *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 Pac. 281. Ind.—*Pursley v.*



the judgment actually rendered.<sup>14</sup> Never, under the guise of an amendment, may the court, with propriety, correct a judicial error, *i. e.*, change the judgment itself,<sup>15</sup> indeed, the very purpose of amending the judgment is not to make it conform to what it should have been, but to make it conform to what it was, right or wrong, as

Wickle, 4 Ind. App. 382, 30 N. E. 1115. **Me.**—*Bean v. Ayers*, 70 Me. 421. **Minn.**—*Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84. **Mich.**—See *Whitwell v. Emory*, 3 Mich. 84, 88, 59 Am. Dec. 220. **Mo.**—*Hanley v. Dewes*, 1 Mo. 16. See also *Webb v. Elliott*, 75 Mo. App. 557. **Neb.**—*Dillon v. Chicago, etc. Co.*, 58 Neb. 472, 78 N. W. 927. See *Nuckolls v. Irwin*, 2 Neb. 60, 69. **N. Y.**—See *Geller v. Hoyt*, 7 How. Pr. 265. **N. C.**—See *Moore v. Hinant*, 90 N. C. 163, 166. **Wash.**—*Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389. **Wis.**—See *Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302.

See generally 14 STANDARD PROC. 971, et seq.

[a] "A judgment is one thing; the record of a judgment is another thing. The one is a judicial act; the other a clerical act only." *Bean v. Ayers*, 70 Me. 421.

[b] "There is a clear distinction between the making or rendering of a judgment and its entry. The judgment is made or rendered when the court announces it or signs the judgment, as is the common practice, and returns the signed judgment to counsel. It is entered when it is placed of record by the clerk." *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389.

14. **Cal.**—*Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139. **Conn.**—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727. **Mo.**—*Evans v. Fisher*, 26 Mo. App. 541. **N. Y.**—*Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122; *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063; *Jones v. Newton*, 19 N. Y. Supp. 786. **N. C.**—*Wolfe v. Davis*, 74 N. C. 597. **Can.**—*Balfour v. Drummond*, 4 Manitoba L. Rep. 467.

[a] "These decisions show that the power to amend the record is limited to making the record conform to the fact, that is, to making it express the judgment which was actually rendered." *Evans v. Fisher*, 26 Mo. App. 541, 548.

15. **U. S.**—*Elder v. Richmond Gold, etc. Min. Co.*, 58 Fed. 536, 7 C. C. A. 354; *Hicklin v. Marco*, 64 Fed. 609;

*Northern Bank v. Labitut*, 1 Woods 11, 2 Fed. Cas. No. 842. **Ala.**—*Wilmerding v. Corbin Bkg. Co.*, 126 Ala. 268, 28 So. 640; *Robertson v. King*, 120 Ala. 459, 24 So. 929; *Brown v. Barnes*, 93 Ala. 58, 9 So. 455; *Emerson v. Heard*, 81 Ala. 443, 1 So. 197; *Lewis v. State*, 10 Ala. App. 31, 64 So. 537. **Ark.**—*McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597. **Cal.**—*In re Wullard*, 139 Cal. 501, 73 Pac. 240; *First Nat. Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476; *Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284; *Mann v. Mann*, 6 Cal. App. 610, 92 Pac. 740. **Colo.**—*Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193. **Conn.**—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727. **Ill.**—*Robinson v. Brown*, 82 Ill. 279; *Lill v. Stooker*, 72 Ill. 495; *Cramer v. Com. Men's Assn.*, 176 Ill. App. 1; *Horner v. Horner*, 37 Ill. App. 199. **Ind.**—*Stone v. Stone*, 158 Ind. 628, 64 N. E. 86; *Johnson v. Foreman*, 24 Ind. App. 93, 56 N. E. 254. **Ia.**—*Perry v. Kaspar*, 113 Iowa 268, 85 N. W. 22. **Ky.**—*Chester v. Graves*, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678; *Ballard v. Davis*, 3 J. J. Marsh. 656. **La.**—*State v. Williams, etc. Co.*, 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290; *Factor's, etc. Ins. Co. v. New Harbor Co.*, 39 La. Ann. 583, 2 So. 407. **Minn.**—*Schloss v. Lennon*, 123 Minn. 420, 144 N. W. 148; *Day v. Mountain*, 89 Minn. 297, 94 N. W. 887. **Miss.**—*Wilson v. Town of Handsboro*, 99 Miss. 252, 54 So. 845, Ann. Cas. 1913E, 345; involving §1016, Miss. Code of 1906. **Neb.**—*Dillon v. Chicago, etc. R. Co.*, 58 Neb. 472, 78 N. W. 927. **N. H.**—*Gove v. Lyford*, 44 N. H. 525. **N. J.**—See *Probasco v. Probasco*, 3 N. J. L. 565. **N. Y.**—*Heath v. New York, etc. Co.*, 146 N. Y. 260, 40 N. E. 770; *Bohnen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932; *Bullard v. Sherwood*, 85 N. Y. 253; *Hotaling v. Marsh*, 14 Abb. Pr. 161; *Heath v. Banking Co.*, 84 Hun 302, 32 N. Y. Supp. 454; *Pond v. New Rochelle Water Co.*, 140 App. Div. 141, 124 N. Y. Supp. 1033; *Morrison v. Metropolitan R. Co.*, 60 App. Div. 180, 70 N. Y. Supp. 65; *Matter of Silli-*



actually pronounced." So, where the defect consists in the failure of

man, 38 Misc. 226, 77 N. Y. Supp. 267; *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 106.; *People Bank v. Birnbaum*, 117 N. Y. Supp. 237. See *McLean v. Stewart*, 14 Hun 472; *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958; *Beitz v. Fuller*, 36 N. Y. Supp. 950; *Parker v. Linden*, 13 N. Y. Supp. 95. N. C.—*Creed v. Marshall*, 160 N. C. 394, 76 S. E. 270; *Moore v. Hinnant*, 90 N. C. 163; *Simmons v. Dowd*, 77 N. C. 155; *Wolfe v. Davis*, 74 N. C. 597. Ohio.—*Greene v. Dodge*, 3 Ohio 486. Pa.—*Duffey v. Houtz*, 105 Pa. 96; *Paul v. Hardee*, 9 Serg. & R. 23; *Gannon v. Riel*, 3 Lack. Leg. N. 68. S. C.—*Knox v. Moore*, 41 S. C. 355, 19 S. E. 683. See *Carroll v. Tompkins*, 14 S. C. 223. Tex.—*Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Perkins v. Dunlavy*, 61 Tex. 241; *Milam County v. Robertson*, 47 Tex. 223; *Chambers v. Hodges*, 3 Tex. 517; *Hedrick v. Smith* (Tex. Civ. App.), 146 S. W. 305. Va.—*Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452; *Shipman v. Fletcher*, 91 Va. 473, 490, 22 S. E. 458; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12; *Com. v. Winstons*, 5 Rand. (26 Va.) 546. Wash.—*Sivery v. Lawyer*, 25 Wash. 360, 65 Pac. 529; *Seattle & Mont. R. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567. W. Va.—*Bank v. Ralphsnyder*, 54 W. Va. 231, 46 S. E. 206; *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954. See *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. Wis.—*Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44; *Pinger v. Vandick*, 36 Wis. 141; *Durning v. Burkhardt*, 34 Wis. 585; *Wymann v. Buckstaff*, 24 Wis. 477.

[a] "The law does not authorize the correction of judicial errors, under the pretense of correcting clerical errors." *Evans v. Fisher*, 26 Mo. App. 541, 547. See to the same effect, *Gove v. Lyford*, 44 N. H. 525; *Johnson v. Atlantic & St. L. R.*, 43 N. H. 410.

[b] Where, in an action to foreclose a mortgage and a pledge of water stock, no mention of the water stock was made in either the finding or the conclusions of law, but the latter recited that the plaintiff was entitled to a certain sum and that such sum was a valid lien upon the premises

described in the complaint and that the plaintiff was entitled to have such premises sold and the proceeds applied, etc., and concluded by directing that "judgment be entered accordingly," this is a judicial, not a clerical, omission and is not the subject of amendment. *First Nat. Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476.

[c] "There is, . . . no authority to correct judicial errors under the pretense of correcting clerical errors, and to entitle a party to an order amending a judgment or decree, he must establish that the entry as made does not conform to what the court intended it should be when it was ordered. An error of the court, no matter how palpable, cannot be corrected in this way, . . ." *Ives v. Hulce*, 17 Ill. App. 30. And see *Radclyffe v. Barton*, 154 Mass. 157, 28 N. E. 148.

[d] "No error in the application of the law to the facts, or what is known as judicial error, can be corrected" by amendment. *Stringer v. Anderson*, 23 W. Va. 482.

[e] Nor has the court power, under the guise of an amendment of a void judgment, to create a judgment. *Fairchild v. Dean*, 15 Wis. 206.

[f] Reducing Amount of Judgment. "Thus it is error to amend a judgment by reducing the amount where the reason for the alteration is that the court has changed its mind; such action may be taken as the means of correcting a miscalculation or other clerical error, but not to set right a judicial mistake." *State v. Williams, etc. Co. (La.)*, 61 So. 988. To same effect see *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115; *Griffith v. Maxwell*, 19 Wash. 614, 54 Pac. 35.

[g] After a judge has heard the plaintiff's testimony and decided the case on its merits, dismissing the complaint, he cannot destroy the effect of that decision by overruling the judgment so as to give the plaintiff leave to bring another action. *Bostwick, etc. v. Abbott*, 40 Barb. (N. Y.) 331.

16. Ala.—*Robertson v. King*, 120 Ala. 459, 24 So. 929; *Browder v. Faulkner*, 82 Ala. 257, 3 So. 30. Cal.—*In re Estate of Willard*, 139 Cal. 501, 73 Pac. 240; *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775; *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; *First*

the court to render the *proper* judgment,<sup>17</sup> or arises from a want of judicial action, the judgment cannot be corrected by amendment.<sup>18</sup> Thus it follows that where a judgment as entered is for an amount in excess of the sum for which the judgment was rendered, the entry may properly be corrected by amendment,<sup>19</sup> although where the judgment *rendered* is for more than the amount actually due, the correction cannot be made in this manner.<sup>20</sup> There are, however, rare

Nat. Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; Egan v. Egan, 90 Cal. 15, 27 Pac. 22. See Forrester v. Lawler, 14 Cal. App. 171, 111 Pac. 284. Conn. See Brown v. Clark, 81 Conn. 562, 71 Atl. 727. Ga.—Moses v. The Eagle, etc. Mfg. Co., 68 Ga. 241. Ill.—Ives v. Hulce, 17 Ill. App. 30. Ind.—Purley v. Wickle, 4 Ind. App. 382, 30 N. E. 1115. Ia.—Graham Paper Co. v. Wohlwend, 116 Iowa 358, 89 N. W. 1068. La.—State v. Williams, etc. Co., 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290. Mo.—See Burnside v. Wand, 170 Mo. 531, 71 S. W. 337, 62 L. R. A. 427; Fetters v. Baird, 72 Mo. 389. Mont.—See Keene v. Welsh, 8 Mont. 305, 21 Pac. 25. N. Y.—See McLean v. Stewart, 14 Hun 472. N. C. Wall v. Covington, 83 N. C. 144; Simmons v. Dowd, 77 N. C. 155; Wolfe v. Davis, 74 N. C. 597. Ohio.—Cleveland, etc. Co. v. Green, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725. Tex. Milam County v. Robertson, 47 Tex. 222; Rogers v. East Line Lumb. Co., 11 Tex. Civ. App. 108, 33 S. W. 312. Wis.—See Wyman v. Buckstaff, 24 Wis. 477.

[a] "A record is the memorial of what was done and not what ought to have been done." Simmons v. Dowd, 77 N. C. 155.

17. Ala.—Story Mercantile Co. v. McClellan, 145 Ala. 629, 40 So. 123; Browder v. Faulkner, 82 Ala. 257, 3 So. 30. Cal.—Estate of Potter, 141 Cal. 424, 75 Pac. 850; Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928; Egan v. Egan, 90 Cal. 15, 27 Pac. 22. Colo.—Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193. Ia.—Graham Paper Co. v. Wohlwend, 116 Iowa 358, 89 N. W. 1068; Kenyon v. Baker, 82 Iowa 724, 47 N. W. 977. Ky.—Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678; Ballard v. Davis, 3 J. J. Marsh. 656; Scroggins v. Scroggins, 1 J. J. Marsh. 362. Me.—Thomas v. Thomas, 98 Me. 184, 56 Atl. 651;

Lewis v. Ross, 37 Me. 230, 59 Am. Dec. 49; Hall v. Williams, 10 Me. 278, 290. Miss.—Barber v. Biloxi, 76 Miss. 578, 25 So. 298. Mo.—Fetters v. Baird, 72 Mo. 389; Hanley v. Dewes, 1 Mo. 16. Ohio.—Cleveland, etc. Co. v. Green, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725. Tex.—Perkins v. Dunlavy, 61 Tex. 241. Wis.—Williams v. Hayes, 68 Wis. 248, 32 N. W. 44.

18. Ala.—Story Mercantile Co. v. McClellan, 145 Ala. 629, 40 So. 123; Wilmerding v. Corbin Bkg. Co., 126 Ala. 268, 28 So. 640; Ivey v. Gilder, 119 Ala. 495, 24 So. 715; Tippins v. Peters, 103 Ala. 196, 15 So. 564; Browder v. Faulkner, 82 Ala. 257, 3 So. 30; McEntire v. Paffe, 12 Ala. App. 507, 67 So. 713. Cal.—O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; Egan v. Egan, 90 Cal. 15, 27 Pac. 22. Colo.—Doane v. Glenn, 1 Colo. 454. Conn.—Goldreyer v. Cronan, 76 Conn. 113, 55 Atl. 594. Ill. Cook v. Wood, 24 Ill. 295; Forquer v. Forquer, 19 Ill. 67; Kretzinger v. Lewis, 174 Ill. App. 45; Ives v. Hulce, 17 Ill. App. 30. Ind.—Rader v. Sheets, 26 Ind. App. 479, 59 N. E. 1090. Ia. Knox v. Moser, 72 Iowa 154, 33 N. W. 617. Ky.—Com. v. Ratcliff, 27 Ky. L. Rep. 297, 84 S. W. 1147. La.—Factors' etc. Ins. Co. v. Harbor, etc. Co., 39 La. Ann. 583, 2 So. 407. Me.—Inhab. of Limerick, Petitioners, 18 Me. 183. Md.—Hawkins v. Bowie, 9 Gill & J. 428. Mo. Burnside v. Want, 170 Mo. 531, 71 S. W. 337; Gibson v. Chouteau's Heirs, 45 Mo. 171, 100 Am. Dec. 366; Evans v. Fisher, 26 Mo. App. 541, 547. N. C. See Creed v. Marshall, 160 N. C. 394, 76 S. E. 270; Brady v. Beason, 28 N. C. 425. Tex.—Perkins v. Dunlavy, 61 Tex. 241.

19. Mingay v. Lackey, 142 N. Y. 449, 37 N. E. 471. See *infra*, XIII, A, 3, b, (VI).

20. Heath v. New York, etc. Co., 146 N. Y. 260, 40 N. E. 770. Compare,

instances where a clerical error may be said to have been responsible for the rendition of the judgment, and in such a case the judgment itself may be corrected by amendment,<sup>21</sup> but only where this is apparent from the record.<sup>22</sup> In such a case it is important that the distinction be observed between a mere *mistake*, *miscalculation* or *misrecital* and an error in the opinion or judicial determination of the court,<sup>23</sup> for the latter are judicial errors, and, as such, this rule has

Eubank v. Ralls, 4 Leigh (31 Va.) 308.

21. Ala.—Ford v. Tinchant, 49 Ala. 567. Cal.—Leviston v. Swan, 33 Cal. 480; Kowalsky v. Nicholson, 23 Cal. App. 160, 137 Pac. 607. See Estate of Schroeder, 46 Cal. 305. Ga.—See Johnson & Murphy v. Globe, etc. Co., 11 Ga. App. 485, 75 S. E. 822. Minn.—Chase v. Whitten, 62 Minn. 498, 65 N. W. 84. N. M.—Crichton v. Storz, 20 N. M. 195, 147 Pac. 916. N. Y.—See Bohlen v. Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932. Va.—See Eubank v. Ralls, 4 Leigh (31 Va.) 308.

[a] "In their prayer for relief, however, they asked both that the foreclosure be set aside and also that the mortgage be adjudged void. . . . It is also apparent to us from the record, and particularly from the language of the order for judgment on the pleadings, that all that the court intended to do was to order judgment declaring the foreclosure void; that the judicial mind never assented to the proposition that the mortgage was void, but that the order was worded as it was through the clerical mistake or inadvertence of the judge by reason of his not knowing or having presently in mind the fact that the prayer of the complaint for relief asked that the mortgage itself be adjudged void. We think the court had the power to correct in this way its mere clerical mistake or misprision so that the judgment might conform to what the court intended it should be." Chase v. Whitten, 62 Minn. 498, 65 N. W. 84.

[b] "But, where the amendment is in the line of the correction of a mistake, or of an omission, obviously due, as in this case, to the trial judge's oversight, the power to make it is a general and incidental one." Bohlen v. Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932.

[c] Also, where a note sued upon provided that a ten days' notice should

be given after the maturity thereof to entitle the payee to attorney's fees and the records showed, besides this, that the suit was commenced eight days after maturity, it was held that the judgment might be amended in this regard. Johnson v. Globe, etc. Co., 11 Ga. App. 485, 75 S. E. 822.

[d] In California the courts have said that the "power of the courts to amend their judgments . . . extends also to cases where, as here, the order was inadvertently made and entered. This is not a case like the Estate of Potter, 141 Cal. 424, 75 Pac. 850, where, upon dismissal, the court might have directed different forms of judgment to be entered. Here, the defendant being entitled to a dismissal of the action, as the court correctly held it followed under the circumstances disclosed by the record that the judgment should, as a matter of course, have directed the return to her of the property taken. Its failure to do so, it clearly appears, was merely an inadvertence or mistake, and not a judicial error." Kowalsky v. Nicholson, 23 Cal. App. 160, 137 Pac. 607.

[e] In New Mexico it has been held that where, in a suit to foreclose a mechanic's lien, the judgment allowed "recovery for the costs of filing plaintiff's lien, there can be no doubt but that, if asked for at the time the court would have rendered judgment foreclosing the liens as a matter of course, and the omission to do so arose from mere inadvertence." Crichton v. Storz, 20 N. M. 195, 147 Pac. 916.

22. Ga.—See Johnson v. Globe, etc. Co., 11 Ga. App. 485, 75 S. E. 822. Minn.—Chase v. Whitten, 62 Minn. 498, 500, 65 N. W. 84. Va.—Eubank v. Ralls, 4 Leigh (31 Va.) 308.

23. Com. v. Winstons, 5 Rand. (26 Va.) 546; Eubank v. Rall's Exr., 4 Leigh (31 Va.) 308.

[a] "But if, upon the inspection of the proceeding, the matter complained



no application to them,<sup>24</sup> while the former are, in their last analysis, clerical errors, presenting an apparent rather than an actual exception to the rule.<sup>25</sup> The power of a court to change its judgment, *i. e.*, to correct judicial errors therein, as well as the time within which such changes may be made, is controlled by different principles,<sup>26</sup> such a change being accomplished by revision or modification,<sup>27</sup> as distinguished from amendment.<sup>28</sup> After the lapse of the term,<sup>29</sup> or, in those

of appears to have proceeded from error in the opinion of the court, and not from mere mistake, the case is not within the statute. *Eubank v. Ralls*, 4 Leigh (31 Va.) 308.

[b] "It was not intended to cover errors in the *reasoning* and *conclusion* of the court" (*Shipman v. Fletcher*, 91 Va. 473, 489, 22 S. E. 458), or those "committed by the court in the exercise of its *judicial functions*" (*Lewis v. State*, 10 Ala. App. 31, 64 So. 537).

[c] Error "in the application of the law to the facts, or what is known as a judicial error," cannot be so corrected. *Stringer v. Anderson*, 23 W. Va. 482. See *Pringle v. Dunn*, 39 Wis. 435.

24. *Com. v. Winstons*, 5 Rand. (26 Va.) 546; *Eubank v. Rall's Exr.*, 4 Leigh (31 Va.) 308. See also preceding notes in this subdivision.

[a] **Judicial Error.**—An error or mistake committed by the court in the exercise of its judicial function is a judicial error and cannot be corrected in this manner. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537; *Shipman v. Fletcher*, 91 Va. 473, 489, 22 S. E. 458.

25. *Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607.

[a] Where the defendant was, according to holding of the court and the circumstances as disclosed by the record, entitled to a dismissal in a proceeding in claim and delivery, he was also entitled, as a matter of course, to a judgment directing the property to be returned. "Its failure to do so, it clearly appears, was merely an inadvertance or mistake, and not a *judicial error*." *Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607.

26. *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139. See *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Hotaling v. Marsh*, 14 Abb. Pr. (N. Y.) 161.

See generally the titles "Appeals;" "Certiorari;" "New Trial;" "Re-

view;" "Writ of Error;" and *infra*, XIV, XV, XVI.

[a] "The mistakes here referred to (in the code provision for the correction of mistakes in the judgment) are not judicial errors in rendering judgment; those are to be corrected in another manner." *Hotaling v. Marsh*, 14 Abb. Pr. (N. Y.) 161.

27. *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115; *Culbreth v. Smith*, 124 N. C. 289, 32 S. E. 714.

[a] Amendments are "not allowed as a means of incorporating into a judgment a mere afterthought nor as a means of modifying or enlarging the judgment, so that it shall express something which the court did not do . . ." *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. And see *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220.

[b] Errors of this kind are corrected by "modification" or "alteration" rather than by amendment. *Culbreth v. Smith*, 124 N. C. 289, 32 S. E. 714.

28. **U. S.**—*Northern Bank of Labitut*, 1 Woods 11, 2 Fed. Cas. No. 842. **Cal.**—*Canadian, etc. Co. v. Clarita, etc. Co.*, 140 Cal. 672, 74 Pac. 301; *Brackett v. Banegas*, 99 Cal. 623, 628, 34 Pac. 344; *Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284. **N. Y.**—*Bullard v. Sherwood*, 85 N. Y. 253; *Libby v. Rosekrans*, 55 Barb. 202; *Sheldon v. Williams*, 52 Barb. 183; *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063. See *Maltby-Henley Co. v. Deane*, 57 N. Y. Supp. 457. **N. C.**—*Culbreth v. Smith*, 124 N. C. 289, 32 S. E. 714.

[a] "That judicial errors . . . cannot be thus summarily corrected is equally well settled." *Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284.

29. **U. S.**—*Wetmore v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Jenkins v. Eldredge*, 1 Woodb. & M. 61, 13 Fed. Cas. No. 7,269; *North-ern Bank v. Labitut*, 1 Woods 11, 2



jurisdictions where "terms" have been abolished, as soon as the judgment has, by the rules of practice become final,<sup>30</sup> judicial errors are properly corrected only by a writ of error from or an appeal to a higher tribunal,<sup>31</sup> or by review or rehearing as either may be appropriate.<sup>32</sup>

(II.) **Clerical Errors.**—**General Statement.**—While, as already noticed, judicial errors in a judgment are not subject to correction in the summary manner of amendment,<sup>33</sup> clerical errors may, at any time,<sup>34</sup> subject to certain statutory restriction,<sup>35</sup> be corrected by the court in this manner, in order that its judgment may speak the truth.<sup>36</sup> In-

Fed. Cas. No. 842; *Russell v. United States*, 15 Ct. Cl. 168. **Ga.**—*Richards v. McHan*, 139 Ga. 37, 76 S. E. 382. **Ill.**—*Bill Board Pub. Co. v. McCarahan*, 180 Ill. App. 539; *Uteley v. Cameron*, 87 Ill. App. 71. **Ind.**—*Parsley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. **Ky.** *Com. v. Ratcliff*, 27 Ky. L. Rep. 297, 84 S. W. 1147. **N. Y.**—*Meldon v. Devlin*, 39 App. Div. 581, 57 N. Y. Supp. 670; *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063. See *Ray v. Connor*, 3 Edw. Ch. 478; *Gardner v. Derling*, 2 Edw. Ch. 131; *In re Silliman*, 38 Misc. 226, 77 N. Y. Supp. 267. **N. C.** *Simmons v. Dowd*, 77 N. C. 155. **Tex.** *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Perkins v. Dunlavy*, 61 Tex. 241; *Milam County v. Robertson*, 47 Tex. 222; *Sass v. Hirshfeld*, 23 Tex. Civ. App. 1, 56 S. W. 941. **W. Va.**—*Bank v. Ralphsnnyder*, 54 W. Va. 231, 46 S. E. 206; *Stringer v. Anderson*, 23 W. Va. 482. See *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. **Wis.**—*Van Dresar v. Coyle*, 38 Wis. 672; *Durning v. Burkhardt*, 34 Wis. 585.

See *supra*, XIII, A, 3, a, (II).

[a] That this may also be done by a writ of review see *Barron v. Jackson*, 42 N. H. 419. But see *Johnson v. Atlantic & St. L. Railroad*, 43 N. H. 410.

30. **U. S.**—*Wetmore v. Karriek*, 205 U. S. 141, 27 Supp. Ct. 434, 51 L. ed. 745. **Mass.**—See *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15, 55 N. E. 468. **Minn.**—See *Schloss v. Lennon*, 123 Minn. 420, 144 N. W. 148. **N. Y.** *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, 24 N. E. 932; *Morrison v. Metropolitan R. Co.*, 60 App. Div. 180, 70 N. Y. Supp. 65; *Maltby-Henley Co. v. Deane*, 57 N. Y. Supp. 457. See *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261.

[a] In Minnesota this, for the purposes of this rule at least, is after the time for appeal has elapsed. *Schloss v. Lennon*, 123 Minn. 420, 144 N. W. 148.

See *supra*, XIII, A, 3, a, (III).

31. *Cook v. Wood*, 24 Ill. 295.

See the titles "Appeals;" "Writ of Error;" and *infra*, XVI.

32. **U. S.**—*Russell v. United States*, 15 Ct. Cl. 168. **Cal.**—*Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284. **Ill.**—*Cook v. Wood*, 24 Ill. 295. **N. C.** *Moore v. Hinnest*, 90 N. C. 163. **Tex.** *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605. **Ore.**—See *Hoover v. Hoover*, 39 Ore. 456, 65 Pac. 796.

See *infra*, XVI, also the titles "Rehearing;" "Review."

[a] **Certiorari** is, under some circumstances, the proper remedy. *Simmons v. Dowd*, 77 N. C. 155. See the title "Certiorari."

33. See *supra*, XIII, A, 3, b, (I).

34. See *supra*, XIII, A, 3, a, (II).

35. See generally the statutes.

[a] Under some statutes relief is confined to the grounds enumerated therein (*Girard Trust Co. v. Null*, 97 Neb. 324, 149 N. W. 809) and so where the statute provided for the correction, at a certain time and in certain manner, of errors arising from the "mistake . . . of the clerk" (*Neb. Code Civ. Proc.*, §602; *Rev. St.* 1913, §8207) an error of the court in calculation could not be cured at such time by amendment (*Girard Co. v. Null*, *supra*) although such a mistake is, in many jurisdictions, treated as a "clerical error."

36. **U. S.**—*Fidelity Ins., etc. Co. v. Roanoke Iron Co.*, 84 Fed. 744; *Hicklin v. Marco*, 64 Fed. 609; *Albers v. Whitney*, 1 Story 310, 1 Fed. Cas. No. 137. See *Barnes v. Lee*, 1 Cranch C.

- C. 430, 2 Fed. Cas. No. 1,017. **Ala.** Story Mercantile Co. v. McClellan, 145 Ala. 629, 40 So. 123; Tippins v. Peters, 103 Ala.-196, 15 So. 564; Myers v. Conway & Co., 90 Ala. 109, 7 So. 639; Taylor v. Harwell, 65 Ala. 1; Randolph v. Little, 62 Ala. 396; Russell v. Erwin's Admr., 41 Ala. 292; Moore v. Appleton, 26 Ala. 633; Dobson v. Dickson, 8 Ala. 252; Jordan v. Huntsville Bank, 5 Ala. 284; Dearing v. Smith, 4 Ala. 432; Smyth v. Strader, 9 Port. 446; Moody v. Keener, 9 Port. 252. **Ark.**—Melton v. Railroad Co., 99 Ark. 433, 139 S. W. 289; St. Louis & N. A. R. Co. v. Bratton, 93 Ark. 234, 124 S. W. 752; Portis v. Talbot, 33 Ark. 218; Arrington v. Conrey, 17 Ark. 100. **Cal.** San Francisco v. Brown, 153 Cal. 644, 96 Pac. 281; Canadian, etc. Co. v. Clarita, etc. Co., 140 Cal. 672, 74 Pac. 301; *In re* Willard, 139 Cal. 501, 73 Pac. 240; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Homeseekers' L. Assn. v. Gleeson, 133 Cal. 312, 65 Pac. 617; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Dickey v. Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Jones v. Bullard, 107 Cal. 130, 40 Pac. 108; Alpers v. Shammell, 75 Cal. 590, 17 Pac. 708; Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; Will v. Sinkwitz, 41 Cal. 588; Leviston v. Swan, 33 Cal. 480; De Castro v. Richardson, 25 Cal. 49; Swain v. Naglee, 19 Cal. 127; Morrison v. Dapman, 3 Cal. 255; Des Granges v. Crall, 27 Cal. App. 313, 149 Pac. 777; Forrester v. Lawler, 14 Cal. App. 171, 111 Pac. 284. **-Colo.** Seeley v. Taylor, 17 Colo. 70, 28 Pac. 461, 723; Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324; Wolfey v. Lebanon Co., 3 Colo. 296; Doane v. Glenn, 1 Colo. 454; Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193. See Bates v. Hall, 44 Colo. 360, 98 Pac. 3. **Conn.** Brown v. Clark, 81 Conn. 562, 71 Atl. 727; Pelton v. Goldberg, 81 Conn. 280, 70 Atl. 1020. **Fla.**—McGourin v. De Funiak Spgs., 52 Fla. 556, 42 So. 187. **Ga.**—Williams v. Merritt, 109 Ga. 217, 34 S. E. 1012; Pollard v. King, 62 Ga. 103; McLendon v. Frost, 59 Ga. 350; Castellaw v. Guilmartin, 58 Ga. 305; Pryor v. Leonard, 57 Ga. 136; Saffold v. Wade, 56 Ga. 174; Lenoard v. Collier, 53 Ga. 387. **Ill.**—Consolidated, etc. Co. v. Oeltjen, 189 Ill. 85, 59 N. E. 600; Newman v. Chicago, 153 Ill. 469, 38 N. E. 1053; Cairo & St. Louis Railroad Co. v. Holbrook, 72 Ill. 419; Lill v. Stookey, 72 Ill. 495; Smith v. Wilson, 26 Ill. 186; McCormick v. Higgins, 190 Ill. App. 241; De Wolf v. Springer, 190 Ill. App. 116; Goodykoontz v. Kelly, 185 Ill. App. 165; Bledsoe v. Ziegenhein Co., 161 Ill. App. 146; Murphy v. McMahon, 131 Ill. App. 384; Metz v. McAvoy Brew. Co., 98 Ill. App. 584, 592; Heintz v. Pratt, 54 Ill. App. 616; Littlefield v. Schmoltdt, 24 Ill. App. 624; Ives v. Hulce, 17 Ill. App. 30; Rauh v. Ritchie, 1 Ill. App. 188. **Ind.**—Ryon v. Thomas, 104 Ind. 59, 3 N. E. 653; Sherman v. Nixon, 37 Ind. 153; Jenkins v. Long, 23 Ind. 460; Silner v. Butterfield, 2 Ind. 24; Brittenhaus v. Robinson, 22 Ind. App. 536, 54 N. E. 133; Stratton v. Lockhart, 1 Ind. App. 380, 27 N. E. 715. **Ia.**—Code 1897, §4091; Greazel v. Price, 135 Iowa 364, 112 N. W. 827; Goldsmith v. Clausen, 14 Iowa 278; Hurley v. Dubuque G. L. & C. Co., 8 Iowa 274. See Thompson v. Association, 136 Iowa 557, 114 N. W. 31. **Kan.**—Cubitt v. Cubitt, 74 Kan. 353, 86 Pac. 475; Morris v. Bunyan, 58 Kan. 210, 48 Pac. 864; Clevenger v. Hansen, 44 Kan. 182, 24 Pac. 61; Sumner v. Cook, 12 Kan. 162; Birmingham v. Leonhardt, 2 Kan. App. 513, 43 Pac. 996. **Ky.**—Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678; Scroggins v. Scroggins, 1 J. J. Marsh. 362; Johnson v. Bank of Kentucky, 2 Duval 521; Oldham v. Brannon, 2 Mete. 302; Hurt v. Chess, 33 Ky. L. Rep. 767, 111 S. W. 285; Brashears, 33 Ky. L. Rep. 233, 110 S. W. 303; Lindsey v. Brawner, 29 Ky. L. Rep. 1236, 97 S. W. 1; United States Fidelity & Guar. Co. v. Boyd, 29 Ky. L. Rep. 598, 94 S. W. 35; Seiler v. Bank, 9 Ky. L. Rep. 497, 5 S. W. 536. **La.**—State v. Williams Cypress Co., 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290; Mullan v. Creditors, 39 La. Ann. 397, 2 So. 45; Hale v. City of New Orleans, 18 La. Ann. 353. **Me.**—Thomas v. Thomas, 98 Me. 184, 56 Atl. 651; Bean v. Ayers, 70 Me. 421; Lewis v. Ross, 37 Me. 230, 59 Am. Dec. 49; Colby v. Moody, 19 Me. 111; Inhab. of Limerick, Petitioners, 18 Me. 183; Hall v. Williams, 10 Me. 278. **Md.**—Ecker v. Bank, 64 Md. 292, 1 Atl. 849; Parkhurst v. Citizens' Nat. Bank, 61 Md. 254. **Mass.**—Fay v. Wenzell, 8 Cush. 315; Bacon v. Lincoln, 2 Cush. 124; Clark v. Lamb, 8 Pick. 415, 19 Am. Dec. 332. **Mich.**—Kunze v. Bank, 130 Mich. 688, 90 N. W. 668; Souvais v. Leavitt, 53 Mich. 577, 19 N. W. 261;

- Emery v. Whitwell, 6 Mich. 174. **Minn.**—Schloss v. Lennon, 123 Minn. 120, 144 N. W. 148; State v. Lindberg, 120 Minn. 147, 139 N. W. 286; Northwestern, etc. Co. v. Gippe, 92 Minn. 36, 99 N. W. 364; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Nell v. Dayton, 47 Minn. 257, 49 N. W. 981; McClure v. Bruck, 43 Minn. 305, 45 N. W. 438. **Mo.**—Davison v. Davison, 207 Mo. 702, 106 S. W. 1; Stevenson v. Black, 168 Mo. 549, 68 S. W. 909; Wand v. Ryan, 166 Mo. 646, 65 S. W. 1025; Nave v. Todd, 83 Mo. 601; State v. Primm, 61 Mo. 166; Robertson v. Neal, 60 Mo. 579; Hanley v. Dewes, 1 Mo. 16; Hickman v. Barnes, 1 Mo. 156; Martin v. Brown, 162 Mo. App. 223, 144 S. W. 1115; Kreisel v. Snavelly, 135 Mo. App. 155, 115 S. W. 1059; Tait v. Loocke, 130 Mo. App. 273, 109 S. W. 105; Jackson v. Railroad Co., 89 Mo. App. 104. **Mont.**—Kendall v. O'Neal, 16 Mont. 303, 40 Pac. 599; Barber v. Briscoe, 9 Mont. 341, 23 Pac. 726. **Neb.**—Brownlee v. Davidson, 28 Neb. 785, 45 N. W. 51; Nuckolls v. Irwin, 2 Neb. 60, 69; Colby v. Maw, 1 (Unof.) 478, 95 N. W. 677. **Nev.**—Breckenridge v. Lamb, 34 Nev. 275, 118 Pac. 687, Ann. Cas. 1914B, 871. **N. H.**—State v. Dowd, 43 N. H. 454. **N. J.**—Probascio v. Probascio, 3 N. J. L. 565; Day v. Argus Printing Co., 47 N. J. Eq. 594, 22 Atl. 1056. **N. Y.**—Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423; Roberts & Co. v. Buckley, 145 N. Y. 215, 234, 39 N. E. 966; Bohlen v. M. E. R. Co., 121 N. Y. 546, 24 N. E. 932; Produce Bank v. Morton, 67 N. Y. 199; Mitchell v. Van Buren, 27 N. Y. 300; Union Bank v. Bush, 36 N. Y. 631; Rockwell v. Carpenter, 25 Hun 529; Daly v. Mathews, 20 How. Pr. 267; Hirshbach v. Ketchum, 79 App. Div. 561, 80 N. Y. Supp. 113; Deutermann v. Pollock, 30 App. Div. 278, 51 N. Y. Supp. 928; Strodl v. Parish-Stafford Co., 65 Misc. 625, 121 N. Y. Supp. 93; Heath v. Banking Co., 84 Hun 302, 32 N. Y. Supp. 454; Jones v. Newton, 19 N. Y. Supp. 786; Gasz v. Strick, 3 N. Y. Supp. 830. **N. C.**—Harrison v. Harrison, 114 N. C. 219, 19 S. E. 232; Beam v. Bridgers, 111 N. C. 269, 16 S. E. 391; Wall v. Covington, 83 N. C. 144; Brady v. Beason, 28 N. C. 425. See State v. King, 27 N. C. 203. **Ohio.**—State v. Beam, 3 Ohio St. 508; Hammer v. McConnell, 2 Ohio 31. See Hollister v. Dist. Court, 8 Ohio St. 201, 70 Am. Dec. 100. **Okla.**—Bristow v. Carrigan, 37 Okla. 730, 132 Pac. 1106. **Ore.**—State v. Donahue, 75 Ore. 409, 144 Pac. 755, 147 Pac. 548. **Pa.**—*In re Pocono Twp.*, 22 Pa. Co. Ct. 105. **S. C.**—Brown v. Rogers, 80 S. C. 289, 61 S. E. 440; Gregory v. Perry, 71 S. C. 246, 50 S. E. 787; Knox v. Moore, 41 S. C. 355, 19 S. E. 683; Chafee v. Rainey, 21 S. C. 11, 17. See Carroll v. Tompkins, 14 S. C. 223. **S. D.**—Carney v. Twitshell, 22 S. D. 521, 118 N. W. 1030; Sioux Falls El. Light, etc. Co. v. Sioux Falls, 21 S. D. 18, 108 N. W. 488. See Sundback v. Griffith, 7 S. D. 109, 63 N. W. 544. **Tenn.**—Rickman v. Rickman, 6 La. 483. **Tex.**—Coleman v. Zapp, 105 Tex. 491, 151 S. W. 1040; Chambers v. Hodges, 3 Tex. 517; Taylor v. Doom, 43 Tex. Civ. App. 59, 95 S. W. 4. **Utah.**—Ryan-Beam Cattle Co. v. Slaughter, 6 Utah 278, 21 Pac. 997. **Va.**—Saunders v. Lipscomb, 90 Va. 647, 19 S. E. 450; Digges v. Dunn, 1 Munf. (15 Va.) 56. **Wash.**—Sivyer v. Lawyer, 25 Wash. 360, 65 Pac. 529; Seattle & Mont. Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567. **W. Va.**—See Triplett v. Lake, 43 W. Va. 428, 27 S. E. 363. **Wis.**—Frost v. Meyer, 137 Wis. 255, 118 N. W. 811; Bostwick v. Van Vleck, 106 Wis. 387, 82 N. W. 302; State v. Delafeld, 69 Wis. 264, 34 N. W. 123; Wyman v. Buckstaff, 24 Wis. 477. **Eng.**—Tucker v. New Brunswick, etc. Co., 44 L. Rep. Ch. Div. 249; Hatton v. Harris, 67 L. T. 722.
- [a] "The right of a court to have its judgments entered as they are given, and where, through clerical misprisions the entries are inaccurately made, to have them corrected so as to express the truth, is too well established to require a citation of authorities. The judgment of the court is that which it pronounces. The record entry is not itself the judgment, but rather the evidence of the judgment, or its embodiment in visible and permanent form; and the court, in virtue of the same authority by which it pronounces its judgment, can cause the record to express it as it was given, or change an inaccurate record into a true one." Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193.
- [b] A judgment which, according to the records, had been rendered prematurely upon constructive service, but which, in fact, had been rendered on personal service, may be amended so as to conform to the truth. Seeley



deed this is expressly sanctioned by statute in many states.<sup>37</sup> This power of the court to correct by amendment errors arising from clerical inadvertence or mistake is distinct from the statutory power to relieve against excusable mistake of the parties.<sup>38</sup> The "mistakes" contemplated by those last-mentioned statutes are such as deprive a party of his day in court, *i. e.*, prevent him from presenting his cause of action or defense.<sup>39</sup> The term "clerical errors" as here used, includes any mistake into which judicial reasoning or determination did not enter and but for which the judgment would not have been rendered in the precise manner in which it is found.<sup>40</sup> Thus where a judg-

*v. Taylor*, 17 Colo. 70, 28 Pac. 461, 723.

[c] Where one judgment against the defendant had already been entered the act of the clerk in entering another judgment against him amounted to a mere clerical error which might have been properly corrected by amendment. *Green v. Commonwealth*, 152 Ky. 239, 153 S. W. 242.

[d] Judgment Against Sureties.—In Arkansas, under the statute, when a decree for money, stayed by an appeal bond, is affirmed, since a decree goes against the sureties the appeal bond as a matter of course, if the clerk omits to enter the decree against the sureties at the time of entering the decree of affirmance against the appellant, it may afterwards be entered *nunc pro tunc* (*Rogers v. Brooks*, 31 Ark. 194), and the same doctrine has been held to apply to sureties in criminal cases. *Shaul v. Duprey*, 48 Ark. 331, 3 S. W. 366.

[e] Fraudulent alteration or defacing of a judgment may be reviewed in the exercise of this same power. *Hollister v. District Court*, 8 Ohio St. 201, 70 Am. Dec. 100.

[f] Errors in descriptions of property may be thus corrected. Ala.—*Taylor v. Harwell*, 65 Ala. 1. Idaho.—*Wilcox v. Wells*, 5 Idaho 786, 51 Pac. 985. Mo.—*Elliott v. Buffington*, 149 Mo. 663, 51 S. W. 408; *Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70; *Bishop v. Seal*, 92 Mo. App. 167.

[g] Errors in Dates.—U. S.—*Fidelity Ins., etc. Co. v. Roanoke Iron Co.*, 84 Fed. 752. Ga.—*Girardey v. Bessman*, 62 Ga. 654. Ill.—*Woodward v. People*, 56 Ill. App. 45. Neb.—*Grimes v. Grosjean*, 24 Neb. 700, 40 N. W. 137. N. H.—*Carlton v. Patterson*, 29 N. H. 580.

[h] The alternative clause in replevin judgment may be supplied when

inadvertently omitted. *Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607; *Brittenham v. Robinson*, 22 Ind. App. 536, 54 N. E. 133.

37. Ala.—Code, §3334; *Benford v. Daniels*, 13 Ala. 667; *Hood v. Bank of Mobile*, 9 Ala. 335; *Dearing v. Smith*, 4 Ala. 432; *Armstrong v. Robertson*, 2 Ala. 164; *Dunn v. Tillotson*, 9 Port. 272. Ind.—*Cramer v. Illinois Commercial Men's Assn.*, 260 Ill. 516, 103 N. E. 459. Ky.—*Oldham v. Brannon*, 2 Mete. 302. La.—*State v. Williams, etc. Co.*, 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290; involving art. 547 Code Pr. Miss.—Code 1906, §1016. Neb.—*Girard Trust Co. v. Null*, 97 Neb. 324, 149 N. W. 809 (involving Code Civ. Proc., §602; Rev. St. 1913, §8207); *Brandt v. Albers*, 6 Neb. 504. S. C.—Code Civ. Proc., §196. Tenn.—*Rickman v. Rickman*, 6 Lea 483; *Tunstall v. Schoenpflug*, 4 Baxt. 43.

38. *Strickland v. Strickland*, 95 N. C. 471. But see *Bank of Newburgh v. Seymour*, 14 Johns. (N. Y.) 219, where an amendment of the judgment was permitted because of a mistake made by the clerk of one of the attorneys.

39. As to relief from excusable mistake and inadvertence see *infra*, XIV.

40. Ala.—*Ford v. Tinchant*, 49 Ala. 567; *City of Huntsville v. Goodenrath* (Ala. App.), 68 So. 676. Cal.—*Levison v. Swan*, 33 Cal. 480. Minn.—*Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84. Mont.—*Power v. Turner*, 37 Mont. 521, 97 Pac. 950. N. Y.—*Hexter Stable Co. v. Taxicab Co.*, 114 N. Y. Supp. 859. N. C.—*Wolfe v. Davis*, 74 N. C. 597. Va.—*Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452.

See *supra*, XIII, A, 3, b, (I) and (II).

[a] Clerical errors (1) are not those alone which the clerk makes. Ala.—*Ford v. Tinchant*, 49 Ala. 567. Cal.

ment inadvertently and incoherently recites that judgment was had "upon the merits,"<sup>43</sup> or upon "the issues in the action,"<sup>42</sup> or "against the defendant" when, in truth, it was "against the defendants,"<sup>44</sup> it is proper to cure the defect by amendment. In short, wherever a judgment has been inaccurately entered, an amendment is the proper mode of correction.<sup>44</sup>

*Will v. Sinkwitz*, 41 Cal. 588; *Leese v. Clark*, 28 Cal. 26. **Ill.**—*Ives v. Hulce*, 17 Ill. App. 30. **Ky.**—*Johnson v. Bank of Ky.*, 2 Dav. 521. **Me.**—*Hall v. Williams*, 10 Me. 278, 290. **N. Y.**—*Hunt v. Grant*, 19 Wend. 90. **Va.**—*Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458. (2) They include all such, being matters of record, as intervene in the progress of a cause (*Moses v. Eagle, etc. Mfg. Co.*, 68 Ga. 241), (3) whether committed by the court (*Ala. Taylor v. Harwell*, 65 Ala. 1; *Sherry v. Priest*, 57 Ala. 410; *Ford v. Tinchant*, 49 Ala. 567. **Cal.**—*In re Estate of Willard*, 139 Cal. 501, 73 Pac. 240. **Ga.**—*Moses v. Eagle, etc. Mfg. Co.*, 68 Ga. 241. **Idaho.**—*Betts v. Butler*, 1 Idaho 185. **Ill.**—*Ives v. Hulce*, 17 Ill. App. 30. **Ky.**—*Blair v. Russell*, 14 Bush 412; *Johnson v. Bank of Kentucky*, 2 Daval 521; *Young v. Sadler*, 15 Ky. L. Rep. 531, 24 S. W. 877. **Minn.**—*Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533. **Ohio.**—*See Elliot v. Plator*, 43 Ohio St. 198, 1 N. E. 222. **R. I.**—*Trott v. Wheaton*, 5 R. I. 353. **Va.**—*Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458), (4) or counsel (**U. S.**—*Ex parte Marks*, 136 Fed. 168, 69 C. C. A. 80. **Ala.**—*Ford v. Tinchant*, 49 Ala. 567. **Ga.**—*Pollard v. King*, 62 Ga. 103; *Lenoard v. Collier*, 53 Ga. 387. **Me.**—*Hall v. Williams*, 10 Me. 278, 290. **N. H.**—*See Lighton v. Lord*, 29 N. H. 237. **N. Y.**—*Hunt v. Grant*, 19 Wend. 90. **N. C.**—*Brooks v. Stephens*, 100 N. C. 297, 6 S. E. 81), (5) to which judicial sanction or discretion cannot reasonably be said to have been applied. *Ford v. Tinchant*, 49 Ala. 567; *Shipman v. Fletcher*, 91 Va. 473, 489, 22 S. E. 458; *Eubank v. Ralls*, 4 Leigh (31 Va.) 308.

Compare, *Ostrowski v. Wayne Circuit Judge*, 170 Mich. 563, 136 N. W. 442, where an amendment was refused when the judgment was entered exactly as presented by counsel for the successful litigant.

[a] "The test to be applied in determining whether an error in a judg-

ment is of a judicial character, or a mere clerical mistake which may be corrected in the court where it was made at any time, . . . is whether the error relates to something that the trial court erroneously omitted to pass upon or considered and passed upon erroneously, or a mere omission to preserve the record, correctly in all respects, the actual decision of the court, which in itself was free from error." *Bostwick v. Van Vleck*, 106 Wis. 387, 82 N. W. 302.

[b] "A clerical error, as its designation imports, is an error of a clerk or a subordinate officer in transcribing or entering an official proceeding ordered by another." *Marsh v. Nichols & Co.*, 128 U. S. 605, 9 Sup. Ct. 168, 32 L. ed. 538.

[c] "The statute does not, . . . confine the power to amend, to mistakes, etc., made by the clerk only; but, extends to those also made by the court, if they be not errors in the judgment of the court." *Com. v. Winstons*, 5 Rand. (26 Va.) 546.

[d] Omissions are included in the term "clerical errors." *Schoonover v. Reed*, 65 Ind. 313; *Miller v. Royce*, 60 Ind. 189. See *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; *Morris v. Payton*, 29 W. Va. 201, 11 S. E. 954.

41. *Card v. Meineke*, 70 Hun 382, 24 N. Y. Supp. 375; *Petrie v. Hamilton College*, 36 N. Y. Supp. 636; *Martin v. Bronsveld*, 29 N. Y. Supp. 1119; *Mannion v. Brd'v. & Seventh Ave. R. Co.*, 13 N. Y. Supp. 759; *Riggs v. Chapin*, 7 N. Y. Supp. 765; *Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44.

[a] A judgment may be amended by adding that a dismissal was "upon the merits," where such was the case and the judgment does not so state. *Ruegamer v. Cieslinski*, 104 App. Div. 135, 93 N. Y. Supp. 599.

42. *Taylor v. Taylor*, 7 N. Y. Supp. 880.

43. *Pelton v. Goldberg*, 81 Conn. 280, 70 Atl. 1020; *Saffold v. Wade*, 56 Ga. 174.

44. *Olcott v. Kohlsaat*, 8 N. Y. Supp. 117.

(III.) Names of Parties. — (A.) ADDING, STRIKING OUT AND CORRECTING SPELLING OF. — That it is a proper exercise of this power to add or strike out names of parties inadvertently and improperly omitted or inserted,<sup>45</sup> or to correct clerical errors in names properly appearing in the judgment, has long been recognized,<sup>46</sup> having, in fact, been provided for by express statutory enactments at an early date in some

[a] **Irregularities as to form** are properly corrected by amendment. *Hartley v. White*, 94 Pa. 31.

45. **Ala.**—*Brown v. Barnes*, 93 Ala. 58, 9 So. 455; *Russell v. Erwin's Admr.*, 41 Ala. 292; *Savage v. Walshe*, 26 Ala. 619; *English v. Brown*, 9 Ala. 504; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Hood v. Bank of Mobile*, 9 Ala. 335. **Ark.**—*Shaul v. Duprey*, 48 Ark. 331, 3 S. W. 366. **Cal.**—*Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708; *Mulliken v. Hull*, 5 Cal. 245. **Colo.**—*Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193. **Ga.**—*Rucker v. Williams*, 129 Ga. 828, 60 S. E. 155; *Bryan v. Averett*, 21 Ga. 401, 68 Am. Dec. 464. **Idaho.**—*Gaffney v. Hoyt*, 2 Idaho 199, 10 Pac. 34. **Ill.**—*Heintz v. Pratt*, 54 Ill. App. 616. **Ind.**—*Bales v. Brown*, 57 Ind. 282; *Lemen v. Young*, 14 Ind. 3. **Kan.**—*Chapman v. Western Irr. Co.*, 75 Kan. 765, 90 Pac. 284. **Miss.**—*Forbes v. Navra*, 63 Miss. 1. **Mo.**—*Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Neenan v. St. Joseph*, 126 Mo. 89, 28 S. W. 963; *State v. Tate*, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; *Turner v. Christy*, 50 Mo. 145; *Bergen v. Bolten*, 10 Mo. 658; *City of California v. Harlan*, 75 Mo. App. 506; *Rumsey Co. v. Baker*, 35 Mo. App. 217. **N. Y.**—*Mingay v. Lackey*, 142 N. Y. 449, 37 N. E. 471; *Produce Bank of N. Y. v. Morton*, 67 N. Y. 199; *Sherman v. Fream*, 8 Abb. Pr. 33; *Nathan Mfg. Co. v. Smelting Co.*, 130 App. Div. 518, 114 N. Y. Supp. 1037. **N. C.**—*Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *People's Nat. Bank v. McArthur*, 82 N. C. 107; *Ashe v. Streater*, 53 N. C. 256. **Ohio.**—*Hammer v. McConnel*, 2 Ohio 31. **Pa.**—*Young v. Young*, 88 Pa. 422. **S. C.**—*See Carroll v. Tompkins*, 14 S. C. 223. **Tex.**—*Henderson v. Banks*, 70 Tex. 398, 7 S. W. 815; *Whittaker v. Gee*, 63 Tex. 435; *Frerich v. Hering* (Tex. Civ. App.), 147 S. W. 1164. See *Sugg v. Thornton*, 73 Tex. 666, 9 S. W. 145; *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798; *Birdsong v. Allen* (Tex. Civ. App.), 166 S. W. 1177; *Benge v.*

*Panhandle Land Co.* (Tex. Civ. App.), 145 S. W. 318.

[a] Names of parties (1) which are not fully (*Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429), (2) or properly stated are amendable by reference to the papers in the cause (*Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43), (3) and also, where a judgment has been rendered against A. and B. while the declaration was against A. alone, such judgment is amendable at a subsequent term, by striking out the name of the defendant who was not before the court. *Hammer v. McConnel*, 2 Ohio 31.

[b] A judgment erroneously entered against one only of several defendants may be regarded as the result of a clerical error and amended. *Russell v. Erwin's Admr.*, 41 Ala. 292, 301.

[c] But a name cannot be struck out to correct a judicial error. *Green v. Worth Bros. Co.*, 223 Pa. 604, 72 Atl. 1064.

[d] Where one of several defendants made default and a judgment for the plaintiff did not recite that the same was also against the defaulting defendant, this error is properly cured by amendment. *Birdsong v. Allen* (Tex. Civ. App.), 166 S. W. 1177.

[e] The theory that a judgment is an entirety is no longer looked upon as a bar to amending or correcting a judgment as to one of several parties, unless substantial rights of the others would be injuriously affected thereby. *Hood v. Bank of Mobile*, 9 Ala. 335; *Neenan v. City of St. Joseph*, 126 Mo. 89, 28 S. W. 963. And *Powell v. Banks*, 146 Mo. 620, 644, 48 S. W. 664.

46. **Ala.**—*Floyd v. Lamar* (Ala. App.), 69 So. 227. **Ga.**—*Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771. **Kan.**—*Southern Kan. Ry. Co. v. Brown*, 44 Kan. 681, 24 Pac. 1100.

[a] In Alabama clerical mistakes in the names of the parties are corrected by the court by reference to other parts of the record, without a motion



states.<sup>47</sup> At the same time, a judgment, to be amendable, must not be void,<sup>48</sup> and so a judgment against a party who was sued by a wrong name and who was neither served with process nor made any appearance in the action, being entirely void, cannot be corrected in any respect by an amendment,<sup>49</sup> and it would be an obvious abuse of this power to so amend a judgment as to include, as parties defendant, strangers to the action.<sup>50</sup>

(B.) PERSONAL AND REPRESENTATIVE CAPACITY. — Whenever, through clerical inadvertence, a judgment has been entered against a party in his individual capacity when it should have been against him in a representative capacity, or vice versa,<sup>51</sup> the judgment may be corrected in this respect by an amendment.

(IV.) Omission. — Under the power to correct clerical errors in the judgment the court may supply omissions therein,<sup>52</sup> but the omission,

to amend. *Floyd v. Lamar* (Ala. App.), 69 So. 227.

[b] **A Mistake in the Name Is Not a Defect of Form.**—*Albers v. Whitney*, 1 Story 310, 1 Fed. Cas. No. 137, under §32, Judiciary Act of 1789, c. 20 (1 St. at L. 91, U. S. Comp. St., 1901, pp. 696, 714).

47. *Sherman v. Fream*, 8 Abb. Pr. (N. Y.) 33. See also art. 1357, Rev. St. 1895, Texas, and the statutes of the various states.

48. See *infra*, XIII, A, 3, c, (V).

49. *Schoellkopf v. Ohmeis*, 11 Misc. 253, 32 N. Y. Supp. 736.

50. *Ga.*—*Giddens v. Alexander*, 127 Ga. 734, 56 S. E. 1014. *Ill.*—*Northwest Land & Trust Co. v. Lowman*, 132 Ill. App. 454. *Pa.*—*Young v. Young*, 88 Pa. 422. *Wash.*—*Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144.

[a] The court must not in striking a name from a judgment in effect correct a judicial error or alter the judgment in a material matter. *Baragwanath v. Wilson*, 4 Ill. App. 80.

51. *Ala.*—*Garner v. Garner*, 107 Ala. 242, 18 So. 169; *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Sellers v. Smith*, 11 Ala. 264; *Yarborough's Exr. v. Scott*, 5 Ala. 221. *Ark.*—*Crane v. Crane*, 51 Ark. 287, 11 S. W. 1. *Cal.*—*Leonis v. Leffingwell*, 126 Cal. 369, 58 Pac. 940. *Compare*, *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561. *Fla.*—*Adams v. Re Qua*, 22 Fla. 250, 1 Am. St. Rep. 191. *Ga.*—*Lenoard v. Collier*, 53 Ga. 387. *Ky.*—*Speed v. Hann*, 1 Mon. 16, 15 Am. Dec. 78. *Me.*—*West v. Jordan*, 62 Me. 484. *Mo.*—*Martin v. Brown* (Mo. App.), 144 S. W. 115. *N. C.*—*Davis v. Coffee Co.*,

152 N. C. 763, 67 S. E. 922. *Pa.*—*Aycinena v. Peries*, 2 Pa. 286. *Tenn.*—*Conn v. Scruggs*, 5 Baxt. 567. *Tex.*—*Sass v. Hirshfeld*, 23 Tex. Civ. App. 1, 56 S. W. 941. *Compare*, *Gilbert v. Hancock*, 2 Tex. App. Civ. Cas., §379. *Wis.*—*Wyman v. Buckstaff*, 24 Wis. 477.

[a] A judgment is properly amended to show that it is against the members of a firm instead of a corporation. *Davis v. Coffee Co.*, 152 N. C. 763, 67 S. E. 922.

52. *Ala.*—*Gatchell v. Foster*, 94 Ala. 622, 10 So. 434; *Browder v. Faulkner*, 82 Ala. 257, 3 So. 30. *Ark.*—*Melton v. St. Louis, etc. Co.*, 99 Ark. 433, 139 S. W. 289; *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1. See *Bomer v. Jones*, 140 S. W. 22. *Cal.*—See *Estate of Willard*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554. *Colo.*—*Hittson v. Davenport*, 4 Colo. 169. *Conn.*—*Dunn's Appeal*, 81 Conn. 127, 70 Atl. 703. *Ga.*—*Pollard v. King*, 62 Ga. 103; *Woolfolk v. Gunn*, 45 Ga. 117. *Ill.*—*Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *Gebhard v. Brewers Malting Co.*, 185 Ill. App. 254. *Ia.*—*Thorpe v. Platt*, 34 Iowa 314; *Buckwalter v. Craig*, 24 Iowa 215; *Lind v. Adams*, 10 Iowa 398, 77 Am. Dec. 123. *Kan.*—*Bank v. Stevenson*, 65 Kan. 816, 70 Pac. 865; *Sumner v. Cook*, 12 Kan. 162. *La.*—*State v. Williams, etc. Co.*, 132 La. 949, 61 So. 988, Ann. Cas. 1914D, 1290. *Mich.*—*Salter v. Sutherland*, 125 Mich. 662, 85 N. W. 112. *Mo.*—*Fitzmaurice v. Turney*, 214 Mo. 610, 114 S. W. 504; *Evans v. Fisher*, 26 Mo. App. 541. *Mont.*—*Kendall v. O'Neal*, 16 Mont. 303, 40 Pac. 599. *Neb.*—*State v. Moran*, 24 Neb. 103, 38

to be the proper subject of an amendment, must be of some matter or provision which was intended and understood to be a part of the judgment, and not a mere afterthought,<sup>53</sup> but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk.<sup>54</sup> Thus an omission of the clerk to enter a judgment of dismissal for want of prosecution may be corrected by amendment.<sup>55</sup>

(V.) **Recitals as to Process, Service and Appearance.** — If the judgment, through clerical inadvertence, contains erroneous recitals as to the issuance of process, or the service thereof, or the appearance of the party thereunder this may be corrected by amendment.<sup>56</sup>

(VI.) **As to Amount and Character of Relief Obtained.** — (A.) **GENERAL STATEMENT.** — This power of the courts may also be invoked to remedy such matters as the failure of the clerk to have the judgment recite the true amount thereof,<sup>57</sup> or any enlargement or abridgement of the

N. W. 29. **N. Y.**—*Galligan v. Galligan*, 73 App. Div. 71, 76 N. Y. Supp. 786; *Strodl v. Farish-Stafford Co.*, 65 Misc. 625, 121 N. Y. Supp. 93; *Martin v. Bronsveld*, 29 N. Y. Supp. 1119. **N. C.**—*Alexander v. Robinson*, 85 N. C. 275; *Freshwater v. Baker*, 52 N. C. 404; *Gal-loway v. McKeithen*, 27 N. C. 12, 42 Am. Dec. 153. **Ohio.**—*Nye v. Stillwell*, etc. Co., 12 Ohio Cir. Ct. 40. **Okla.**—*Bristow v. Carrigar*, 37 Okla. 730, 132 Pac. 1106. **Ore.**—*Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769.

[a] The power of the court to amend its judgments "extend to all omissions to enter the judgment pronounced by the court." *Browder v. Faulkner*, 82 Ala. 257, 3 So. 30.

53. **Ala.**—*Robertson v. King*, 120 Ala. 459, 24 So. 929. **Ark.**—*Liddell v. Landau*, 87 Ark. 438, 112 S. W. 1085. **Ga.**—*Rucker v. Williams*, 129 Ga. 828, 60 S. E. 155; *Branch v. Carswell*, 66 Ga. 254. **Ill.**—*Forquer v. Forquer*, 19 Ill. 67. **Me.**—*Inhab. of Limerick*, Petitioners, 18 Me. 183. **Md.**—*Montgomery v. Murphy*, 19 Md. 576, 81 Am. Dec. 652. **N. Y.**—*Nathan Mfg. Co. v. Smelting Co.*, 130 App. Div. 518, 114 N. Y. Supp. 1037. **Ore.**—*Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769. **Tex.**—*Hamilton v. Joachim* (Tex. Civ. App.), 160 S. W. 645; *Frerich v. Hering* (Tex. Civ. App.), 147 S. W. 1164.

[a] "If . . . the proposed addition is a mere afterthought and formed no part of the judgment originally intended and pronounced, it cannot be brought in by way of amendment." *Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769.

54. *Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769.

55. *State v. Goodrich*, 159 Mo. App. 422, 140 S. W. 629.

56. **Ala.**—*Seymour v. Harrow Co.*, 81 Ala. 250, 1 So. 45. **Colo.**—*Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193. **Me.**—*Smith v. Wood*, 48 Me. 252. **Mass.**—*Merrill v. Kaulback*, 158 Mass. 328, 33 N. E. 515. **N. D.**—*Mills v. Howland*, 2 N. D. 30, 49 N. W. 413.

[a] A judgment which, according to the records, had been rendered prematurely upon constructive service, but which, in fact, had been rendered on personal service, may be amended so as to conform to the truth. *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193.

57. **U. S.**—*United States v. Frearson*, 5 Cranch C. C. 95, 25 Fed. Cas. No. 15,081. **Ala.**—*McGowan v. Simmons*, 185 Ala. 310, 64 So. 569; *Gatchell v. Foster*, 94 Ala. 622, 10 So. 434; *Sherry v. Priest*, 57 Ala. 410; *Modawell v. Hudson*, 57 Ala. 75; *Drane v. King*, 21 Ala. 556; *Burt v. Hughes*, 11 Ala. 571; *Smith v. Robinson*, 11 Ala. 270. **Ark.**—*Powhatan Zinc Co. v. Hill*, 98 Ark. 519, 136 S. W. 669; *Arrington v. Conrey*, 17 Ark. 100. **Cal.**—*Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708. **Colo.**—*Kindel v. Beck Lith. Co.*, 19 Colo. 310, 35 Pac. 538; *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324. **Del.**—*State v. Walker*, 3 Harr. 502. **Ga.**—*Alexander v. Troutman*, 1 Ga. 469. **Ill.**—*Elston v. Dewes*, 28 Ill. 436; *O'Connor v. Mullan*, 11 Ill. 57. See *Luckey v. Yoeman*, 141 Ill. App. 332. **Ind.**—*Daniels v. McGinnis*, 97 Ind. 549; *Mitchell v. Lincoln*, 78 Ind. 531; *Miller v. Royce*, 60 Ind. 189; *Latta v. Griffith*, 57 Ind. 329; *Sherman v. Nixon*, 37 Ind. 153; *Pritchard*

scope or operation of the judgment.<sup>58</sup> These errors must, however, be clerical, and not judicial, in their character, to be remedied by amendment.<sup>59</sup> Thus, a motion to amend may not be urged upon the ground that the amount of the judgment was not justified by the evidence; this would call upon the court to review its prior judicial determination of that question.<sup>60</sup>

(B.) As to Costs. — If the court, in rendering judgment, failed to make any provision for costs, this error, since it is a judicial one, cannot be remedied, at a subsequent term, by amendment.<sup>61</sup> However, if the judgment, through a purely clerical error or omission does

*v. Mines*, 56 Ind. App. 671, 106 N. E. 411. **Kan.**—*Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997; *Clevenger v. Hansen*, 44 Kan. 182, 24 Pac. 61. **Ky.** *Emison v. Walker*, 17 Ky. L. Rep. 238, 31 S. W. 461. **La.**—*State v. Cypress Co.*, 132 La. 949, 61 So. 988; *Goldman v. Goldman*, 47 La. Ann. 1463, 17 So. 881; *Hale v. City of New Orleans*, 18 La. Ann. 353. **Me.**—*White v. Blake*, 74 Me. 489. **Mass.**—*Bacon v. Lincoln*, 2 Cush. 124. **Mich.**—*Lyman v. Becannon*, 29 Mich. 466; *Emery v. Whitwell*, 6 Mich. 474. **Minn.**—*Clements v. Utley*, 91 Minn. 352, 98 N. W. 188; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533. **Nev.**—*Howard v. Richards*, 2 Nev. 128. **N. Y.**—*Roberts & Co. v. Buckley*, 145 N. Y. 215, 39 N. E. 966; *Greer v. New York*, 4 Rob. 675; *Frankland v. Schoenfeld*, 106 N. Y. Supp. 1101. **N. C.**—*Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347; *Wall v. Covington*, 83 N. C. 144. **Ohio.** *Kellogg v. Churchill*, 2 Ohio Dec. (Reprint) 4. **Pa.**—*Smith v. Hood*, 25 Pa. 218. **R. I.**—*Trott v. Wheaton*, 5 R. I. 353. *Compare*, *Richardson v. Hunt*, 7 R. I. 543. **S. C.**—*Patton v. Massey*, 2 Hill 475. **Tex.**—*De Hymel v. Scottish-American Mtg. Co.*, 80 Tex. 493, 16 S. W. 311; *Stephens v. Lee*, 70 Tex. 279, 8 S. W. 40. **Vt.**—*Lowry v. Catlin*, 2 Vt. 365. **Wash.**—*Tacoma Lumb., etc. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755. **W. Va.**—*Triplett v. Lake*, 43 W. Va. 428, 27 S. E. 363.

[a] "If . . . one of the parties or a clerk in making necessary arithmetical calculations commits an error, so that a wrong amount is inserted in the decree, that would be regarded as a clerical error." *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954, expressly affirmed in *Stewart v. Stewart*, 40 W. Va. 65, 29 S. E. 862.

[b] Failure of the docket to show

amount of judgment is a mere clerical error and amendable as such. *Nabers' Admr. v. Meredith*, 67 Ala. 333.

[c] As was said in *State v. Williams Cypress Co.*, 132 La. 949, 965, 61 So. 988, "the fact that 2+2=4 and that a smaller number subtracted from a larger one leaves a certain, immutable remainder, the amount of which may be ascertained by the use of a mechanical device, are established, leaving no room for the exercise of any judicial function."

58. *United States v. Fearson*, 5 Cranch C. C. 95, 25 Fed. Cas. No. 15,081; *Brusie v. Peck*, 16 N. Y. Supp. 645. See *Effray v. Masson*, 18 N. Y. Supp. 353.

59. **Ind.**—*Boos v. State*, 11 Ind. App. 257, 39 N. E. 197; *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. **Ia.** *McConkey v. Lamb*, 71 Iowa 636, 33 N. W. 146. **Mo.**—See *Evans v. Fisher*, 26 Mo. App. 541. **Tenn.**—See *Williams v. Tenpenny*, 11 Humph. 176. **Tex.** *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605.

See *supra*, XIII, A, 3, b, (I) and (II), and generally the cases hereinbefore cited.

60. *Boos v. State*, 11 Ind. App. 257, 39 N. E. 197.

61. *Jackson v. St. Louis, etc. Railroad Co.*, 89 Mo. 104, 1 S. W. 224.

[a] That costs may be dealt with by the amendment of the appellate court under certain circumstances, see *McDonald v. Patterson*, 190 Ill. 121, 60 N. E. 106.

As to correction of judgment during the term, see *supra*, XIII, A, 3, a, (I).

[b] It was held in *Locke v. Cope* (Kan.), 146 Pac. 416, that it was proper for the court to retax costs upon a motion to amend.



not incorporate the true direction of the court in regard to costs this, too, may be cured by an amendment.<sup>62</sup>

(C.) ERRORS IN CALCULATION OF INTEREST. — The calculation or computation of interest, involving, as it does, no exercise of judicial determination or discretion, is amendable at any time.<sup>63</sup>

(VII.) To Conform to Verdict, Findings and Pleadings. — It is proper to amend the judgment in conformity with the verdict,<sup>64</sup> or, where the cause was tried by the court without a jury, to conform with the findings of fact and conclusions of law,<sup>65</sup> or the pleadings.<sup>66</sup>

c. *As to Kinds of Judgments Affected.* — (I.) In General. — In the exercise of this power of amendment of its judgments, the court is not confined to any class or kind of judgments,<sup>67</sup> its power extending

62. Ark.—*England v. Files*, 45 Ark. 530. Cal.—*James v. Bullard*, 197 Cal. 130, 40 Pac. 108. Ga.—*McLendon v. Frost*, 59 Ga. 350. Ky.—*Hilton v. Hilton*, 32 Ky. L. Rep. 1082, 107 S. W. 736. Me.—*Thomas v. Thomas*, 98 Me. 184, 56 Atl. 651. Mo.—*Little v. St. Louis Trust Co.*, 146 Mo. App. 580, 124 S. W. 600; *Saunders v. Scott*, 132 Mo. App. 209, 111 S. W. 874. N. J.—*Blackwell v. Leslie*, 4 N. J. L. 112. N. Y.—*Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707; *Thurston v. Thurston*, 136 N. Y. Supp. 340; *Martine v. Huylar*, 12 N. Y. Supp. 66. R. I.—*Bishop v. Aborn*, 16 R. I. 568, 18 Atl. 203.

63. U. S.—*Fidelity Ins. Co. v. Iron Co.*, 84 Fed. 744. Ala.—*Hastings v. Alabama State Land Co.*, 124 Ala. 608, 26 So. 881; *Spence v. Rutledge*, 11 Ala. 590. Ga.—*Loftis v. Alexander*, 139 Ga. 346, 77 S. E. 169. Ind.—*Conway v. Day*, 79 Ind. 318; *Hughes v. Hinds*, 69 Ind. 93. Ky.—*Dils v. Hatcher*, 25 Ky. L. Rep., 891, 76 S. W. 514. La.—*Mullan v. Creditors*, 39 La. Ann. 397, 2 So. 45. N. C.—*Griffin v. Hinson*, 51 N. C. 154. Pa.—*West Chester, etc. Co. v. Chester County*, 21 Pa. Co. Ct. 86. S. C.—*Ashmore v. Charles*, 14 Rich. 63; *Patton v. Massey*, 2 Hill 475; *O'Driscoll v. McBurney*, 2 Nott. & McC. 58. Tenn.—*Rickman v. Rickman*, 6 Lea 483. Tex.—*Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4; *Ellis v. National City Bank*, 42 Tex. Civ. App. 83, 94 S. W. 437.

*Compare, Girard Trust Co. v. Null*, 97 Neb. 324, 149 N. W. 809; *Garrett v. Love*, 90 N. C. 368.

64. Ga.—*Rucker v. Williams*, 129 Ga. 828, 60 S. E. 155; *Thompson v. Am. Mtg. Co.*, 122 Ga. 39, 49 S. E. 751; *Sanders v. Williams*, 75 Ga. 283; *Dixon v. Mason*, 68 Ga. 478; *Moses v.*

*Eagle, etc. Co.*, 68 Ga. 241. Ky.—*Talbot v. Krahwinkel*, 124 S. W. 323. Mich.—*Grand Rapids Bank v. Widdicombe*, 114 Mich. 639, 72 N. W. 615. Mo.—*Weis Cornice Co. v. Neevel & Sons*, 187 Mo. App. 496, 174 S. W. 159. N. Y.—*Goldstein v. Stern*, 9 N. Y. Supp. 274. Pa.—*See Paul v. Harden*, 9 Serg. & R. 23. Utah.—*Ryan-Beam Cattle Co. v. Slaughter*, 6 Utah 278, 21 Pac. 997. Wash.—*Seattle & Mont. Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567.

[a] Where a general verdict was rendered upon two counts whereas it should only have been rendered upon one, the proper practice is to first amend the verdict and then amend the judgment to conform therewith. *Paul v. Harden*, 9 Serg. & R. (Pa.) 23.

[b] Conformity of judgment with verdict, see *supra*, XI, D.

65. Gough v. McFall, 31 App. Div. 578, 52 N. Y. Supp. 221; *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588.

Conformity of judgment with findings, see *supra*, XI, D, 3.

66. *Dennis v. Colley*, 112 Ga. 114, 37 S. E. 729; *Irby v. Brown*, 59 Ga. 596; *Elliot v. Wilks*, 16 Ga. App. 466, 85 S. E. 679; *Latham v. Lindsay*, 130 Ky. L. Rep. 669, 113 S. W. 878.

Conformity of judgment with pleadings, see *supra*, XI, D, 2, b.

[a] In a default case where the law has assigned to the clerk the duty of assessing damages, in the discharge of that duty, the clerk should allow either too little or too much, the proper remedy is to apply by motion to the court under whose direction it was made, to correct it. *Elston v. Dewes*, 28 Ill. 436.

67. See *infra*, the cases cited in this section.

to interlocutory and final judgments alike.<sup>68</sup> Dormant judgments, too, are subject to correction in this manner.<sup>69</sup>

(II.) *Judgments by Consent.* — It is a general rule that the court has no power to amend a judgment by consent unless all the parties concerned acquiesce therein,<sup>70</sup> and so, it was held to be beyond the power of the court to correct by amendment a recital of the amount of liability in such a judgment.<sup>71</sup> On the same principle, where a judgment was entered upon a stipulation, in strict accordance therewith, it is improper to change it in any respect upon a motion to amend.<sup>72</sup> But this rule does not preclude the correcting of simple clerical misprisions in the entry of such a judgment,<sup>73</sup> and, if, through a clerical mistake or omission, such a judgment was not entered at all, it may be entered *nunc pro tunc*.<sup>74</sup>

(III.) *Judgments by Confession.* — Judgments by confession are not peculiar in this regard and the court has power to amend them upon the same terms and to the same extent as other judgments.<sup>75</sup>

68. *Ala.*—*Hurt v. Hurt*, 157 *Ala.* 126, 47 *So.* 260; *Sims v. Boynton*, 32 *Ala.* 353; *State v. Craig*, 12 *Ala.* 363. *Ill.*—*Campbell v. Powers*, 139 *Ill.* 128, 25 *N. E.* 1062. *Ky.*—*Royse v. Royse*, 17 *Ky. L. Rep.* 1403, 34 *S. W.* 1068. *N. Y.*—*Strodl v. Farish Stafford Co.*, 65 *Misc.* 625, 121 *N. Y. Supp.* 93. *N. C.*—*Coates v. Wilkes*, 94 *N. C.* 174. *Tex.*—*Rogers v. Watrous*, 8 *Tex.* 62.

69. *Allen v. Bradford*, 3 *Ala.* 281; *Williams v. Merritt*, 109 *Ga.* 217, 34 *S. E.* 1012.

As to time for making application, see *infra*, XIII, D, 2, d.

70. *U. S.*—*City of Des Moines v. Des Moines Water Co.*, 218 *Fed.* 939; *Jenkins v. Eldredge*, 1 *Woodb. & M.* 61, 13 *Fed. Cas. No.* 7,269. *Ia.*—*Independent School Dist. v. Ross*, 95 *Iowa* 69, 63 *N. W.* 576; *McConkey v. Lamb*, 71 *Iowa* 636, 33 *N. W.* 146. *N. Y.*—*Aronson v. Sire*, 85 *App. Div.* 607, 83 *N. Y. Supp.* 362. *N. C.*—*McEachern v. Kerchner*, 90 *N. C.* 177.

*Judgments by consent generally*, see 14 *STANDARD PROC.* 913, et seq.

71. *McConkey v. Lamb*, 71 *Iowa* 636, 33 *N. W.* 146.

72. *N. Y.*—*Stilwell v. Stilwell*, 81 *Hun* 392, 30 *N. Y. Supp.* 961; *Aronson v. Sire*, 85 *App. Div.* 607, 83 *N. Y. Supp.* 362. *N. C.*—*McEachern v. Kerchner*, 90 *N. C.* 177. *W. Va.*—*Morris v. Peyton*, 29 *W. Va.* 201, 11 *S. E.* 954.

[a] "If the defendant desired to be released from his stipulation his remedy was by motion for such relief, and to have the interlocutory judgment vacated and not by motion to correct

the decree as entered." *Aronson v. Sire*, 85 *App. Div.* 607, 83 *N. Y. Supp.* 362. And see *McKee v. Tyson*, 10 *Abb. Pr. (N. Y.)* 392; *Morris v. Peyton*, 29 *W. Va.* 201, 11 *S. E.* 954.

[b] But in a similar instance the New York supreme court proceeded in this respect on the principle that the stipulation and judgment constituted a contract which could not properly be changed by the court. *Stilwell v. Stilwell*, 81 *Hun* 392, 30 *N. Y. Supp.* 961.

73. *McEachern v. Kerchner*, 90 *N. C.* 177; *Stewart v. Stewart*, 40 *W. Va.* 65, 20 *S. E.* 862; *Morris v. Peyton*, 29 *W. Va.* 201, 11 *S. E.* 954. See *Merchants' Nat. Bank v. Cotton Mills*, 115 *N. C.* 507, 20 *S. E.* 765.

74. *McDowell v. McDowell*, 92 *N. C.* 227.

75. *Ga.*—*Gaines v. Wedgeworth*, 19 *Ga.* 31. *Ind.*—*Kindig v. March*, 15 *Ind.* 248. *Ia.*—*Thorp v. Platt*, 34 *Iowa* 314. *Md.*—*Sunderland v. Braun Packing Co.*, 119 *Md.* 125, 86 *Atl.* 126. *Mich.*—*Grand Rapids Bank v. Widdicomb*, 111 *Mich.* 639, 72 *N. W.* 615. *Mo.*—*Hull v. Dowdall*, 20 *Mo.* 359. *N. C.*—*Merchants' Nat. Bank v. Cotton Mills*, 115 *N. C.* 507, 20 *S. E.* 765. *Pa.*—*Jenkins v. Davis*, 141 *Pa.* 266, 21 *Atl.* 592. *W. Va.*—*Stringer v. Anderson*, 23 *W. Va.* 482.

*Judgments by confession generally*, see 14 *STANDARD PROC.* 791, et seq.

[a] Of course the rule that a court may not, by amendment, alter a substantial or material portion thereof (*supra*, XIII, A, 3, b, (I) and (II)), applies to judgments of this kind.

(IV.) **Judgments by Default.** — Judgments by default, too, may be corrected by an amendment.<sup>76</sup>

(V.) **Void Judgments.** — A judgment which is void is a nullity and cannot be made a valid judgment by an amendment.<sup>77</sup> And yet, even here the court may exercise its inherent power to make its records speak the truth and may amend even an invalid judgment to that end.<sup>78</sup>

4. **Amendment Nunc Pro Tunc.**<sup>79</sup> — An amendment nunc pro tunc should be granted or refused, as justice may require, in view of the circumstances of each particular case.<sup>80</sup> Where no injustice will result, and an amendment is proper in the premises, it may be made nunc pro tunc.<sup>81</sup> On the other hand, to permit an amendment to have a retroactive effect when to do so would mean an infringement upon the intervening rights of innocent third parties would manifestly be inequitable and should be refused.<sup>82</sup> Thus, it is not competent

*Emerald Benev. Assn. v. Burke*, 9 Kulp. (Pa.) 177.

76. **Ill.**—*Cairo, etc. Ry. Co. v. Holbrook*, 72 Ill. 419. **Ind.**—*Torr v. Torr*, 20 Ind. 118. **N. C.**—*Churchill v. Brooklyn Life Ins. Co.*, 88 N. C. 205; *Griffin v. Hinson*, 51 N. C. 154; *Powell v. Jopling*, 47 N. C. 400. **Ohio.**—*Haswell v. Henley*, 7 Ohio Dec. (Reprint) 453. **Vt.**—*Mosseaux v. Brigham*, 19 Vt. 457. **Va.**—*Dillard v. Thornton*, 29 Gratt. (70 Va.) 392; *Hatcher v. Lewis*, 4 Rand. (25 Va.) 152.

**Judgments by default generally**, see 14 STANDARD PROC. 854, et seq.

77. *Higgins v. Driggs*, 21 Fla. 103. See *Juster v. Court of Honor*, 120 Minn. 325, 139 N. W. 701.

[a] "A thing void is a thing irreparable, and no energy of the law suffices to make something of nothing." *Schoellkopf v. Ohmeis*, 11 Misc. 253, 32 N. Y. Supp. 736.

[b] A judgment resting on a verdict which is wholly void is wholly insufficient and cannot be amended. *Hedrick v. Smith* (Tex.), 146 S. W. 305; *Fairchild v. Dean*, 15 Wis. 206.

[c] To do otherwise would be "to create a judgment and give it a retroactive effect." It seems a perversion of the word amendment, to attempt to disguise under that name the exercise of such an extraordinary power." *Fairchild v. Dean*, 15 Wis. 206.

78. Where a judgment was rendered without jurisdiction it may be afterwards amended so as to show what the judgment actually rendered was, irrespective of the question as to whether or not the court was, in the first in-

stance, without jurisdiction. *Thompson v. Kimbrel*, 46 Ga. 529.

79. **Entry of judgments nunc pro tunc**, see 14 STANDARD PROC. 1017, et seq.

80. *Borer v. Chapman*, 119 U. S. 587, 597, 7 Sup. Ct. 342, 30 L. ed. 532; *Aeklen v. Aeklen*, 45 Ala. 609.

81. **Ala.**—*Dobson v. Dickson*, 8 Ala. 252; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159. **Ark.**—*Melton v. St. Louis, I. M. & S. R. Co.*, 99 Ark. 433, 139 S. W. 289. **Cal.**—*Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607. **Conn.**—*Wooster v. Glover*, 37 Conn. 315; *Waldo v. Spencer*, 4 Conn. 71. **Fla.**—*Adams v. Higgins*, 23 Fla. 13, 1 So. 321. **Ga.**—*Shaw v. Watson*, 52 Ga. 201. **Ill.**—*Monson v. Kill*, 144 Ill. 248, 33 N. E. 43. **Kan.**—*Small v. Douthitt*, 1 Kan. 317. **Ky.**—*Oldham v. Brannon*, 2 Metc. 302. **Mass.**—See *Gibson v. Crehore*, 5 Pick. 146. **Mo.**—*Koch v. Atlantie, etc. R. Co.*, 77 Mo. 354; *Bishop v. Seal*, 92 Mo. App. 167; *Evans v. Fisher*, 26 Mo. App. 541. **Mont.**—*Barber v. Briscoe*, 9 Mont. 341, 23 Pac. 726. **N. Y.**—*Eagan v. Moore*, 2 Civ. Proc. 300; *Buffalo Com. Bank v. Nice*, 139 N. Y. Supp. 322; *De Lancey v. Piepgras*, 26 N. Y. Supp. 1110. **Ohio.**—*Elliott v. Plattor*, 43 Ohio St. 198, 1 N. E. 222; *Green v. Raitz*, 18 Ohio Cir. Ct. 364. **Ore.**—*Senkler v. Berry*, 52 Ore. 212, 96 Pac. 1070. **S. C.**—See *Carroll v. Tompkins*, 14 S. C. 223. **Tex.**—*Tillman v. Peoples*, 28 Tex. Civ. App. 233, 67 S. W. 201.

82. **Ill.**—*McCormick v. Wheeler*, 36 Ill. 114. See *Greenleaf v. Roe*, 17 Ill. 474. **Ia.**—*Miller v. Wolf*, 63 Iowa 233,



for a court to bind by a lien the land of a third person, by the rendition of a nunc pro tunc judgment against such third person's grantor.<sup>83</sup> However, subject to the foregoing restriction it is proper that such matters as the failure to enter of record a judgment actually rendered,<sup>84</sup> or, in an entered judgment, its failure to express the true judgment of the court, are properly corrected by an amendment nunc pro tunc.<sup>85</sup>

**5. Courts of Inferior Jurisdiction.**—Courts of limited or special jurisdiction may amend their judgments to the end that they may speak the truth,<sup>86</sup> although they do not possess, in the absence of a statutory grant thereof, the power to modify or revise, in any matter of substance, a judgment rendered therein.<sup>87</sup>

**6. Effect of Filing Transcript in Higher Court.**—Where a judgment of an inferior court becomes, in effect, a judgment of a superior court by the filing of a transcript therein, the latter court may amend it,<sup>88</sup> otherwise, it may be amended only by the court which rendered

18 N. W. 889. Ky.—*Graham v. Lynn*, 4 B. Mon. 17. Mo.—*Koch v. Atlantic*, etc. R. Co., 77 Mo. 354.

[a] An amendment may be good as to all persons and effectual for all purposes after the making thereof, and yet have no effect upon intervening rights of third persons acquired prior to the amendment. *Greenleaf v. Roe*, 17 Ill. 474.

83. *Miller v. Wolf*, 63 Iowa 233, 18 N. W. 889.

[a] A party may not, however, defeat the rendition of such an order simply because the rights of his grantee, who with notice of the proposed action did not intervene nor in any manner ask the protection of the court, will be effected thereby. *Hyde v. Michelson*, 52 Neb. 680, 72 N. W. 1035.

84. U. S.—*Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. ed. 532. Neb.—*Hyde v. Michelson*, 52 Neb. 680, 72 N. W. 1035. N. C.—*Creed v. Marshall*, 160 N. C. 391, 76 S. E. 270. Okla.—*Bristow v. Carrigar*, 37 Okla. 730, 132 Pac. 1106.

85. *Spears v. Wise*, 187 Ala. 346, 65 So. 786; *Creed v. Marshall*, 160 N. C. 391, 76 S. E. 270.

[a] It has been held that "an order for a judgment entry nunc pro tunc cannot be made to relate back for the purposes of an appeal." *Hoffman-Bruner Co. v. Stark*, 132 Iowa 100, 108 N. W. 329.

86. See the title "Justices of the Peace." Compare, *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

[a] The municipal court of New

York has this power by express statutory provision. Municipal Court Act, Laws 1902, p. 1563, c. 580, §254; *Ruegamer v. Cieslinski*, 104 App. Div. 135, 93 N. Y. Supp. 599; *Frankland v. Schoenfeld*, 106 N. Y. Supp. 1101.

[b] The surrogate's court of New York, while exercising only such powers as are granted to it by statute and being thus a court of "limited jurisdiction" (*In re Henderson*, 157 N. Y. 423, 52 N. E. 183), "certainly must possess . . . some inherent power, and the correction of their own records, when effected by some mistake or clerical error," is a power which is "recognized and perhaps regulated by various statutes, but it does not proceed from or rest upon statutes, since it would exist without them." *In re Henderson*, 157 N. Y. 423, 52 N. E. 183, quoted with approval in *Matter of Robertson*, 151 App. Div. 589, 136 N. Y. Supp. 548, involving §2481, Code Civ. Proc. of New York.

[c] Probate courts possess such power. *Aull v. St. Louis T. Co.*, 149 Mo. 1, 50 S. W. 289; *Kennedy v. Wachsmith*, 12 Serg. & R. (Pa.) 171, 14 Am. Dec. 676. See generally the title "Probate Courts."

87. See the title "Justices of the Peace." See *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

88. *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1; *Marlow v. Robins*, 14 Ark. 602; *Harrison v. Mfg. Co.*, 10 S. C. 278. And see *Babb v. Bruere*, 23 Mo. App. 604, where it was held that the superior court in which a transcript

it.<sup>89</sup> And it would seem that even in the first instance the filing of such a transcript does not destroy the power of the inferior court thereafter to correct clerical errors in the judgment.<sup>90</sup>

**B. COURTS OF APPELLATE JURISDICTION. — 1. Generally.** — There is nothing in the nature of appellate jurisdiction which inhibits the granting of amendments,<sup>91</sup> and this power is sometimes expressly conferred upon appellate tribunals by statutory enactment.<sup>92</sup> An appellate court has power to amend its own judgments in conformity with the truth of the case.<sup>93</sup> Thus, where the clerk of the appellate court inadvertently entered up a judgment of affirmance in a cause wherein the judgment appealed from was, in reality, reversed,<sup>94</sup> or, where the judgment entered was in an incorrect sum,<sup>95</sup> or improperly entitled,<sup>96</sup> or otherwise incomplete,<sup>97</sup> the appellate court may so amend such judgment as to make it show the true and entire action of the court. The rule that a court may not, at a subsequent term, review or revise its judgments upon any matter of substance,<sup>98</sup> applies with equal force to appellate tribunals and their judgments.<sup>99</sup>

**2. Power Over Judgments of Trial Court.** — As a general rule, whenever the judgment of the trial court is correct save for a clerical error therein the appellate court may remand the cause with directions

was thus filed might “*modify*” the judgment of the inferior court to conform to law.

[a] The transcript itself was held to have been properly amended in the superior court in *Wiley v. Forsee*, 6 Blackf. (Ind.) 246. And, for a similar case, see *Justice v. Meeker*, 30 Pa. Super. 207.

As to effect of filing transcript, see the title “*Justices of the Peace*.”

89. *Maltby-Henley Co. v. Deane*, 57 N. Y. Supp. 457. See *Greider v. Kaufman*, 19 Pa. Dist. 90.

90. *Morris v. Bunyan*, 58 Kan. 210, 48 Pac. 864.

91. *Brett v. Ming*, 1 Fla. 498, 502; *McDonald v. Patterson*, 190 Ill. 121, 60 N. E. 106.

[a] Where a cause was appealed to the appellate court in which an order was entered that “. . . it is further considered by the court that the said appellant recover of and from, etc., costs, etc. . . .” whereas in the order as directed no costs were provided for, it was held that the appellate court might, even after affirmance by the supreme court, amend in this regard. *McDonald v. Patterson*, 190 Ill. 121, 60 N. E. 106.

92. *Mo.*—*State ex rel. Ozark County v. Tate*, 109 Mo. 265, 18 S. W. 1088; *Wiel v. Simmons*, 66 Mo. 617. *Ohio.* *Huntington v. Ziegler*, 2 Ohio St. 10.

*Pa.*—*Smith v. McChesney*, 238 Pa. 538, 86 Atl. 493, involving Act of May 20, 1891 (P. L. 101), §2.

93. *Ala.*—*Stephens v. Norris*, 15 Ala. 79. *Cal.*—*Swain v. Naglee*, 19 Cal. 127.

*La.*—*O'Rourke v. Fulton Bag & Cotton Mills*, 133 La. 955, 63 So. 480. *Tenn.*

*Crutchfield v. Stewart*, 1 Humph. 380; *Farris v. Kilpatrick*, 1 Humph. 379.

*Tex.*—*Milam County v. Robertson*, 47 Tex. 222; *Chambers v. Hodges*, 3 Tex. 517. *Vt.*—*Lowry v. Catlin*, 2 Vt. 365.

94. *Crutchfield v. Stewart*, 1 Humph. (Tenn.) 380.

95. *Kyle v. Caravello*, 103 Ala. 150, 15 So. 527; *Smith v. Robinson*, 11 Ala. 270.

96. *Kennedy & Merritt v. Young*, 25 Ala. 563; *Buffalo Com. Bank v. Nice*, 139 N. Y. Supp. 322.

97. *Farris v. Kilpatrick*, 1 Humph. (Tenn.) 379.

98. See *supra*, XIII, A, 3, a, (II).

99. *Ferguson v. Beaumont Land, etc. Co.* (Tex. Civ. App.), 154 S. W. 303; *Boland v. Benson*, 54 Wis. 387, 11 N. W. 911.

[a] “As the judgment of this court was rendered at a former term, it would seem that this court would have no jurisdiction at this time to set that judgment aside, though it may have been erroneously rendered.” *Ferguson v. Beaumont Land, etc. Co.* (Tex. Civ. App.), 154 S. W. 303.

to amend the judgment in this regard and declare the same affirmed as corrected,<sup>1</sup> or it may amend the judgment itself.<sup>2</sup>

**C. BY THE CLERK.**—The amendment of a judgment is strictly a function of the court,<sup>3</sup> and a clerk, after a judgment has been entered and the record thus completed, may not, unless it be at the court's direction, make any changes or corrections therein.<sup>4</sup>

**D. PROCEEDINGS TO OBTAIN RELIEF.**—1. **On the Court's Own Motion.**—The court may amend a judgment of its own motion, in those respects in which judgments are ordinarily amendable.<sup>5</sup>

1. **Cal.**—*Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708. **Idaho.**—*Gaffney v. Hoyt*, 2 Idaho 184, 199, 10 Pac. 34; *Betts v. Butler*, 1 Idaho 185. **Ill.**—*Woodward v. People*, 56 Ill. App. 45. **Ky.**—See *Latham v. Lindsay*, 130 Ky. 669, 113 S. W. 878. **Md.**—*Ecker v. Bank*, 64 Md. 292, 1 Atl. 849. **Mich.**—*Kees v. Maxim*, 99 Mich. 493, 58 N. W. 473. **Mo.**—*Elliott v. Buffington*, 149 Mo. 663, 51 S. W. 408. **Mont.**—*Quigley v. Birdseye*, 11 Mont. 439, 23 Pac. 741. **N. Y.**—*Pace v. Drainage Co.*, 138 N. Y. Supp. 420. See *Foley v. Foley*, 15 App. Div. 276, 44 N. Y. Supp. 588; *Riggs v. Chapin*, 7 N. Y. Supp. 765. **N. C.**—*Alexander v. Robinson*, 85 N. C. 275. **Pa.**—*Hartley v. White*, 94 Pa. 31; *Barker & Co. v. Johnson*, 2 Pa. Co. Ct. 414. **Tex.**—*McNairy v. Castleberry*, 6 Tex. 286. **W. Va.**—*Bee v. Burdett*, 23 W. Va. 744. **Wis.**—*Jones v. Supervisors*, 14 Wis. 514.

2. **Ala.**—*Southern States Ins. Co. v. Brannon*, 178 Ala. 115, 59 So. 60; *Ramey v. Peeples Grocery Co.*, 108 Ala. 476, 18 So. 805; *Tobias v. Treist*, 103 Ala. 664, 15 So. 914; *Seisel v. Folmar*, 103 Ala. 491, 15 So. 850; *Ladiga, etc. Co. v. Smith*, 78 Ala. 108; *Parker v. Wimberly*, 78 Ala. 64; *Sherry v. Priest*, 57 Ala. 410; *English v. Brown*, 9 Ala. 504. **Ill.**—*Doyle v. Doyle*, 257 Ill. 229, 100 N. E. 950. **Ind.**—*M'Manus v. Richardson*, 8 Blackf. 100; *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. **La.**—*Hale v. City of New Orleans*, 18 La. Ann. 353. **Mo.**—*Elliott v. Buffington*, 149 Mo. 663, 51 S. W. 408.

[a] A statute in Alabama specifically requires this. *Southern States Ins. Co. v. Brannon*, 178 Ala. 115, 59 So. 60 (§2891 Alabama Code 1907). This statute applies "only to judgments, not verdicts, and to such errors and mistakes as may be corrected from matter apparent on the record."

*Cook, etc. Contracting Co. v. Bell*, 177 Ala. 618, 59 So. 273.

[b] Where the judgment of affirmance is in entire harmony with the records before the court it will not receive proof that the judgment of the trial court should have been amended before the affirmance, since to do so would clearly involve the exercise of original, not appellate, jurisdiction. *Stephens v. Norris*, 15 Ala. 79. See also *Chambers v. Hodges*, 3 Tex. 517.

3. *Chapin v. Broder*, 16 Cal. 403.

4. **U. S.**—*Barnes v. Lee*, 1 Cranch C. C. 430, 2 Fed. Cas. No. 1,017. **Cal.**—*Chapin v. Broder*, 16 Cal. 403. **Ia.**—*Grattan v. Matteson*, 54 Iowa 229, 6 N. W. 298. **Me.**—*Rockland Water Co. v. Pillsbury*, 60 Me. 425. **N. Y.**—See *Smith v. Coe*, 7 Robt. 477. **Ohio.**—*Hollister v. Dist. Court*, 8 Ohio St. 201. See *Woods v. Green*, *Wright* 503. **Pa.**—*Prowattain v. McTier*, 1 Phila. 105. **S. C.**—*Chafee v. Rainey*, 21 S. C. 11.

5. **U. S.**—*Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. ed. 135. **Ala.**—*Floyd v. Lamar* (Ala. App.), 69 So. 227. **Ark.**—*Portis & Bro. v. Talbot*, 33 Ark. 218. **Cal.**—*Brackett v. Banegas*, 99 Cal. 623, 626, 34 Pac. 344. **Ga.**—*Jones v. Garage Co.*, 16 Ga. App. 596, 85 S. E. 940. **Ind.**—*Ryon v. Thomas*, 104 Ind. 59, 3 N. E. 653. **Ia.**—*Willson v. District Court*, 166 Iowa 352, 147 N. W. 766; *McConnell v. Avery*, 117 Iowa 282, 90 N. W. 604. **Me.**—*Lewis v. Ross*, 37 Me. 230, 235. **N. H.**—*Emery v. Berry*, 28 N. H. 473. **N. C.**—*Parsons v. McBride*, 49 N. C. 99. **Tex.**—*Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Hooker v. Williamson*, 60 Tex. 524.

[a] If the parties are before the court the amendment may be made by the court *ex mero motu*. *Portis & Bro. v. Talbot*, 33 Ark. 218.

[b] Where all the parties were be-



**2. On the Application of the Parties.**—a. *Nature of the Proceedings.*—Formerly relief in such instances was obtained through the writ of error coram nobis,<sup>6</sup> but this end is now almost universally attained by the more direct means of a motion.<sup>7</sup> While an amendment

fore the court it was held that the court's action in granting an amendment was not improper simply because a formal motion was not made and filed. *Varn v. Varn*, 58 Tex. Civ. App. 595, 125 S. W. 639.

[c] **In Criminal Case.**—*Ex parte* Breckenridge, 34 Nev. 275, 118 Pac. 687. See the title "**Sentence and Judgment.**"

[d] **In Louisiana** no change or correction may be made by the judge *ex proprio motu* after the judgment has been signed by him, even though the judgment as signed is exactly opposite to the judgment orally pronounced, since signing is essential to a valid judgment. *State ex rel. Vignes v. Judge*, 43 La. Ann. 1169, 10 So. 294; *Miller v. Chandler*, 29 La. Ann. 88. See *Miller v. Chandler*, 29 La. Ann. 88.

**6. U. S.**—*Phillips v. Russell*, Hempst. 62, 19 Fed. Cas. No. 11,105a. **Ariz.** *Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. **Ark.**—*King v. Bank*, 9 Ark. 185. **Ill.**—*People v. Petit*, 266 Ill. 628, 107 N. E. 830; *Cramer v. Ill. Com. Men's Assn.*, 260 Ill. 516, 103 N. E. 459; *Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600; *McPherson v. Wood*, 52 Ill. App. 170; *Baragwanath v. Wilson*, 4 Ill. App. 80. **Ia.**—*McKinney v. Western Stage Co.*, 4 Iowa 420. **Miss.**—*Mississippi & Tenn. Railroad Co. v. Wynne*, 42 Miss. 315; *Land v. Williams*, 12 Smed. & M. 362. **Mo.** See *Bishop v. Seal*, 92 Mo. App. 167. **Tenn.**—*Brandon v. Diggs*, 1 Heisk. 472. **Tex.**—*Milam County v. Robertson*, 47 Tex. 222. **Wis.**—*Gardner v. Comrs. of Grant County*, 1 Pinn. 210.

**Review by Writ of Error Coram Nobis.**—See *infra*, XVI, C.

[a] "The common-law writ of coram nobis is not entirely obsolete in *Kansas*, but it is so largely superseded by statutory methods for obtaining a review of the law and facts that its application is limited to those cases not provided for by statute." *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

**7. U. S.**—*Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. ed. 135; *Manning v. German Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144; *Morgan's Louisi-*

*ana, etc. Co. v. Texas Cent. Ry. Co.*, 32 Fed. 525. See *Ledgerwood v. Picketts*, 1 McLean 143, 15 Fed. Cas. No. 8,175; *Jenkins v. Eldredge*, 1 Woodb. & M. 61, 13 Fed. Cas. No. 7,269. **Ala.** *Gatchell & Co. v. Foster*, 94 Ala. 622, 10 So. 434. **Ariz.**—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. **Ark.**—*King v. Bank*, 9 Ark. 185. **Cal.**—*Mulliken v. Hull*, 5 Cal. 245. **Ga.**—*Mayo v. Kersey*, 24 Ga. 167. **Ill.**—*People v. Petit*, 266 Ill. 628, 107 N. E. 830; *Cramer v. Illinois Com. Men's Assn.*, 260 Ill. 516, 103 N. E. 459; *Life Association v. Fassett*, 102 Ill. 315; *Mains v. Cosner*, 67 Ill. 536; *Luckey v. Yeoman of Am.*, 141 Ill. App. 332; *McPherson v. Wood*, 52 Ill. App. 170; *Baragwanath v. Wilson*, 4 Ill. App. 80. See *Doyle v. Doyle*, 257 Ill. 229, 100 N. E. 950. **Ind.**—*Daniels v. McGinnis*, 97 Ind. 549; *Baker v. Allen*, 92 Ind. 101; *Gray v. Robinson*, 90 Ind. 527; *Urbanski v. Manns*, 87 Ind. 585; *Mitchell v. Lincoln*, 78 Ind. 531; *Hughes v. Hinds*, 69 Ind. 93; *Blizzard v. Blizzard*, 40 Ind. 344; *Hebel v. Scott*, 36 Ind. 226; *Clifton v. State*, 5 Blackf. 224; *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. **Ia.**—*Greazel v. Price*, 135 Iowa 364, 112 N. W. 827, involving §§4091, 4093 and 224 of code. **Kan.**—*Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997; *Bank v. Stevenson*, 65 Kan. 816, 70 Pac. 875; *Sumner v. Cook*, 12 Kan. 162; *Birmingham v. Leonhardt*, 2 Kan. App. 513, 43 Pac. 996. **Ky.**—*Green v. Com.*, 152 Ky. 239, 153 S. W. 242; *Oldham v. Brannon*, 2 Mete. 302; *Emison v. Walker*, 17 Ky. L. Rep. 238, 31 S. W. 461. **La.**—*Shelly v. Dobbins*, 31 La. Ann. 530. **Me.**—*Thomas v. Thomas*, 98 Me. 184, 56 Atl. 651; *West v. Jordan*, 62 Me. 484; *Lewis v. Ross*, 37 Me. 230; *Hall v. Williams*, 10 Me. 278, 290. **Mass.**—*Atkins v. Sawyer*, 1 Pick. 351. **Minn.**—*Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533; *Hall v. Merrill*, 47 Minn. 260, 49 N. W. 980; *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981. **Miss.**—*Mississippi & Tenn. Railroad Co. v. Wynne*, 42 Miss. 315. **Mo.** *Fitzmaurice v. Turney*, 214 Mo. 610, 114 S. W. 504; *Neenan v. City of St.*

may only be obtained in a direct proceeding for that purpose,<sup>8</sup> the remedy pursued is, nevertheless, considered, not as an independent action, but rather as an auxiliary to the one in which the judgment in question was rendered,<sup>9</sup> and a proceeding instituted by complaint

Joseph, 126 Mo. 59, 28 S. W. 963; Nave v. Todd, 83 Mo. 601; Latschaw v. McNees, 59 Mo. 381; Fugate v. Glascock, 7 Mo. 577; Bishop v. Seal, 92 Mo. App. 167. **N. H.**—Gove v. Lyford, 44 N. H. 525. **N. Y.**—Corn Exch. Bank v. Blye, 119 N. Y. 414, 23 N. E. 805; Mitchell v. Van Buren, 27 N. Y. 300; Coleman v. Security Bank, 161 App. Div. 715, 146 N. Y. Supp. 622; Olcott v. Kohlsaat, 8 N. Y. Supp. 117. See Nealon v. Frisbie, 9 Misc. 660, 30 N. Y. Supp. 551. **Ohio.**—Haswell v. Henley, 7 Ohio Dec. (Reprint) 453; Ohio v. Beam, 3 Ohio St. 508. **Ore.**—Hoover v. Hoover, 39 Ore. 456, 65 Pac. 796. **Pa.**—Com. H. Hultz, 6 Pa. 469. **S. C.**—Carroll v. Tompkins, 14 S. C. 223. **Tenn.**—See Ridgeway v. Ward, 4 Humph. 430. **Tex.**—Coleman v. Zapp, 105 Tex. 491, 151 S. W. 1040 (involving art. 1356-7, Sayles Civ. St.); Whitaker v. Gee, 63 Tex. 435; Bengé v. Panhandle Land Co. (Tex. Civ. App.), 145 S. W. 318. See Converse v. Langshaw, 81 Tex. 275, 16 S. W. 1031. **Wash.**—Seattle & Mont. Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567. **W. Va.**—Triplett v. Lake, 43 W. Va. 428, 440, 27 S. E. 363; Alleman v. Kight & Bro., 19 W. Va. 201. **Wis.** Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; Chouteau v. Hooe, 1 Pinn. 663. **Wyo.**—O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525. **Eng.**—Hatton v. Harris, 67 L. T. 722.

[a] "The writ of coram nobis was employed only to supply or rectify a mistake of fact in a decree or judgment . . . The writ was abolished by Sec. 67, chap. 110, R. S., which provides that such mistake of fact may be corrected by motion in the court wherein the judgment or decree was entered." McPherson v. Wood, 52 Ill. App. 170. See also Luckey v. Yeoman of Am., 141 Ill. App. 332.

[b] In Connecticut the error, if discovered at the time in which the judgment was rendered, may be corrected without any formal application. "But if the mistake is not discovered until after the term is ended, . . . the correction ought not to be made, unless upon a formal petition setting

forth the mistake, and the alteration prayed for, and after due notice has been given to the adverse party, . . . ." Weed v. Weed, 25 Conn. 337.

[c] "Where a judgment not authorized by the verdict or direction of the court or referee is entered, the proper remedy is, in the first instance, not by appeal, but by motion to correct the entry." Hall v. Merrill, 47 Minn. 260, 49 N. W. 980. But see Wilson v. Boughton, 50 Mo. 17.

[d] "From the English statute of 14 Ed. 3, stat. 1, ch. 6, which is said to have been the first statute of amendment, . . . the legislative will has leaned to the amendment of mere misprisions, without the necessity of encountering the expense and trouble of a writ of error." Eubank v. Ralls's Exr., 4 Leigh (31 Va.) 308.

[e] "Motions are substitutes for writs of error coram nobis in many respects. The court can correct mistakes of the clerk upon motion." Chouteau v. Hooe, 1 Pinn. (Wis.) 663.

[f] Amendments in special proceedings may be had only upon the terms of and in the manner directed by, the statute creating such proceeding. Child v. Whitman, 7 Colo. App. 117, 42 Pac. 661; Harrison v. Mfg. Co., 10 S. C. 278, 298.

8. Holland v. Preston, 12 Tex. Civ. App. 585, 34 S. W. 975. See Lansing v. Beaver Land Co., 158 Iowa 693, 138 N. W. 833; Greazel v. Price, 135 Iowa 364, 112 N. W. 827.

[a] "It (a judgment) cannot be amended in a collateral proceeding." Lansing v. Beaver Land Co., 158 Iowa 693, 138 N. W. 833.

[b] A proceeding to correct a judgment may be joined with one to revive the judgment. Taylor v. Doom, 43 Tex. Civ. App. 59, 95 S. W. 4.

9. Ind.—Gray v. Robinson, 90 Ind. 527; Urbanski v. Manns, 87 Ind. 585; Latta v. Griffith, 57 Ind. 329; Bales v. Brown, 57 Ind. 282; Indianapolis & G. R. T. Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145. **Md.**—Dent v. Hancock, 5 Gill. 120. **N. Y.**—Libby v. Rosekrans, 55 Barb. 202; Colburn v. woodworth, 31 Barb. 381. **Tex.**—Cole-

and summons, as in ordinary actions, is irregular,<sup>10</sup> although not necessarily ineffectual, for even though the initial step in the remedy be designated a "petition,"<sup>11</sup> or a "complaint,"<sup>12</sup> the court may regard the pleading as a motion,<sup>13</sup> and grant the desired relief accordingly.<sup>14</sup>

b. *Contents and Formal Requisites of Application.*—This motion is governed by those rules which control the form and contents of motions generally.<sup>15</sup> It should be entitled in the court which rendered the judgment,<sup>16</sup> and should state with certainty the grounds upon which the relief is sought.<sup>17</sup> This last requirement is sometimes prescribed by statute.<sup>18</sup> Thus, if the motion be made upon the ground of fraud it should set forth with particularity the facts and circumstances.<sup>19</sup> The motion must be addressed, not to the validity or correctness of the judgment, but to the form or substance of the same,<sup>20</sup> and, if it should appear from such a motion that the error, if any, is not such as is properly cured by amendment, the motion is defective.<sup>21</sup>

man v. Zapp, 105 Tex. 491, 151 S. W. 1040.

[a] *In Illinois.*—But in *Barnes v. Chicago City Ry. Co.*, 185 Ill. App. 148, the court says that while the motion substituted for the writ of error coram nobis "is entitled in the case in which the judgment sought to be corrected was entered, and is filed among the papers in that case, it is not in fact a step in that case, but is, like a writ of error, a new suit in which original pleadings are filed, process issued and served, issues made up and final judgment entered."

10. *Gray v. Robinson*, 90 Ind. 527; *Urbanski v. Manns*, 87 Ind. 585; *Blizzard v. Blizzard*, 40 Ind. 344; *Hebel v. Scott*, 36 Ind. 226; *Dunham v. Tappan*, 31 Ind. 173; *Goodwine v. Hedrick*, 29 Ind. 383; *Jenkins v. Long*, 23 Ind. 460; *Indianapolis & G. R. T. Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145.

[a] But note that even so the remedy is a summary proceeding and does not proceed as an ordinary action. *Urbanski v. Manns*, 87 Ind. 585; *Douglass v. Keehn*, 78 Ind. 199; *Nord v. Marty*, 56 Ind. 531.

11. *Miller v. Royce*, 60 Ind. 189.

12. *Latta v. Griffith*, 57 Ind. 329.

13. *Gray v. Robinson*, 90 Ind. 527; *Latta v. Griffith*, 57 Ind. 329.

14. *Latta v. Griffith*, 57 Ind. 329.

15. See the title "Motions."

16. See *infra*, XIII, D, 2, e.

17. *Ala.*—*Dunham v. Roberts*, 28 Ala. 286. See *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123.

*Ill.*—*Barnes v. Chicago City Ry. Co.*, 185 Ill. App. 148. *Ind.*—*Scotton v. Mann*, 89 Ind. 404; *Bole v. Newberger*, 81 Ind. 274; *Zink v. Zink*, 56 Ind. App. 677, 106 N. E. 381; *Heaton v. Grant Lodge No. 335*, 55 Ind. App. 100, 103 N. E. 488; *Borror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123. *Ohio.* *Cleveland Leader Ptg. Co. v. Green*, 52 Ohio St. 487, 40 N. E. 201. *W. Va.* *Slingluff v. Gainer*, 49 W. Va. 7, 37 S. E. 771.

[a] "Good practice doubtless requires" that the motion should show "the character of the relief sought, as well as the facts and circumstances upon which the applicant rests his claim to such relief." *Cleveland, etc. Printing Co. v. Green*, 52 Ohio St. 487, 40 N. E. 201.

18. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

19. *Dunham v. Roberts*, 28 Ala. 286.

[a] The averment for the purpose of establishing fraud, that the record shows a fact which was not proved and that "the record as it stands, operates as a fraud" on the rights of the applicant, and, in another part, that "the record is void, in law, on account of fraud, in a legal sense," is insufficient. *Dunham v. Roberts*, 28 Ala. 286.

20. *Stone v. Stone*, 158 Ind. 628, 64 N. E. 86; *Warrick v. Spry*, 49 Ind. App. 327, 97 N. E. 361; *Cooley v. Kelley*, 52 Ind. App. 687, 96 N. E. 638, 98 N. E. 653.

21. *Strange v. Tyler*, 95 Ind. 396.



c. *Parties*.—The rule generally obtains that either party to the action in which the judgment under consideration was rendered may apply to the court to have the same amended,<sup>22</sup> and is equally well settled that a stranger to the action may not do so,<sup>23</sup> though this rule has been relaxed to the extent of permitting one, not a party to the action, but directly interested in the outcome thereof and possessed of rights liable to be injuriously effected thereby, to become a party to a proceeding of this nature.<sup>24</sup> All parties to the action in which the judgment was rendered should, ordinarily, be made parties to an application to amend such judgment.<sup>25</sup>

d. *Time for Making Application*.—Of course whenever such a length of time has elapsed since the rendition of a judgment that the court has lost its power to make the amendment desired, an application for this relief would be fruitless.<sup>26</sup> And in any event the applicant should proceed with due diligence: an unreasonable delay may operate as a bar to the desired relief,<sup>27</sup> and where statutes require the application to be made within a designated time the failure to proceed within that time is usually fatal.<sup>28</sup> It should be noticed, however,

22. Ill.—*Adam v. Arnold*, 86 Ill. 185. Ind.—*Urbanski v. Manns*, 87 Ind. 585. Ky.—*Latham v. Lindsay*, 130 Ky. 669, 113 S. W. 878. See *Smith v. Mullins*, 3 Mete. 182. N. Y. *Montgomery v. Ellis*, 6 How. Pr. 326. W. Va.—*Triplett v. Lake*, 43 W. Va. 428, 439, 27 S. E. 363.

[a] "The judge thereof may on the motion of *any party* amend such judgment or decree." *Triplett v. Lake*, 43 W. Va. 428, 439, 27 S. E. 363.

[b] In Texas it is expressly provided by statute (art. 1357, Rev. St. 1895) that the amendment may be made "on the application of either party."

23. *Adam v. Arnold*, 86 Ill. 185.

[a] Sureties on a bond to release an attachment in the action are not proper parties. *Urbanski v. Manns*, 87 Ind. 585.

24. *Strickland v. Strickland*, 95 N. C. 471. See *Parsons v. McBride*, 49 N. C. 99.

25. *Pritchard v. Mines*, 56 Ind. App. 671, 106 N. E. 411; *Bradford v. McBride*, 50 Ind. App. 624, 96 N. E. 508; *Oldham v. Brannon*, 2 Mete. (Ky.) 302.

26. See *supra*, XIII, A, 3, a, et seq.

27. U. S.—*Coleman v. Neill*, 11 Fed. 461. Ill.—*Elston v. Doves*, 28 Ill. 436. Ind.—*Brittenham v. Robinson*, 22 Ind. App. 536, 54 N. E. 133. Ky.—*Bonar v. Gosney*, 17 Ky. L. Rep. 66, 30 S. W. 602. La.—*Smith's Heirs v. Railroad*

*Lands Co.*, 120 La. 564, 45 So. 441. Mass.—*Snell v. Dwight*, 121 Mass. 348. Mich.—*Harrington v. Probate Judge*, 102 Mich. 35, 127 N. W. 255. Minn. *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981. Neb.—*Girard Trust Co. v. Neill*, 97 Neb. 324, 149 N. W. 809. N. Y.—*Hirshbach v. Ketchum*, 79 App. Div. 561, 80 N. Y. Supp. 143; *Gall v. Gall*, 58 App. Div. 97, 68 N. Y. Supp. 649. N. C.—*Pinnell v. Burroughs*, 168 N. C. 315, 84 S. E. 364. Ohio.—*Fowble v. Rayberg*, 4 Ohio 45. Pa.—*Ullery v. Clark*, 18 Pa. 148. Tex.—*Williamson v. Wright*, 1 Tex. Unrep. Cas. 711. See *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040. Wis.—*McKinney v. Jones*, 57 Wis. 301, 15 N. W. 160.

[a] In California, due diligence is all that is required, it having been said that the amendment might be granted at any time "provided the party moving proceeds with due diligence." *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 Pac. 281.

28. Ala.—*McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123; *Sartor v. Montgomery Bank*, 29 Ala. 353. Cal.—*Seamman v. Bonslett*, 118 Cal. 93, 50 Pac. 272; *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615, 36 Pac. 928. Colo.—*Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579; *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. 601. Ga.—See *Giddens v. Alexander*, 127 Ga. 734, 56 S. E. 1014. Ill.—*Barnes v. Chicago City Ry. Co.*, 185 Ill. App. 148. Ind.

that ordinarily statutes limiting the time within which an application for the modification of a judgment may be made do not apply to the amendment of clerical errors, as distinguished from the revision or correction of judicial mistakes;<sup>29</sup> and the consequences of the "mistake or excusable neglect" of the party,<sup>30</sup> and statutes which apparently refer to such mistakes have received so liberal a construction as to be practically nullified in this regard.<sup>31</sup> On the other hand, the provisions of some statutes on this subject are such, and have received

Douglass v. Keehn, 78 Ind. 199. **Ia.** Reed v. Lane, 96 Iowa 454, 65 N. W. 350; Wetmore v. Harper, 70 Iowa 346, 30 N. W. 611. **Kan.**—State Bank v. Stevenson, 65 Kan. 816, 70 Pac. 875. **Ky.**—Boro v. Holtzhauer, 23 Ky. L. Rep. 2317, 67 S. W. 30. **Minn.**—Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057; McClure v. Bruck, 43 Minn. 305, 45 N. W. 438. **Neb.**—Girard Trust Co. v. Null, 97 Neb. 324, 149 N. W. 809. **N. Y.**—Deagan v. King, 83 App. Div. 428, 82 N. Y. Supp. 422; Oliver v. French, 9 App. Div. 623, 41 N. Y. Supp. 106. **Ohio.** Corry v. Campbell, 34 Ohio St. 204. **R. I.**—Fitch v. Richard, 18 R. I. 617, 29 Atl. 689. **S. C.**—Robbins v. Slatery, 30 S. C. 328, 9 S. E. 510. **Tenn.** Carney v. McDonald, 10 Heisk. 232. **Wis.**—Williams v. Hayes, 68 Wis. 248, 32 N. W. 44. **Wyo.**—Holt v. Cheyenne, 22 Wyo. 212, 137 Pac. 876.

[a] This means that the matter must be brought to the attention of the court within this designated time, that is a hearing must be had; it is not sufficient that the notice of motion be served within this time. Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91.

29. **Cal.**—Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928 (involving §473, Code Civ. Proc.). And San Joaquin Land & W. Co. v. West, 99 Cal. 345, 33 Pac. 928; Egan v. Egan, 90 Cal. 15, 27 Pac. 22. See City and County of San Francisco v. Brown, 153 Cal. 644, 96 Pac. 281. **Colo.**—Pleyte v. Pleyte, 15 Colo. 44, 24 Pac. 579 (involving §75, Code Civ. Proc.). **Ky.**—Smith v. Mullins, 3 Mete. 182. **Minn.**—See Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057; McClure v. Bruck, 43 Minn. 305, 45 N. W. 438. **Mo.**—See Latshaw v. McNeese, 50 Mo. 381. **N. C.** Walton v. Pearson, 85 N. C. 34. **Tex.** Coleman v. Zapp, 105 Tex. 491, 151 S. W. 1040, overruling earlier cases.

[a] This is not "a motion to relieve a party from a judgment taken against him through his mistake or excusable neglect; for then it would have come within the scope of section 133 of the code, and must, as suggested by the judge, have been made within one year after notice; but it was a motion to amend, not the action of the court, its judgment or its process, but simply its record as inadvertently made by its officer and there is no length of time which will bar this power of the court or relieve it of the duty of exercising it." Walton v. Pearson, 85 N. C. 34.

30. McClure v. Bruck, 43 Minn. 305, 45 N. W. 438; Walton v. Pearson, 85 N. C. 34.

See *infra*, XIV.

[a] The power to amend is distinct from the power to relieve against such mistakes. Strickland v. Strickland, 95 N. C. 471. The distinction between such cases is recognized in Corry v. Campbell, 34 Ohio St. 204.

[b] In Indiana, in considering §405, Burns' Ann. St. 1908, which provides that "the court may also . . . relieve a party from a judgment taken against him through his mistake, inadvertance, surprise, or excusable neglect, . . .," the court says (Cauthorn v. Bierhaus [Ind. App.], 88 N. E. 314). "The defect sought to be cured here clearly does not come within the meaning of any of the terms used." "If a mistake, (it) was a mistake of . . . the court."

31. Shelley v. Smith, 50 Iowa 543; Goldsmith v. Clausen, 14 Iowa 278.

[a] In Tennessee the rule adopted is that the right of a party to demand such a correction as of right ceases at the expiration of the time prescribed by the statute (Code, §2877) but that after that time it is discretionary with the court whether it will make the correction or not (Code, §2878). Rickman v. Rickman, 6 Lea 483.

such a construction at the hands of the courts, as to render them applicable to clerical errors as well.<sup>32</sup>

e. *Jurisdiction and Venue*.—Jurisdiction of such a motion is possessed only by the tribunal in which the judgment involved was rendered.<sup>33</sup>

f. *Notice*.—(I.) *When Necessary*.—(A.) *GENERAL STATEMENT*.—The rules governing the necessity of giving notice of such an application are dependent, to some extent, upon the view taken by the courts in that particular jurisdiction as to the class or kind of evidence which will support an amendment.<sup>34</sup> Thus, whenever the amendment is considered as properly made only upon record evidence notice has been held to be necessary<sup>35</sup> since in such a case any amendment which may be obtained is always founded upon matter of record and cannot

32. *Bank v. Stevenson*, 65 Kan. 816, 70 Pac. 875. See *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901. Compare, *Corn Exch. Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805.

[a] See *Luckey v. Yoeman of Am.*, 141 Ill. App. 332, involving \$66, Pr. Act 1872, which provides that such errors may be corrected by motion "in writing made at any time within five years after the rendition of final judgment."

33. *U. S.*—*King v. French*, 2 Sawy. 441, 14 Fed. Cas. No. 7,793. *Ga.* *Richards v. McHan*, 139 Ga. 37, 76 S. E. 382; *Woolfolk v. Gunn*, 45 Ga. 117. *Kan.*—*Holdredge v. McCombs*, 63 Kan. 889, 66 Pac. 1048. *La.*—*Smith's Heirs v. Railroad Lands Co.*, 120 La. 564, 45 So. 441. *N. Y.*—*Maltby-Henley Co. v. Deane*, 57 N. Y. Supp. 457. *N. C.* *Johnson v. Marcom*, 121 N. C. 83, 28 S. E. 58; *Adams v. Reeves*, 76 N. C. 412. *Pa.*—*Com. v. Hultz*, 6 Pa. 469. *S. C.*—*Hughes v. Shingle Co.*, 51 S. C. 1, 28 S. E. 2. *Tex.*—See *Milam County v. Robertson*, 47 Tex. 222; *Wheeler v. Roberts*, 2 Tex. Civ. Cas., §127. *Eng.* *Tucker v. New Brunswick Trading Co.*, 44 L. Rep. (Ch. Div.) 249.

[a] In *New York* the supreme court has declared that it had not the power to amend a judgment of the municipal court, even though such judgment had been filed with the county clerk for enforcement. *Maltby-Henley Co. v. Deane*, 57 N. Y. Supp. 457. For a similar case see *In re Ashman's Estate*, 218 Pa. 513, 67 Atl. 842.

[b] "The court where a judgment is rendered is the proper, and, indeed, the only court where a motion can be made to amend it." *Woolfolk v. Gunn*, 45 Ga. 117.

[c] In *Texas* the statute regulating this remedy (art. 1357, Rev. St. 1895) provides that the amendment may be made by "court in which such judgment or decree shall be rendered . . ."

34. See *infra*, XIII, D, 2, i.

35. *McGowan v. Simmons*, 185 Ala. 310, 64 So. 569; *McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62; *Ware v. Kent*, 123 Ala. 427, 26 So. 208; *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635; *Naber's Admr. v. Meredith*, 67 Ala. 333; *Gunn v. Howell*, 35 Ala. 144; *Glass v. Glass*, 24 Ala. 468; *Allen v. Bradford*, 3 Ala. 281; *Homeseekers' Assn. v. Gleeson*, 133 Cal. 312, 65 Pac. 617; *Dickey v. Gibson*, 113 Cal. 26, 45 Pac. 15; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074. And see *Herman v. Santee*, 103 Cal. 519, 37 Pac. 509. *Contra*, *Alexander v. Stewart*, 23 Ark. 18; *Martin v. Bank*, 20 Ark. 636.

[a] In *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, it was said that "ordinarily, a court would require notice of the motion to be given to all parties interested, but it has the power to make the correction without such notice."

[b] "Where it is manifest from a bare inspection of the record (that) the clerk entered a judgment other than the one the court rendered, opinions have held an amendment to make the record express the true judgment given by the court may be ordered without notice . . . But if the propriety of the amendment cannot be thus determined, notice must be given. . . . The essence of the rule is that notice must be given to the adverse party, unless it is obvious he cannot be aggrieved by the proposed amendment."



be affected by extraneous facts.<sup>36</sup> But whenever the amendment can, in the nature of things, only be predicated upon extrinsic facts, it is held that a notice is required.<sup>37</sup> However, the fact that extraneous evidence is permissible does not necessitate notice of the application except when the records do not disclose sufficient grounds to justify an amendment.<sup>38</sup> Some courts unqualifiedly require that a proper notice of such an application be given,<sup>39</sup> while others say that notice is never necessary in case of the correction of clerical errors.<sup>40</sup> In other jurisdictions the necessity of notice is made to depend upon whether or not the amendment is proposed at the same term in which the judgment was rendered, it being considered essential when the motion to amend is made at a subsequent term,<sup>41</sup> but unnecessary if made during the current

Pulitzer Pub. Co. v. Allen, 134 Mo. App. 229, 113 S. W. 1159.

36. Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317; McGowan v. Simmons, 185 Ala. 310, 64 So. 569; Nabers v. Meredith, 67 Ala. 333; Allen v. Bradford, 3 Ala. 281.

[a] In Georgia, however, one of this group of states (see *infra*, XIII, D, 2, i), and amendment of a former order by the ordinary is proper only after notice to the adverse parties. Fischesser v. Thompson, 45 Ga. 459.

[b] "In the former case (an amendment based upon record evidence) notice to the parties is not necessary. . . . The court, for the clearer and more accurate expression of its final action, molds into form that which is fairly and reasonably deducible from the whole record, taken together. There is nothing to litigate. No right is substantially affected." Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317.

[c] When this motion is made in answer to another motion notice thereof has been held unnecessary. Whitaker v. Gee, 63 Tex. 435.

37. Where a default judgment is obtained against A. D. when, in reality, the defendant's name is C. D., it is improper to entertain a motion to amend unless it be shown that C. D. has been given sufficient notice of the making of the motion. This is because the record, in such a case, could contain no evidence on which to predicate an amendment. McNally v. Mott, 3 Cal. 235. And see Chester v. Miller, 13 Cal. 558.

[a] Amendment on the ground of fraud requires notice. Dunham v. Roberts, 28 Ala. 286; Carney v. McDonald, 10 Heisk. (Tenn.) 232 (statute).

38. U. S.—Odell v. Reynolds, 70

Fed. 656, 17 C. C. A. 317. Cal.—Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272. Mich.—Emery v. Whitwell, 6 Mich. 474. And see Souvais v. Leavitt, 53 Mich. 577, 19 N. W. 261.

39. Wooster v. Glover, 37 Conn. 315; Weed v. Weed, 25 Conn. 337.

[a] In the Federal Court.—In this connection the supreme court has said, "It is urged that when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the fact jurisdiction once lost can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of a party to be heard against the rendition of a new judgment against him." Wetmore v. Karrick, 205 U. S. 141, 158, 27 Sup. Ct. 434, 51 L. ed. 745.

40. Chafee & Co. v. Rainey, 21 S. C. 11.

41. U. S.—Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745. Ill.—Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Gillet v. Booth, 95 Ill. 183; Lill v. Stookey, 72 Ill. 495; Cairo & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Seely v. Pelton, 63 Ill. 101; Swift v. Allen, 55 Ill. 303; Means v. Means, 42 Ill. 50; Smith v. Wilson, 26 Ill. 186; Cook v. Wood, 24 Ill. 295; Coughran v. Gutcheus, 18 Ill. 390; O'Conner v. Mullen, 11 Ill. 57; Atkins v. Hinman, 7 Ill. 437; Fitzgerald v. Gore, 105 Ill. App. 242; Page v. Shields, 102 Ill. App. 575; Ives v. Hulce, 17 Ill. App. 30; Baragwanath v. Wilson, 4 Ill. App. 80; Rauh v. Ritchie, 1 Ill. App. 188. Ind.—Corwin v. Thomas, 83 Ind. 110; Richardson v. Howk, 45 Ind. 451;

term.<sup>42</sup> However, such relief may always be granted upon motion, notice and hearing, provided, of course the facts permit and the dictates of justice require it.<sup>43</sup>

(B.) To STRANGERS. — Wherever subsequently acquired rights of third persons may have become involved, it is the better practice to give such persons notice of the motion to amend,<sup>44</sup> although it would seem to be not absolutely necessary;<sup>45</sup> nor is it necessary to notify a defendant who, although properly served, has never appeared in the action.<sup>46</sup>

(II.) Waiver of. — The parties may by appearance waive formal notice,<sup>47</sup> as by voluntarily appearing and contesting the motion.<sup>48</sup>

(III.) Form and Contents. — The office of the notice is to bring the

*Clifton v. State*, 5 Blackf. 224; *Bradford v. McBride*, 50 Ind. App. 624, 96 N. E. 508; *Pursley v. Wickle*, 4 Ind. App. 382, 30 N. E. 1115. **Ia.**—*Browne v. Kiel*, 117 Iowa 316, 90 N. W. 624. **Kan.**—*Morris v. Bunyan*, 58 Kan. 210, 48 Pac. 864; *Birmingham v. Leonhardt*, 2 Kan. App. 513. **Ky.**—*Oldham v. Brannon*, 2 Metc. 302; *Seiler v. Northern Bank*, 9 Ky. L. Rep. 497, 5 S. W. 536. **Minn.**—*Berthold v. Fox*, 21 Minn. 51. **Miss.**—*Shirley v. Conway*, 44 Miss. 454; *Mississippi & Tenn. Railroad Co. v. Wynne*, 42 Miss. 315; *Poole v. McLeod*, 1 Smed. & M. 391. **Mo.**—*Brown v. Marshall*, 241 Mo. 707, 145 S. W. 810; *Pulitzer Pub. Co. v. Allen*, 134 Mo. App. 229, 113 S. W. 1159. See *Wand v. Ryan*, 166 Mo. 646, 656, 65 S. W. 1025; *Pulitzer Pub. Co. v. Allen*, 134 Mo. App. 229, 113 S. W. 1159. **Ore.**—*Hoover v. Hoover*, 39 Ore. 456, 65 Pac. 796. **Tex.**—*Coffee v. Black*, 50 Tex. 117. See *De Hymel v. Scottish-American Mtg. Co.*, 80 Tex. 493, 16 S. W. 341; *Note to Swift v. Paris*, 11 Tex. 18.

[a] An amendment in a material point "should not have been allowed without . . . notice . . . True, they (the parties) were nominally in court . . . but the decree, . . . had been made at a former term." *Means v. Means*, 42 Ill. 50.

[b] Where the motion was made pending an appeal, notice was required in *Eno v. Hunt*, 8 Iowa 436.

[c] At such a time, all the parties should be given notice, and where the application was to amend a judgment on a cross-complaint, it is not sufficient to give the respective cross-complainants notice, the plaintiff as well as other defendants must be served.

*Bradford v. McBride*, 50 Ind. App. 624, 96 N. E. 508.

[d] But it has been held that, having jurisdiction of the subject-matter, viz., the right to correct the record, its judgment in such matter would be binding on those parties who were properly before it. *Pritchard v. Mines*, 56 Ind. App. 671, 106 N. E. 411.

42. *Richardson v. Howk*, 45 Ind. 451. And see *Homan v. Hellman*, 35 Neb. 414, 53 N. W. 369.

[a] Where all the parties are before the court the failure of the moving party to file and serve a formal notice of the application to amend will not invalidate the proceedings. *Varn v. Varn*, 58 Tex. Civ. App. 595, 125 S. W. 639.

43. *Thomas v. Thomas*, 98 Me. 184, 53 Atl. 651.

44. *Auerbach v. Giesecke*, 40 Minn. 258, 41 N. W. 946.

[a] Sureties on attachment bond are entitled to notice of motion to amend. *Forbes v. Navra*, 63 Miss. 1.

45. *Auerbach v. Giesecke*, 40 Minn. 258, 41 N. W. 946.

46. *Case v. Mannis*, 11 N. Y. Supp. 243.

47. *Conn.*—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727. **Ill.**—*National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22. **Ia.**—*McConnell v. Avery*, 117 Iowa 282, 90 N. W. 604. **Miss.**—*Graves v. Fulton*, 7 How. 592. **Va.**—*Dillard v. Thornton*, 29 Gratt. (70 Va.) 392. **Wash.**—*Stark Bros. v. Royce*, 44 Wash. 287, 87 Pac. 340. **W. Va.**—*Johnson v. Wheeler Lum. Co.*, 69 W. Va. 539, 72 S. E. 470.

48. *Graves v. Fulton*, 7 How. (Miss.) 592; *Stark Bros. v. Royce*, 44 Wash. 287, 87 Pac. 340.

adverse party into court at the time of the hearing,<sup>49</sup> and if it serve this purpose it would seem unnecessary that it be in any particular form.<sup>50</sup> Indeed, it has been held that the notice need not even be in writing,<sup>51</sup> and that constructive, as well as actual, notice is sufficient to support such a motion.<sup>52</sup>

(IV.) **Service.**—(A.) **TIME OF SERVICE.**—Where the length of notice is not prescribed by statute the notice must be given or served at such a time as will give the adverse party a “reasonable notice.”<sup>53</sup> What will constitute a reasonable notice in a given case is a matter entirely dependent upon attending circumstances.<sup>54</sup>

(B.) **BY AND UPON WHOM MADE.**—If the cause is still in fieri the notice may be served upon the attorney of the adverse party,<sup>55</sup> but after the lapse of any considerable time this is not enough: the notice must then be served upon such party personally.<sup>56</sup> Whenever personal service is necessary, service on a co-party is insufficient.<sup>57</sup> Service may be made by any sheriff,<sup>58</sup> constable,<sup>59</sup> or disinterested person<sup>60</sup> who would be a competent witness.<sup>61</sup>

(C.) **PROOF AND RETURN.**—The return of any officer,<sup>62</sup> or the affidavit of a disinterested person,<sup>63</sup> is a sufficient proof of service. The notice

49. *Makepeace v. Lukens*, 27 Ind. 435; *Indianapolis & G. R. T. Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145. See *State v. Williams Cypress Co.*, 132 La. 949, 61 So. 988.

50. *Latta v. Griffith*, 57 Ind. 329.

[a] **Notice Considered Sufficient.** Ind.—*Bales v. Brown*, 57 Ind. 282. La.—*State v. Williams Cypress Co.*, 132 La. 949, 61 So. 988. Va.—*Dillard v. Thornton*, 29 Gratt. (70 Va.) 392.

[b] A summons may serve as a notice in case the remedy was sought to be pursued by complaint and summons instead of by motion. *Gray v. Robinson*, 90 Ind. 527.

51. *Dillard v. Thornton*, 29 Gratt. (70 Va.) 392. But see *Swift v. Allen*, 55 Ill. 303.

52. *O’Conner v. Mullen*, 11 Ill. 57.

53. *Coffee v. Black*, 50 Tex. 117; *Ellis v. Nat. City Bank*, 42 Tex. Civ. App. 83, 94 S. W. 437; *Dillard v. Thornton*, 29 Gratt. (70 Va.) 392.

[a] “We do not think that, on principle, the same indulgence should be granted the defendant on a motion to reform a mere clerical error in a judgment already rendered, as would be proper to prepare his defense in the first instance, . . .” *Coffee v. Black*, 50 Tex. 117.

[b] “‘But the opposite party shall have reasonable notice of the application for such amendment.’” Art. 1357, Rev. St. 1895, construed in *Ellis*

*v. Nat. City Bank*, 42 Tex. Civ. App. 83, 94 S. W. 437.

54. *Dillard v. Thornton*, 29 Gratt. (70 Va.) 392. See generally the title “Notice.”

[a] Four days has been held to be a sufficient notice of such an application. *Coffee v. Black*, 50 Tex. 117.

55. *Berthold v. Fox*, 21 Minn. 51; *McNairy v. Castleberry*, 6 Tex. 286.

56. *Berthold v. Fox*, 21 Minn. 51.

[a] Where the attorney’s connection with the case is considered at an end with the entry of judgment notice must thereafter be given to the parties personally. *Swift v. Allen*, 55 Ill. 303.

57. *Swift v. Allen*, 55 Ill. 303.

58. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

59. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

60. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

[a] But in Louisiana, “service cannot be made by an unofficial person.” *Weaver v. Schumpert*, 118 La. 315, 42 So. 949.

61. Note to *Swift v. Faris*, 11 Tex. 18.

62. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

63. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335.

[a] The affidavit of an attorney of the moving party would seem to be insufficient for this purpose. *Nigh v.*



should be returned, or noticed on the record, before the day named therein as the one upon which the motion would be made,<sup>64</sup> otherwise the applicant must be regarded as having abandoned his notice and the court should refuse to entertain the motion.<sup>65</sup>

g. *Mode of Defense*.—In the event that the grounds upon which the amendment is asked do not appear to be sufficient, the question is properly raised by a motion to quash or dismiss the proceedings,<sup>66</sup> but not by demurrer,<sup>67</sup> nor, it has been held, by motion to strike.<sup>68</sup> Prohibition will not lie to enjoin a court from entertaining an application to amend its judgment,<sup>69</sup> unless the court has lost jurisdiction over the cause.<sup>70</sup>

h. *The Hearing*.—The general rule is that only such questions as are necessary to determine the propriety of granting the amendment will be considered, on the hearing.<sup>71</sup> Such facts, however, as are pertinent and properly considered are to be determined by the court and not by the jury.<sup>72</sup>

i. *What May Be Shown*.—The rule followed in some states as to what may properly be shown in support of a motion to amend a judgment is that the amendment cannot be made except upon record evidence,<sup>73</sup> or some entry or memorandum of the trial made at the

Stillwell, etc. Co., 5 Ohio Cir. Dec. 335.

64. *Johnson v. Wheeler Lumb. Co.*, 69 W. Va. 529, 72 S. E. 470.

65. *Johnson v. Wheeler Lumb. Co.*, 69 W. Va. 539, 72 S. E. 470.

66. *Conway v. Day*, 79 Ind. 318; *Douglass v. Keehn*, 78 Ind. 199.

67. *Urbanski v. Manns*, 87 Ind. 585; *Sidener v. Coons*, 83 Ind. 183; *Conway v. Day*, 79 Ind. 318; *Latta v. Griffith*, 57 Ind. 329.

[a] The objection was, however, raised by demurrer in *Mitchell v. Lincoln*, 78 Ind. 531, and it has been held that if the proper result is obtained in this manner, the fact that it was arrived at by means of a demurrer, instead of on a motion to dismiss, will furnish no cause for reversing the judgment. *Conway v. Day*, 79 Ind. 318.

[b] But in Illinois the proceeding to amend is an independent proceeding and a demurrer is proper. *Barnes v. Chicago City Ry. Co.* 185 Ill. App. 148.

[c] In *Robertson v. King*, 120 Ala. 459, 24 So. 929, a demurrer was permitted for this purpose, and also in *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

68. *Urbanski v. Manns*, 87 Ind. 585.

69. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

70. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

71. *Ga.*—*Pryor v. Leonard*, 57 Ga. 136. *N. Y.*—*Effray v. Masson*, 18 N. Y. Supp. 353. *N. C.*—*Foster v. Woodfin*, 65 N. C. 29.

[a] It is irregular upon the hearing of such a motion to consider collaterally what the effect of the proposed amendment will be, the proper practice being to decide this question in a direct proceeding for that purpose. *Foster v. Woodfin*, 65 N. C. 29.

72. *Ga.*—*Woolfolk v. Gunn*, 45 Ga. 117. *N. H.*—*Brown v. West*, 65 N. H. 187, 18 Atl. 233. *N. C.*—*Creed v. Marshall*, 160 N. C. 394, 16 S. E. 270.

73. *Ala.*—Code, 1907, §334; *Spears v. Wise*, 187 Ala. 346, 65 So. 786; *Briggs v. Tennessee, etc. Co.*, 175 Ala. 130, 57 So. 882; *Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 So. 123; *Robertson v. King*, 120 Ala. 459, 24 So. 929; *Leinkauff v. Tuskaloosa, etc. Co.*, 105 Ala. 328, 16 So. 891; *Browder v. Faulkner*, 82 Ala. 257, 3 So. 30; *Modawell v. Hudson*, 57 Ala. 75; *Dunlap v. Horton*, 49 Ala. 412; *Tanner v. Hayes*, 47 Ala. 722; *Bruce v. Strickland*, 47 Ala. 192; *Summersett v. Summersett*, 40 Ala. 596; *West v. Galloway's Admr.*, 23 Ala. 300; *Dunham v. Roberts*, 28 Ala. 286; *Hudson v. Hudson*, 20 Ala. 264; *Metcalf v. Metcalf*, 19 Ala. 319; *Kidd v. Montague*, 19 Ala. 619; *Salt-*

trial thereof,<sup>74</sup> or, entries in some book belonging to the office of the

marsh *v.* Bird, 19 Ala. 665; Benford *v.* Daniels, 13 Ala. 667; Andrews' Admr. *v.* Bank, 10 Ala. 375; Brown *v.* Bartlett, 2 Ala. 29; Scales *v.* Swan, 9 Port. 163; Tombeckbee Bank *v.* Strong's Exr., 1 Stew. & P. 187; Thompson *v.* Miller, 2 Stew. 470. Cal. Leonis *v.* Leffingwell, 126 Cal. 369, 58 Pac. 940; Dreyfuss *v.* Tompkins, 67 Cal. 339, 7 Pac. 732; Leviston *v.* Swan, 33 Cal. 480; De Castro *v.* Richardson, 25 Cal. 49; Swain *v.* Naglee, 19 Cal. 127; Branger *v.* Chevalier, 9 Cal. 351; Morrison *v.* Dapman, 3 Cal. 255. Ga. Dixon *v.* Mason, 68 Ga. 478; Pitman *v.* Lowe, 24 Ga. 429; Mathews *v.* Swatts, 16 Ga. App. 208, 84 S. E. 980. Ind.—Williams *v.* Henderson, 90 Ind. 577; Pritchard *v.* Mines, 56 Ind. App. 671, 106 N. E. 411; Nixon *v.* Nichols, 10 Ind. App. 1. Ky.—Crenshaw *v.* Crenshaw, 24 Ky. L. Rep. 600, 69 S. W. 711. Mo.—Bank *v.* Allen, 68 Mo. 474; State *ex rel.* Graves *v.* Judge of Cr. Court, 61 Mo. 166; Jones *v.* Hart, 60 Mo. 351; Gibson *v.* Chouteau's Heirs, 45 Mo. 171; Monk *v.* Wabash R. Co., 166 Mo. App. 692, 150 S. W. 1083, 1087; Kreisel *v.* Snively, 135 Mo. App. 155, 115 S. W. 1059; Pulitzer Pub. Co. *v.* Allen, 134 Mo. App. 229, 113 S. W. 1159; Bishop *v.* Seal, 92 Mo. App. 167; Burns *v.* Sullivan, 90 Mo. App. 1; Bohm & Co. *v.* Stivers, 75 Mo. App. 291; State *ex rel.* Brown *v.* White, 75 Mo. App. 257; Blize *v.* Castlio, 8 Mo. App. 290. See Fitzmaurice *v.* Turney, 214 Mo. 610, 114 S. W. 504; Saxton *v.* Smith, 50 Mo. 490. Nev.—Solomon *v.* Fuller, 14 Nev. 63. Ore.—Nicklin *v.* Robertson, 28 Ore. 278, 42 Pac. 993. Pa.—See Smith *v.* Hood & Co., 25 Pa. 218. Tenn.—Tunstall *v.* Schoenpflug, 4 Baxt. 43; Williams *v.* Tenpenny, 11 Humph. 176; Ridgeway *v.* Ward, 4 Humph. 430; Ocoee Bank *v.* Hughes, 2 Coldw. 52; State *v.* Disney, 5 Sneed 598. See Rickman *v.* Rickman, 6 Lea 483. Tex.—Missouri Pac. Ry. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605; Yarbrough *v.* Etheredge (Tex. Civ. App.), 163 S. W. 998; Meyer Bros. *v.* Coulter, 18 Tex. Civ. App. 685, 46 S. W. 648. Compare, State *v.* Womack, 17 Tex. 237. Va.—Richardson *v.* Jones, 12 Gratt. (53 Va.) 53. Wash. Hale *v.* Finch, 1 Wash. Ter. 517. W. Va. Triplett *v.* Lake, 43 W. Va. 428, 439, 27 S. E. 363; Morris *v.* Peyton, 29

W. Va. 201, 11 S. E. 954; Stringer *v.* Anderson, 23 W. Va. 482.

[a] "It is well settled that an amendment cannot be predicated upon matter dehors the record." Bondurant *v.* Thompson, 15 Ala. 202.

[b] In accordance with this rule an entry, "Continued on payment of costs . . . , otherwise the case is dismissed," does not furnish sufficient evidence to authorize a subsequent amendment of the order so as to make it provide that unless the defendant paid the costs judgment would be rendered against him. Dunlap *v.* Horton, 49 Ala. 412.

[c] "While it (the amendment) cannot be allowed, unless it can be made from matter apparent on the record, the court is not confined exclusively to the record in determining whether to allow it or not, or what amendment to make." Ford *v.* Tinchant, 49 Ala. 567.

[d] Where the bill of exceptions furnishes the only evidence of the clerical error complained of, there is nothing on which to predicate an amendment. Stoutz *v.* Rouse, 75 Ala. 431.

[e] "A clerical misprision can only be ascertained and corrected from other parts of the record, not from extraneous circumstances or facts." Crenshaw *v.* Crenshaw, 24 Ky. L. Rep. 600, 69 S. W. 711.

[f] That the matter referred to in such a case must appear in some "part of the record *previous* to the entering" of the judgment was held in Morris *v.* Peyton, 29 W. Va. 201, 214, 11 S. E. 954.

[g] An original judgment which was stricken out and another substituted has been held not to be record evidence within the meaning of this rule. Briggs *v.* Tennessee, etc. Co., 175 Ala. 130, 57 So. 882.

74. Ala.—Robertson *v.* King, 120 Ala. 459, 24 So. 929; Horton *v.* Beadle, 62 Ala. 32; Hudson *v.* Hudson, 20 Ala. 364. Ga.—Mathews *v.* Swatts, 16 Ga. App. 208, 84 S. E. 980. Ill.—Coughran *v.* Guteheus, 18 Ill. 390. Ky.—Kendrick *v.* Williams, 157 Ky. 767, 164 S. W. 72. Mo.—Burns *v.* Sullivan, 90 Mo. App. 1; Williams *v.* Walton, 84 Mo. App. 433. See State *ex rel.* Brown *v.* White, 75 Mo. App. 257. Pa.—See

court and required by law to be kept,<sup>75</sup> unless it is evident that the entry must have been a misprision of the clerk, as where, in a statutory proceeding the statute provides the form of judgment to be entered and the clerk, in entering the judgment, departs from that form.<sup>76</sup> The weight of authority is to the effect that an amendment may properly be based upon the minutes of the trial judge,<sup>77</sup> although a contrary view has been adopted by some courts.<sup>78</sup> Amendments are also permitted to be made upon the entries in the judge's docket,<sup>79</sup>

*Smith v. Hood & Co.*, 25 Pa. 218. Tenn.—*Oceee Bank v. Hughes*, 2 Coldw. 52.

[a] "If these, or either of them (the record, the clerk's minutes, the judge's docket, or some paper in the cause) . . . show to a reasonable degree of absolute certainty the judgment the court actually rendered, it will be entered *nunc pro tunc*." *Burns v. Sullivan*, 90 Mo. App. 1. And to the same point, *Bishop v. Seal*, 92 Mo. App. 167. See also *Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993.

[b] In a criminal case it is improper to amend the judgment so as to show that the jury were sworn to try the case, unless the amendment is predicated upon some note, memorandum or memorial paper in the record. *People v. Blevins*, 251 Ill. 381, 96 N. E. 214.

[c] In Mississippi it has been held that §940, Code 1892 (§1016, Code, 1906), which provides that "such correction could be made by the docket or other memoranda by the judge or chancellor," does not apply to criminal cases. *Wilson v. Town of Handsboro*, 99 Miss. 252, 54 So. 845.

75. *Hudson v. Hudson*, 20 Ala. 364; *Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670.

[a] "The evidence . . . must be of record, or quasi record." *Harris v. Martin*, 39 Ala. 556. See also *Whorley v. Memphis*, etc. R. Co., 72 Ala. 20 (affirmed in *Memphis*, etc. R. Co. v. *Whorley*, 74 Ala. 264); *Lilly v. Larkin*, 66 Ala. 122; *Horton v. Beadle*, 62 Ala. 32; *Summersett v. Summersett*, 40 Ala. 596.

[b] In *Briggs v. Tennessee*, etc. Co., 175 Ala. 130, 57 So. 882, the bench notes of the judge were refused consideration because they were not required by law to be kept.

[c] *Stenographer's notes* are not a part of the record upon which an amendment of a judgment may be

predicated, although they may be used to refresh the memory of the stenographer or to aid the memory of the judge. *Becher v. Deuser*, 169 Mo. 159, 69 S. W. 363.

76. *Lexington & St. Louis Railroad Co. v. Mockbee*, 63 Mo. 348; *Blize v. Castlio*, 8 Mo. App. 290.

77. Ala.—*McGowan v. Simmons*, 185 Ala. 310, 64 So. 569; *Lewis v. State*, 10 Ala. App. 31, 64 So. 537. Ga.—*Rutland v. State*, 14 Ga. App. 746, 82 S. E. 293. Ill.—*Gillett v. Booth*, 95 Ill. 183; *McCormick v. Wheeler*, 36 Ill. 114; *Denhard v. Dunbar*, 98 Ill. App. 266; *In re Annie Barnes*, 27 Ill. App. 151; *Baragwanath v. Wilson*, 4 Ill. App. 80. See *Coughran v. Gutcheus*, 18 Ill. 390; *Troutman v. Hills*, 5 Ill. App. 396. Ky.—*Chester v. Graves*, 159 Ky. 244, 166 S. W. 998. Mo.—*State v. Goodrich*, 159 Mo. App. 422, 140 S. W. 629. Tenn.—*Tunstall v. Schoenpflug*, 4 Baxt. 43; *Carney v. McDonald*, 10 Heisk. 232, *overruling* in this regard, *Williams v. Tenpenny*, 11 Humph. 176.

[a] The memorandum of the judge on an old trial list has been considered sufficient record to support an amendment. *Cromwell v. Bank*, 2 Wall. Jr. 569, 6 Fed. Cas. No. 3,409.

78. *Shackelford v. Levy*, 63 Miss. 125.

79. U. S.—*Hicklin v. Marco*, 64 Fed. 609. Ala.—*Sims v. Boynton*, 22 Ala. 353. See *Briggs v. Tennessee*, etc. Co., 175 Ala. 130, 70 So. 882; *West v. Galloway's Admr.*, 33 Ala. 306. Fla.—*McGourin v. De Funiak Springs*, 52 Fla. 556, 42 So. 187. Ga.—*Mathews v. Swatts*, 16 Ga. App. 208, 84 S. E. 980; *Rutland v. State*, 14 Ga. App. 746, 82 S. E. 293. Miss.—Code, 1892, §940 (§1016, Code, 1906); *Wilson v. Town of Handsboro*, 99 Miss. 252, 54 So. 845. Mo.—*Jones v. Hart*, 60 Mo. 351; *Monk v. Wabash R. Co.*, 166 Mo. App. 692, 150 S. W. 1083, 1087; *Pulitzer Pub. Co. v. Al-*



but not upon memoranda of counsel,<sup>80</sup> or other memoranda found among the records.<sup>81</sup> On the other hand, memoranda of the clerk has been considered sufficient and competent,<sup>82</sup> and so have the clerk's minutes.<sup>83</sup> In jurisdictions requiring some such record evidence, it is improper to grant an amendment based upon the recollection of the judge,<sup>84</sup> except where the amendment is made during the judgment term,<sup>85</sup> and likewise it is improper to make it upon parol<sup>86</sup>

len, 134 Mo. App. 229, 113 S. W. 1159; Bishop v. Seal, 92 Mo. App. 167; Burns v. Sullivan, 90 Mo. App. 1; Williams v. Walton, 84 Mo. App. 433. See Blize v. Castlio, 8 Mo. App. 290. But see Henley v. Kinley, 16 Mo. App. 176. Tex.—Missouri Pac. Ry. Co. v. Haynes, 82 Tex. 448, 18 S. W. 605; Whittaker v. Gee, 63 Tex. 435. See Meyer Bros. v. Coulter, 18 Tex. Civ. App. 685, 46 S. W. 648.

80. Moody v. Grant, 41 Miss. 565. Compare, Moody v. Keener, 9 Port. (Ala.) 252.

81. Shackelford v. Levy, 63 Miss. 125.

82. Williams v. Walton, 84 Mo. App. 433; Farley Bros. v. Cammann, 43 Mo. App. 168. And see Jones v. Hart, 60 Mo. 351; Blize v. Castlio, 8 Mo. App. 290. Contra, People v. Petit, 266 Ill. 628, 107 N. E. 830.

83. Fla.—McGourin v. De Funiak Springs, 52 Fla. 556, 42 So. 186. Ga. See Mathews v. Swatts, 16 Ga. App. 208, 84 S. E. 980. Mo.—Jones v. Hart, 60 Mo. 351; Monk v. Wabash R. Co., 166 Mo. App. 692, 150 S. W. 1083, 1087; State v. Goodrich, 159 Mo. App. 422, 140 S. W. 629; Burns v. Sullivan, 90 Mo. App. 1. Wis.—See Williams v. Hayes, 68 Wis. 248, 32 N. W. 44.

84. Cal.—See Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393. Ga.—Mathews v. Swatts, 16 Ga. App. 208, 84 S. E. 980; Rutland v. State, 14 Ga. App. 746, 82 S. E. 293. Ill.—Culver v. Cogle, 165 Ill. 417, 46 N. E. 242; Frew v. Danforth, 126 Ill. 242, 19 N. E. 293; Page v. Shields, 102 Ill. App. 575; Denhard v. Dunbar, 98 Ill. App. 266. Ky. Kendrick v. Williams, 157 Ky. 767, 164 S. W. 72. Mo.—Jones v. Hart, 60 Mo. 351; Burns v. Sullivan, 90 Mo. App. 1; Blize v. Castlio, 8 Mo. App. 290. Tenn. Ridgeway v. Ward, 4 Humph. 430. Tex.—Missouri Pac. Ry. Co. v. Haynes, 82 Tex. 448, 18 S. W. 605. Compare, Owens v. Vander Stucken (Tex. Civ. App.), 133 S. W. 491; Meyer Bros. v.

Coulter, 18 Tex. Civ. App. 685, 46 S. W. 648.

[a] "Although a judge may remember that the record of a judgment entered by him at a previous term is not in accordance with the judgment he actually delivered, and the order he actually made, nevertheless he has no power to amend or correct the record unless there is something in the minutes kept by him, other entries of the same record, or pleading or files in the case; something, as is said, to amend by; that is, *some written memoranda or record . . .*, from which the court is able to see clearly that the record as made by the clerk does not correctly represent its action." Denhard v. Dunbar, 98 Ill. App. 266.

[b] In the federal courts the rule is otherwise and an amendment may be made by the court predicated upon the recollection of the judge. Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317; Hicklin v. Marco, 64 Fed. 609.

[c] In Arkansas the courts have said that in a proceeding to amend a judgment, "the court's recollection and construction of its own order must be accepted in the absence of any oral evidence or anything in the record itself to the contrary." Lowe v. Hart, 93 Ark. 548, 125 S. W. 1030.

[d] In New Hampshire, where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution. Frink v. Frink, 43 N. H. 508.

85. Eddie v. Eddie, 138 Mo. 599, 39 S. W. 451; Williams v. Walton, 84 Mo. App. 433. See Stony Island Hotel Co. v. Johnson, 57 Ill. App. 608.

86. Ala.—Story Mercantile Co. v. McClellan, 145 Ala. 629, 40 So. 123; Robertson v. King, 120 Ala. 459, 24 So. 929; Lilly v. Larkin, 66 Ala. 122; Tanner v. Hayes, 47 Ala. 722; Bruce's Exr. v. Strickland's Admr., 47 Ala. 192; Harris v. Martin, 39 Ala. 556; West v. Galloway's Admr., 33 Ala. 306; Thompson v. Miller, 2 Stew. 470. Ga.

testimony, affidavits,<sup>87</sup> or other extraneous evidence.<sup>88</sup> The record evidence, too, must be such as may be found in the records of the case at bar, it being considered improper to resort to the records of any case other than the one in which the motion is made,<sup>89</sup> and where there is no such record evidence the court cannot make the record evidence which is to be the predicate of its subsequent action in making the amendment,<sup>90</sup> as by first amending the record on extrinsic evidence.<sup>91</sup> On the other hand, reference may be had to any part of the records of the case in which the motion to amend is pending,<sup>92</sup> the pleadings,<sup>93</sup>

*Dixon v. Mason*, 68 Ga. 478; *Pitman v. Lowe*, 21 Ga. 429; *Mathews v. Swatts*, 16 Ga. App. 208, 84 S. E. 980; *Rutland v. State*, 14 Ga. App. 746, 82 S. E. 293. Ill.—*Coughran v. Guteheus*, 18 Ill. 390. Miss.—*Moody v. Grant*, 41 Miss. 565; *Russell v. McDougall*, 3 Smed. & M. 234, 247. Mo.—*Becher v. Deuser*, 169 Mo. 159, 69 S. W. 363; *Blize v. Castlio*, 8 Mo. App. 290. Tex.—*Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 695.

[a] In Illinois (1) the court has said it "may well be doubted whether, upon motion and ex parte proof (which in this case consisted of oral testimony), however strong . . . , an amendment can be made" (*Coughran v. Guteheus*, 18 Ill. 390), (2) but parol testimony was considered in support of an amendment in *Morrison v. Stewart*, 21 Ill. App. 113, and (3) in *Ives v. Hulee*, 17 Ill. App. 30, the court says that the amendment may be predicated upon "other parts of the record" as well as other "convincing and satisfactory proof." And see *Goodwine v. Hedrick*, 29 Ind. 383.

[b] "The amendment cannot be based upon oral testimony, apart from what is shown by the record." *Blize v. Castlio*, 8 Mo. App. 290. And see *Bank v. Allen*, 68 Mo. 474.

87. *Blize v. Castlio*, 8 Mo. App. 290; *Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993.

[a] Affidavits, however, that are already a part of the record are not included in this rule. *Bank v. Allen*, 68 Mo. 474.

88. Fla.—*McGourin v. Town of De Funiak Springs*, 52 Fla. 556, 42 So. 187. Ga.—*Rutland v. State*, 14 Ga. App. 746, 82 S. E. 293. S. C.—*Barrett v. James*, 30 S. C. 329, 9 S. E. 263.

[a] Letters from the judge who rendered the judgment to the attorney representing the applicant were properly refused consideration by the judge

before whom the motion was made. *Barrett v. James*, 30 S. C. 329, 9 S. E. 263.

89. *Tombeckbee Bank v. Strong's Exr.*, 1 Stew. & P. (Ala.) 187.

90. *Benford v. Daniels*, 13 Ala. 667; *Becher v. Deuser*, 169 Mo. 159, 69 S. W. 363; *Blize v. Castlio*, 8 Mo. App. 290.

91. *Kitchen v. Moye*, 17 Ala. 143.

92. *Smith v. Redus*, 9 Ala. 99; *Jordan v. Bank*, 5 Ala. 284. And see *The Governor v. Knight*, 8 Ala. 297. See also *Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993.

93. Ala.—*City of Huntsville*, 68 So. 676; *Price v. Thomason*, 11 Ala. 875. Ga.—*Thompson v. American Mtg. Co.*, 122 Ga. 39, 49 S. E. 751; *Dixon v. Mason*, 68 Ga. 478. See *Bond v. Burns*, 113 Ga. 82, 38 S. E. 405. Ill.—*Coughran v. Guteheus*, 18 Ill. 390; *Bledsoe v. Furniture Co.*, 161 Ill. App. 146. Mo.—*Martin v. Brown*, 162 Mo. App. 223, 144 S. W. 1115. Ohio.—See *Huntington v. Ziegler*, 2 Ohio St. 10. Ore.—*Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993. Tenn.—See *Carney v. McDonald*, 10 Heisk. 232; *Ocoee Bank v. Hughes*, 2 Coldw. 52.

[a] Thus the court may have recourse to the declaration to aid it in such a proceeding. *Huntington v. Ziegler*, 2 Ohio St. 10.

[b] Reference to an answer in the judgment makes the answer on file a part of the record for the purpose of aiding the court in making an amendment. *Price v. Thomason*, 11 Ala. 875.

[c] Where a judgment by default was in entire conformity with the pleadings, such judgment could not be amended on the ground that by reason of a clerical error the defendant named was not the person intended nor the party served with process. This on the principle that the records must furnish sufficient evidence to support the proposed amendment. *Thompson*

for instance, or the verdict.<sup>94</sup> Without regard to the rules in this respect, it is, of course, always true that where the records disclose sufficient cause to justify the granting of an amendment there is no error in so doing.<sup>95</sup> On the other hand, an amendment will not be allowed where it appears from the record that the judgment entry substantially embodies the judgment pronounced.<sup>96</sup> An exception to the rule requiring record evidence is recognized, however, when the motion is made on the ground of fraud,<sup>97</sup> or where the records have been lost or destroyed,<sup>98</sup> and in some states at least, the rule requiring some evidence to amend by obtains only after the lapse of the term.<sup>99</sup>

*v. American Mtg. Co.*, 122 Ga. 39, 49 S. E. 751.

[d] Parties whose names do not appear in the record cannot be added by amendment. *Bond v. Burns*, 113 Ga. 82, 38 S. E. 405.

[e] "The court should not look beyond the verdict and the pleadings." *Dixon v. Mason*, 68 Ga. 478.

94. *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605. And see *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954.

[a] A verdict which was not received is not part of the record and cannot be looked to, to support such an application. *Messner v. Hutchins*, 17 Tex. 597; *Yarbrough v. Etheredge* (Tex. Civ. App.), 163 S. W. 998.

95. U. S.—See *Cromwell v. Bank*, 2 Wall. Jr. 569, 6 Fed. Cas. No. 3,409. Ala.—*Ware v. Kent*, 123 Ala. 427, 26 So. 208. Cal.—*Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174. Fla.—*Adams v. Re Qua*, 22 Fla. 250. Ill.—*Coughran v. Gutcheus*, 18 Ill. 390. Ind.—*Conway v. Day*, 92 Ind. 422; *Stuart v. City of Logansport*, 87 Ind. 584; *Hughes v. Hinds*, 69 Ind. 93; *Miller v. Royce*, 60 Ind. 189; *Pritchard v. Mines*, 56 Ind. App. 671, 106 N. E. 411. Me.—*Hall v. Williams*, 10 Me. 278, 290. Minn. *Brown v. Lawler*, 21 Minn. 327. Mo. See *Stevenson v. Black*, 163 Mo. 549, 63 S. W. 909. Nev.—*Sparrow v. Strong*, 2 Nev. 362. N. Y.—See *Produce Bank v. Morton*, 67 N. Y. 199.

[a] "Where from the entire record it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right by an amendment nunc pro tunc." From

*Ives v. Hulse*, 17 Ill. App. 30, quoted with approval in *Horner v. Horner*, 37 Ill. App. 199.

[b] "The jury brought in a verdict for \$176.87 as the amount due on the note, whereas the answer admitted an indebtedness on the same, in the sum of \$221.90. The judgment must be modified so as to correct this manifest error appearing upon the face of the record." *Brown v. Lawler*, 21 Minn. 327. And see *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533.

[c] "It is well settled, by numerous decisions of this court, that the courts of this state are possessed of full and ample powers to correct mistakes and supply omissions in their records, whenever and wherever the records supply the means for making such corrections or supplying such omissions." *Miller v. Royce*, 60 Ind. 189.

96. *Reichenbach v. Fisher*, 32 Wis. 133.

97. *Donald & Co. v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Dunham v. Roberts*, 28 Ala. 286.

98. *Lilly v. Larkin*, 66 Ala. 122; *Horton v. Beadle*, 62 Ala. 32; *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

[a] "In this situation (where the verdict had been lost) the court had inherent power to substitute that paper on proper evidence of its contents, and such contents were capable of proof by parol." *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

99. *Eddie v. Eddie*, 138 Mo. 599, 39 S. W. 451; *Saxton v. Smith*, 50 Mo. 490; *Williams v. Walton*, 84 Mo. App. 433; *McGonigle v. Bresnen*, 44 Mo. App. 423. And see *State ex rel. Ozark County v. Tate*, 109 Mo. 265, 18 S. W. 1088; *Jones v. Hart*, 60 Mo. 351; *Bruner v. Marcum*, 50 Mo. 405; *Sydnor v. Burke*, 4 Rand. (25 Va.) 161.

[a] "The rule which excludes oral



The rule sometimes followed is, that the amendment may be made upon any satisfactory evidence,<sup>1</sup> in which event an amendment may be predicated upon the memoranda of the clerk,<sup>2</sup> as well as that of court,<sup>3</sup> oral testimony,<sup>4</sup> and affidavits.<sup>5</sup> Some courts qualify this rule,

evidence, or which prevents the amendment of entries by the recollections of the judge, unaided by records or minutes, is confined in its operation to cases, wherein the records are sought to be amended after the lapse of the term at which a *final judgment* was rendered." *McGonigle v. Bresnen*, 44 Mo. App. 423.

[b] Where the court "pronounces a judgment, and the clerk fails to enter the same on the record, it is competent for the court during the term from its own recollection to correct or amend its record by an entry *nunc pro tunc* so as to make the same correctly express what was done or ordered by it in the first instance." *Williams v. Walton*, 84 Mo. App. 433.

1. U. S.—*Etna Ins. Co. v. Boon*, 95 U. S. 111, 24 L. ed. 395; *Odell v. Reynolds*, 70 Fed. 656, 17 C. C. A. 317; *Lynah v. United States*, 106 Fed. 121; *Hicklin v. Marco*, 64 Fed. 609. Colo. *Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579; *Doane v. Glenn*, 1 Colo. 454; *People ex rel. Schmidt v. County Court*, 9 Colo. App. 41, 47 Pac. 469; *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193. Conn.—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727; *Weed v. Weed*, 25 Conn. 337; *Bradley v. Baldwin*, 5 Conn. 288. Ill.—*People ex rel. McCrea v. Quick*, 92 Ill. 580; *Morrison v. Stewart*, 21 Ill. App. 113; *Ives v. Hulce*, 17 Ill. App. 30; *Baragwanath v. Wilson*, 4 Ill. App. 80. Miss.—*Wilson v. Town of Handshoro*, 99 Miss. 252, 54 So. 845, *overruling*, in this regard, *Shackelford v. Levy*, 63 Miss. 125; *Moody v. Grant*, 41 Miss. 565; *Russell v. McDougall* 3 Smed. & M. 234. Neb. *Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625; *Ackerman v. Ackerman*, 61 Neb. 72, 84 N. W. 598; *School Dist. v. Bishop*, 46 Neb. 850, 65 N. W. 902; *Sullivan Sav. Inst. v. Clark*, 12 Neb. 578, 12 N. W. 103. N. H.—*Frink v. Frink*, 43 N. H. 508, 515, *overruling*, in this respect, *Wendell v. Mugridge*, 19 N. H. 109, 112. *Compare*, *Gove v. Lyford*, 44 N. H. 525. N. C.—*Mayo v. Whitson*, 47 N. C. 231. Ohio.—*See Cleveland, etc. Printing Co. v. Green*, 52 Ohio St. 487.

[a] "It is clearly settled the trial

court may proceed on evidence satisfactory to itself, whether oral or documentary, whether of record or otherwise, to correct the entry and make it speak the judgment which the court in fact rendered." *People ex rel. Schmidt v. County Court*, 9 Colo. App. 41, 47 Pac. 469.

[b] "The amount and kind of evidence requisite to satisfy that court (the one granting the amendment), as to what was the real order of the court, and what was the proper entry . . . , must rest with that court." *Fay v. Wenzell*, 8 Cush. (Mass.) 315.

[c] The written opinion of the judge is sufficient. *Hicklin v. Marco*, 64 Fed. 609.

2. *Bradley v. Baldwin*, 5 Conn. 288.

3. U. S.—*Etna Ins. Co. v. Boon*, 95 U. S. 111, 24 L. ed. 395; *Lynah v. United States*, 106 Fed. 121; *Hicklin v. Marco*, 64 Fed. 609. And see *Matheson's Admr. v. Grant's Admr.*, 2 How. 263, 11 L. ed. 261. Conn.—*Brown v. Clark*, 81 Conn. 562, 71 Atl. 727. Ind. App.—*Brittenham v. Robinson*, 22 Ind. App. 536. Ia.—*Jones v. Field*, 80 Iowa 281, 45 N. W. 753. Neb.—And see *Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625; *School Dist. v. Bishop*, 46 Neb. 850, 65 N. W. 902; *Sullivan Sav. Inst. v. Clark*, 12 Neb. 578, 12 N. W. 103.

4. Conn.—*Weed v. Weed*, 25 Conn. 337. Ill.—*Morrison v. Stewart*, 21 Ill. App. 113; *Ives v. Hulce*, 17 Ill. App. 30. Ind.—*Brownlee v. Commissioners*, 101 Ind. 401; *Indianapolis & G. R. T. Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145. Mass.—*Fay v. Wenzell*, 8 Cush. 315.

[a] Oral testimony was allowed to contradict the records in *Morrison v. Stewart*, 21 Ill. App. 113; *Ives v. Hulce*, 17 Ill. App. 30.

[b] In *Douglass v. Keehn*, 78 Ind. 199, it was said that the application "should be heard . . . upon the depositions, affidavits or oral testimony of both parties, . . ."

[c] In Massachusetts the testimony of the jurors was received in support of such a motion. *Capen v. Stoughton*, 16 Gray (Mass.) 261.

5. Ind.—*Douglass v. Keehn*, 78 Ind.

however, by holding that there is a distinction in regard to the reception of oral testimony in such a proceeding between a case wherein it is sought to correct an affirmative error and one in which the object is to supply an omission, declaring such evidence to be competent only in the former instance.<sup>6</sup>

j. *The Order Determining the Application.*—Ordinarily formal requisites of the order granting the amendment will be controlled by the requirements of orders of a similar nature.<sup>7</sup> But, it seems, that where any considerable lapse of time has intervened between the entry of the judgment and the amendment, the order directing such amendment should contain a clause expressly saving the rights of third parties, not parties or privies to the judgment,<sup>8</sup> and it has also been held that the order should contain recitals showing the amendment to have been made upon proper evidence<sup>9</sup> after due notice to the opposite party,<sup>10</sup> and that the court had jurisdiction.<sup>11</sup>

k. *Making the Amendment.*—The best practice in this regard is to make a new entry, referring to the imperfect or defective judgment and to the order of the court directing such amendment,<sup>12</sup> but, it would seem, that no mode of amending which is sanctioned by and under the view of the court will vitiate the judgment.<sup>13</sup> Thus amendments may be made by interlineation,<sup>14</sup> especially where the order of court granting them specifies the particular amendment allowed to be made in this manner.<sup>15</sup>

199. **Md.**—Parkhurst v. Bank, 61 Md. 254. **Mass.**—See Capen v. Stoughton, 13 Gray 364; Clark v. Lamb, 8 Pick. 415, 417. **Mont.**—Keene v. Welsh, 8 Mont. 305, 21 Pac. 25. See also Barber v. Briscoe, 9 Mont. 341, 23 Pac. 726. **N. Y.**—See Sexton v. Bennett, 17 N. Y. Supp. 437. **N. C.**—Mayo v. Whitson, 47 N. C. 231.

6. Mitchell v. Lincoln, 78 Ind. 531.

7. See generally the title "Orders."

8. McCormick v. Wheeler, 36 Ill. 114; Greenleaf v. Roe, 17 Ill. 474; Berthold v. Fox, 21 Minn. 51.

9. Commissioner's Court v. Holland, 177 Ala. 60, 58 So. 270; Carney v. McDonald, 10 Heisk. (Tenn.) 232.

[a] "If the order of amendment does not show, at least by a general recital, that it is predicated upon satisfactory or sufficient evidence, it fails to show any authority to make the amendment, and the amendment is wholly invalid and ineffectual." Commissioner's Court v. Holland, 177 Ala. 60, 58 So. 270.

[b] A recital that the amendment was made "with purpose in view of having same (the amendment) in every

respect to conform with the statute" is insufficient for this purpose. Commissioner's Court v. Holland, 177 Ala. 60, 58 So. 270.

10. Carney v. McDonald, 10 Heisk. (Tenn.) 232.

11. Carney v. McDonald, 10 Heisk. (Tenn.) 232.

12. **Ala.**—State v. Craig, 12 Ala. 363. **Ark.**—Arrington v. Conrey, 17 Ark. 100; King v. Bank, 9 Ark. 185. **Tex.**—Benge v. Panhandle Land Co. (Tex. Civ. App.), 145 S. W. 318; Mansel v. Castles, 93 Tex. 414, 55 S. W. 559.

13. State v. Craig, 12 Ala. 363.

14. **Ala.**—State v. Craig, 12 Ala. 363. **Ark.**—Arrington v. Conrey, 17 Ark. 100; King v. Bank, 9 Ark. 185. **Mo.**—Allen v. Sales, 56 Mo. 28.

[a] "When the amendment is ordered it is the duty of the clerk to obey the order, not by entering it on the record to be amended, but altering the record itself, so as to answer to the amendment." Jones v. Lewis, 30 N. C. 70. See McDowell v. McDowell, 92 N. C. 227.

15. King v. Bank, 9 Ark. 185.

1. *Appeal and Review.*—(I.) *General Statement.*—Not only is an order granting or denying a motion to amend generally considered appealable,<sup>16</sup> but this, or some other method of direct attack, is the only proper remedy in such a case,<sup>17</sup> it being always improper to proceed by a collateral or incidental assault upon the judgment.<sup>18</sup> As already noticed, the amendment of a judgment is, necessarily, largely within the discretion of the court,<sup>19</sup> and its decision thereon will not be disturbed on appeal unless it appears that this discretion has been abused.<sup>20</sup> In fact, it has been said that the correct use of this discretion cannot be questioned by another court, even on a writ of error.<sup>21</sup>

(II.) *What Questions May Be Raised.*—Only such objections may be urged on the appeal as were raised at the hearing of the motion, provided the party making the same was given notice of the motion if entitled thereto.<sup>22</sup> Thus, a party will not be heard to say for the first time on appeal that the application,<sup>23</sup> or the notice thereof,<sup>24</sup> was in-

16. *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981; *Beam v. Bridgers*, 111 N. C. 269, 16 S. E. 391.

[a] *Writ of Error.*—Wherever the denial of a motion to amend is considered a final judgment a writ of error will lie to review such denial. *The Governor v. Knight*, 8 Ala. 297; *Wilkerson v. Goldthwaite*, 1 Stew. & P. (Ala.) 159.

17. *Ala.*—*Ware v. Kent*, 123 Ala. 427, 26 So. 208. *Cal.*—*Crim v. Kessing*, 89 Cal. 478. *Ill.*—*Tanton v. Keller*, 78 Ill. App. 31. *N. Y.*—See *Sexton v. Bennett*, 17 N. Y. Supp. 437.

18. *U. S.*—*Cromwell v. Bank*, 2 Wall. Jr. 569, 6 Fed. Cas. No. 3,409. *Ala.*—*Ware v. Kent*, 123 Ala. 427. *Ark.*—*Melton v. St. Louis, etc. R. Co.*, 99 Ark. 433, 139 S. W. 289. *Ind.*—*Haines v. Smith*, 381. *Mich.*—*Reynolds v. Reynolds*, 115 Mich. 378, 73 N. W. 425. *Mo.*—*Wellshear v. Kelley*, 69 Mo. 343; *State v. Buchanan County*, 135 Mo. App. 143, 116 S. W. 14. *Neb.*—*School Dist. v. Bishop*, 46 Neb. 850, 65 N. W. 902. *N. H.*—*Carlton v. Patterson*, 29 N. H. 580. *N. C.*—*State v. King*, 27 N. C. 203.

19. See *supra*, XIII, A, 2.

20. *Ala.*—*Ex parte Woodruff*, 123 Ala. 99, 26 So. 509; *Leinkauff v. Tuska-loosa Sale & A. Co.*, 105 Ala. 328, 16 So. 891; *Tanner v. Hayes*, 47 Ala. 722. *Cal.*—*Lewis v. Rigney*, 21 Cal. 268. *Colo.*—*Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579. *Conn.*—*Wooster v. Glover*, 37 Conn. 315; *Waldo v. Spencer*, 4 Conn. 71. *Ga.*—*Saffold v. Keenan*, 2 Ga. 341. *Ia.*—*Chapman v. Allen*, Morris 23.

*Mass.*—*Rugg v. Parker*, 7 Gray 172. *Mo.*—*Becher v. Deuser*, 169 Mo. 159, 69 S. W. 363. *Neb.*—*Wise v. Frey*, 9 Neb. 217, 2 N. W. 375. *N. H.*—*Wendell v. Mugridge*, 19 N. H. 109. *N. M.*—See *Secou v. Leroux*, 1 N. M. 388. *N. Y.*—*Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122; *Sexton v. Bennett*, 17 N. Y. Supp. 437. See *Bohlen v. Metropolitan E. R. Co.*, 121 N. Y. 546, 24 N. E. 932. *N. C.*—*Brooks v. Stephens*, 100 N. C. 297, 6 S. E. 81; *Ashe v. Streater*, 53 N. C. 256; *Brady v. Beason*, 28 N. C. 425. *Ohio.*—*Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735. *Pa.*—*Com. v. Hultz*, 6 Pa. 469. *Tenn.*—*Rickman v. Rickman*, 6 Lea 483. *Tex.*—*Austin v. Jordan*, 5 Tex. 130. *Wash.*—*O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241.

[a] "Whether the court would order the completion of those records (a judgment entry) was a matter of judicial discretion; and the action of the court, within the limits of its authority, is not a subject of exception." *Rugg v. Parker*, 7 Gray (Mass.) 172.

21. *Cromwell v. Bank*, 2 Wall. Jr. 569, 6 Fed. Cas. No. 3,409.

22. *Ind.*—*Pritchard v. Mines*, 56 Ind. App. 671, 106 N. E. 411. *Ia.*—*Hurley v. Dubuque, etc. Co.*, 8 Iowa 274. *N. Y.*—See *Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122. *N. C.*—*Walton v. Pearson*, 85 N. C. 34. *Va.*—*Dillard v. Thornton*, 29 Gratt. (70 Va.) 392.

23. *Latta v. Griffith*, 57 Ind. 329.

24. *Graves v. Fulton*, 7 How. (Miss.)



sufficient, or that the facts shown did not warrant the relief obtained,<sup>25</sup> or that the judge before whom the motion was made had no authority to entertain the same.<sup>26</sup>

(III.) **Bill of Exceptions.**<sup>27</sup> — In order that the action of the court in granting or denying a motion to amend a judgment may be reviewed on appeal it is necessary that it be made a part of the record,<sup>28</sup> by a bill of exceptions or in some other appropriate manner as the rules of practice may provide,<sup>29</sup> and in the absence of this the appellate court will presume that sufficient legal evidence was introduced to justify the granting of the amendment.<sup>30</sup>

(IV.) **Mandamus.** — The action of the court in granting or refusing an amendment cannot be reached by mandamus;<sup>31</sup> the injured party's remedy is by appeal.<sup>32</sup>

m. **Costs.** — The taxing of costs upon such a motion is usually controlled by a consideration of the relation which the fault of the erring litigant bears to the whole expense.<sup>33</sup>

**XIV. OPENING AND VACATING.** — A. **POWER.** — 1. **Generally.** — The power of courts of general jurisdiction to open or vacate a judgment is an inherent one,<sup>34</sup> which is, in some states, ex-

592; *Dillard v. Thornton*, 29 Gratt. (70 Va.) 392.

25. *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393.

26. *Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122.

27. See generally the title "**Bills of Exceptions.**"

28. *Bartmess v. Holliday*, 27 Ind. App. 544, 61 N. E. 750.

29. *Glass v. Glass*, 24 Ala. 468; *Rains v. Warren*, 10 Ala. 623.

30. *Burdeshaw v. Comer*, 108 Ala. 617, 18 So. 556.

31. **U. S.** — *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. ed. 135.

**Ala.** — *Ex parte Schmidt & Smith*, 62 Ala. 252. **Mich.** — *Township of Hiawatha v. Circuit Judge*, 90 Mich. 270, 51 N. W. 282. **N. Y.** — See *Kling v. Walsh*, 60 App. Div. 512, 69 N. Y. Supp. 962. **Pa.** — *Com. v. Hultz*, 6 Pa. 469.

*Compare, State ex rel. Graves v. Judge*, 61 Mo. 166. See generally the title "**Mandamus.**"

32. *Ex parte Schmidt & Smith*, 62 Ala. 252. See *supra*, XIII, D, 2, 1, (I).

33. *White v. Blake*, 74 Me. 489. See the following cases: **Mass.** — *Rugg v. Parker*, 7 Gray 172. **Tex.** — *Westall v. Marshall*, 16 Tex. 182; *Weaver v. Lewis*, 12 Tex. 104. **W. Va.** — *Triplett v. Lake*, 43 W. Va. 428, 440, 27 S. E. 363. **Eng.** — *Tucker v. New Brunswick Trading Co.*, 44 L. Rep. (Ch. Div.) 249.

[a] Where it did not appear that the respondents were in any way responsible for the erroneous entry of the judgment and that they were in fault only in resisting the proposed amendment, the moving party was awarded such legitimate costs as had accrued since the appearance of the respondent in court in opposition to the motion. *White v. Blake*, 74 Me. 489.

34. **U. S.** — *In re Sanitarium, etc. Co.*, 222 Fed. 22, 137 C. C. A. 560; *Fisher v. Simon*, 67 Fed. 387. **Ala.** — *Long v. Gwinn*, 188 Ala. 196, 66 So. 88. **Ga.** — *Brady v. Brady*, 71 Ga. 71. **Ill.** — *Briggs v. Dunne*, 163 Ill. 36, 46 N. E. 628. **Ind.** — *Scott v. Smith* (Ind. App.), 82 N. E. 556. **Ia.** — *Acheson v. Inglis Bros.*, 155 Iowa 239, 135 N. W. 632; *Martin v. Van Bergen*, 1 Greene 314. **Md.** — *Kemp v. Cook*, 18 Md. 130. **Mich.** — *Fifth Nat. Bank v. Clinton Circuit Judge*, 100 Mich. 67, 58 N. W. 648. **Mo.** — *Hesse v. Seyp*, 88 Mo. App. 66. **Neb.** — *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069. **Nev.** — *State v. Fourth District Court*, 16 Nev. 371. **N. Y.** — *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842; *In re Hawley*, 100 N. Y. 206, 3 N. E. 68; *Vanderbilt v. Schreyer*, 81 N. Y. 646; *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Morgan v. Holladay*, 6 Jones & S. 117; *Donnelly v. McOrde*, 14 App. Div. 217, 43 N. Y. Supp. 560; *McCloud v. Meehan*, 30 Misc.

pressly affirmed and regulated by statute;<sup>35</sup> it is not, however, dependent upon such statutes for its existence.<sup>36</sup> This power is possessed not only by courts of law but also by courts exercising equity jurisdiction.<sup>37</sup>

**2. Courts of Inferior Jurisdiction.**—Inferior courts do not possess the power to open or vacate their judgments except by virtue of a statutory grant thereof,<sup>38</sup> and, it seems, such grant must be by

67, 62 N. Y. Supp. 852; *Fortunato v. New York*, 2 Misc. 406, 21 N. Y. Supp. 963. **N. C.**—*Ricard v. Alderman*, 132 N. C. 62, 43 S. E. 543. **Ohio.**—*Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. See also *Manguno, etc. Co. v. Clymonts*, 10 Ohio Cir. Dec. 427, where this power considered as an inherent one, existing independent of statutes, only during the judgment term. **Ore.** *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320; *White v. Ladd*, 41 Ore. 324, 330, 68 Pac. 739; *Ladd v. Mason*, 10 Ore. 308. **Pa.**—*Harper v. Kean*, 11 Serg. & R. 280. See also *Horner & McCann v. Hower*, 39 Pa. 126; *Hill v. Egan*, 2 Pa. Super. 596. **S. D.**—*Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. **Utah.**—*Utah Commercial, etc. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033; *Blyth, etc. Co. v. Swenson*, 15 Utah 345, 355, 49 Pac. 1027; *Elliot v. Bastian*, 11 Utah 452, 463, 40 Pac. 713. See also *Park v. Higbee*, 6 Utah 414, 24 Pac. 524. **Vt.**—*Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590. See also *Amazon Ins. Co. v. Partridge*, 49 Vt. 121. **Wash.**—*Dane v. Daniel*, 28 Wash. 155, 165, 68 Pac. 446. **Wis.**—*Smith v. Milwaukee, etc. Ry. Co.*, 119 Wis. 336, 96 N. W. 823.

[a] **This Power Is a Judicial One.** The legislature may not, by legislation, set aside a solemn judgment of a court. *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

35. **N. C.**—Rev. 1905, §§513, 419. **N. D.**—§§6884, 6846, 6766, Rev. Codes, 1905, and see the following cases: *City of Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836. **S. D.**—*Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. **Utah.**—*Utah Commercial, etc. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033; *Blyth, etc. Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027, involving §3256, Comp. Laws 1888. **Va.** *Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235. **Wash.**—*Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

[a] The clerk of a court has no authority to grant this relief under

these statutes. *Griel v. Vernon*, 65 N. C. 76.

36. **Ia.**—*Todhunter v. De Graff*, 164 Iowa 20, 146 N. W. 66. **Md.**—*Craig v. Wroth*, 47 Md. 281; *Taylor v. Sindall*, 34 Md. 38; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. **Miss.**—See *Harper v. Barnett*, 16 So. 533, not officially reported. **Neb.**—*Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069. **N. Y.**—*Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842; *In re Hawley*, 100 N. Y. 206, 3 N. E. 68; *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Weston v. Citizens' Nat. Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743; *McCloud v. Meehan*, 62 N. Y. Supp. 852; *Donnelly v. McArdle*, 43 N. Y. Supp. 560; *Fortunato v. New York*, 121 N. Y. Supp. 963. **Ohio.**—*Manguno, etc. Co. v. Clymonts*, 19 Ohio Cir. Ct. 237. **S. D.** *Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. **Utah.**—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 355, 49 Pac. 1027.

[a] Should a case arise which is without the purview of the statutory provisions, the common law will at once attach and control the disposition of the case. *Parker v. Robinson*, 5 Ohio Dec. (Reprint) 367.

37. **Ill.**—*Pease v. Roberts*, 16 Ill. App. 634. **Ky.**—*Small v. Reeves*, 104 Ky. 289, 46 S. W. 726. **N. D.**—*Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721. **Wis.**—*Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265.

[a] The rules controlling the exercise of this power are the same in either tribunal. *Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265.

38. **Neb.**—*State v. Duncan*, 37 Neb. 631, 643, 56 N. W. 214. See *Cox v. Tyler*, 6 Neb. 297; *Templin v. Snyder*, 6 Neb. 491. **N. Y.**—*Matter of Underhill*, 117 N. Y. 471, 22 N. E. 1120. **S. C.**—See *Brown v. Buttz*, 15 S. C. 488. See generally the title "Justices of the Peace;" "Probate Courts."

[a] But see (1) *Whitchurst v. Merchants' & F. Transp. Co.*, 109

express reference and not by implication.<sup>39</sup> Statutes in most jurisdictions, however, to a greater or less extent, confer this power upon them,<sup>40</sup> and it can be exercised only to the extent and in the manner specified in the statute.<sup>41</sup>

**3. Courts of Appellate Jurisdiction.**—Courts of appellate jurisdiction have power to set aside their judgments<sup>42</sup> upon a sufficient

N. C. 342, 13 S. E. 937, where the court says: "The remedy for irregularity (in the judgment) is by motion in the action before the justice of the peace . . . It is orderly, convenient, necessary and appropriate to make pertinent motions of all kinds in an action in such court just as like motion may be made in the superior courts." (2) And see *Neville v. Pope*, 95 N. C. 346, where the court, in speaking of a judgment of a justice of the peace, says: "It may have been erroneous. If so, the party against whom it was given ought to have appealed to the superior court. It may have been, and may be, irregular in material respects. If so, then the remedy would be by motion in the action to set aside the judgment because of such irregularity." (3) And to the same effect, *McKee v. Angel*, 90 N. C. 60; *Morton v. Rippey*, 84 N. C. 611; *Broyles v. Young*, 81 N. C. 315; *Birdsey v. Harris*, 68 N. C. 92.

[b] In the case of a void judgment being rendered by a justice of the peace, although that court is powerless to formally set it aside, it may treat it as a nullity wherever it is brought to the court's attention. *Fontaine v. Bergen*, 55 Ga. 410.

39. *Shaw v. Rowland*, 32 Kan. 154, 4 Pac. 146; *Kingsborough v. Towsley*, 56 Ohio St. 450, 47 N. E. 541.

[a] An express statutory grant of this power to an inferior tribunal, however, carries with it, not only statutory powers but all the general inherent power of courts of general jurisdiction in this regard. *In re Henderson*, 53 N. Y. Supp. 957.

40. See generally the statutes, and the following: Cal.—Code Civ. Proc., §859; *Hubbard v. Superior Court*, 9 Cal. App. 166, 98 Pac. 394. Ill.—Ch. 44, §382, *Courtright's St.*, 1916. Kan. §6200, *Dassler's Gen. St.*, 1909. Me. Ch. 85, §12, p. 761, Rev. St. 1903, relief from defaults and nonsuits only. Neb. §8447, Rev. St. 1913; *Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824; *Tootle v.*

*Jones*, 19 Neb. 588, 27 N. W. 635; *Crippen v. Church*, 17 Neb. 304, 22 N. W. 567; *Raymond v. Strine*, 14 Neb. 236; *Strine v. Kauffman*, 12 Neb. 423, 11 N. W. 867. N. C.—§1478, Rev. 1905.

[a] In New York (1) the municipal courts possess this power by virtue of Laws of 1896, c. 748, and the surrogate's court by §2400, Code Civ. Proc., which confers upon this court the power to grant this relief in the same manner as courts of general jurisdiction, with the same limitations. *In re Onderdonk*, 4 Misc. 37, 23 N. Y. Supp. 846. See also *In re Flynn*, 136 N. Y. 287, 32 N. E. 767; *Sipperly v. Baucus*, 24 N. Y. 46. (2) The power of the municipal courts, however, does not extend to judgments on the merits, but only to judgments on default. *Zimmerman v. Bloch*, 12 Misc. 158, 32 N. Y. Supp. 1073.

41. *Cochran v. Reich*, 20 Misc. 593, 46 N. Y. Supp. 441; *Gold v. Hutchinson*, 55 N. Y. Supp. 575. See *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 507; *Ludwin v. Siano*, 73 N. Y. Supp. 940.

[a] For this reason statutes conferring upon inferior courts the power to grant this relief in "any action tried before them" has been held not to give authority to open a judgment in a "special proceeding." Thus a default judgment in unlawful detainer, a special proceeding, may not be relieved against in such a court under authority conferred by a statute like the one mentioned above. *Cochran v. Reich*, 20 Misc. 593, 46 N. Y. Supp. 441.

42. N. C.—*Turner v. Davis*, 132 N. C. 187, 43 S. E. 637. Ohio.—*Murphy & Bros. v. Swadner*, 34 Ohio St. 672. S. C.—*Thew v. Southern Porcelain Mfg. Co.*, 8 S. C. 286. Tex.—*Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537.

[a] The judgments or decisions of a commission created to aid the appellate court in disposing of the cases on a congested calendar, may be set



showing, and statutes sometimes so provide.<sup>43</sup> If the ground upon which this relief is asked was,<sup>44</sup> or could have been raised on the argument of the cause, the application will be rejected.<sup>45</sup>

4. **Courts of Concurrent or Coordinate Jurisdiction.**—As regards courts of concurrent or coordinate jurisdiction, it is a generally accepted rule that one may not open or vacate a judgment of another.<sup>46</sup>

5. **Other Available Remedies.**—It is the general rule that the existence of another adequate remedy will not, in itself, deprive the party of his right to pursue this remedy.<sup>47</sup> An application to open or vacate a judgment will not be granted, however, when the proper

aside by the court. *Murphy & Bros. v. Swadner*, 34 Ohio St. 672.

[b] At a subsequent term a judgment which is a nullity may be set aside. *Burr v. Lewis*, 6 Tex. 76.

[c] Where a judgment of the trial court is reversed and remanded with directions to enter a particular judgment an application to open or set aside the judgment rendered pursuant to such directions must be addressed to the trial court. *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130.

43. See *Bates' Ann. Ohio St.*, §5365, and *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130; *Murphy & Bros. v. Swadner*, 34 Ohio St. 672.

44. *Williamson v. Boykin*, 104 N. C. 100, 10 S. E. 87; *State v. Waupaca Bank*, 20 Wis. 640.

45. *Bonnifield v. Price*, 1 Wyo. 245.

[a] On a motion to set aside a judgment of an appellate court refusing a writ of certiorari, it appeared that the facts upon which the motion was based might, with reasonable diligence, have been presented to the court upon the hearing on the petition for the writ and the motion was denied. *Williamson v. Boykin*, 104 N. C. 100, 10 S. E. 87.

46. *Ga.*—*Dixon v. Baxter*, 106 Ga. 180, 32 S. E. 24. *Ind.*—*Black v. Plunkett*, 132 Ind. 599, 31 N. E. 567. See also *Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537; *Smithson v. Smithson*, 37 Neb. 535, 56 N. W. 300, 40 Am. St. Rep. 504. *N. Y.*—*New York v. Brady*, 115 N. Y. 599, 22 N. E. 237; *Ross v. Wood*, 70 N. Y. 8. *N. C.*—*Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118; *Taylor v. Pope*, 101 N. C. 368, 7 S. E. 795; *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793. *S. C.*—*Odum v. Burch*, 52 S. C. 305, 29 S. E. 726. *Tenn.*—*Smith v. Johnson*, 2 Heisk. 225. *Wash.*—*Bayer*

*v. Bayer*, 83 Wash. 430, 145 Pac. 433. *Wis.*—*Cardinal v. Eau Claire Lumb. Co.*, 75 Wis. 404, 44 N. W. 761; *Coon v. Seymour*, 71 Wis. 340, 37 N. W. 243; *Parish v. Marvin*, 15 Wis. 247.

[a] "We do not deny but that power exists in one court to vacate an order made by a coordinate branch of the same court. . . . The exercise, however, by one judge, of authority in review of the discretion exercised by another, to the extent of vacating the orders and determination of the latter, is of such doubtful propriety as to have been uniformly denied whenever the question has arisen. It is fraught with consequences that may be serious, imperils the stability of an orderly course of procedure in the administration of justice, and is destructive of the dignity and decorum which should attend upon judicial determination." *Corbin v. Casina Land Co.*, 26 App. Div. 408, 49 N. Y. Supp. 929. Compare, *Cruikshank v. Cruikshank*, 30 App. Div. 381, 51 N. Y. Supp. 926; *Ramsdell v. National Rivet & Novelty Co.*, 20 App. Div. 388, 46 N. Y. Supp. 819.

[b] Should a judge of the court to which application for relief was made, order the matter transferred to a court of concurrent jurisdiction, he having the power so to do, the court to which the proceeding is thus removed may properly entertain the same. *Cruikshank v. Cruikshank*, 30 App. Div. 381, 51 N. Y. Supp. 926.

47. *Kimball v. Kelton*, 54 Vt. 177.

[a] Where the officer who served the writ made the return day wrong in the copy delivered to the then defendant, as a result of which a default judgment was had the defendant was entitled to his remedy notwithstanding he might have a remedy against the officer for a false return. *Kimball v. Kelton*, 54 Vt. 177.

remedy is by an independent action for damages,<sup>48</sup> or a proceeding in equity,<sup>49</sup> or by a motion for a new trial,<sup>50</sup> or by appeal or certiorari.<sup>51</sup>

**B. GROUNDS OF RELIEF.**<sup>52</sup> — 1. **Void Judgments Generally.** — It is everywhere considered that absolute invalidity of a judgment constitutes a sufficient ground for its vacation by the court wherein it was rendered.<sup>53</sup>

2. **Matters of Defense.** — a. *Generally.* — Not every matter of defense is available as a ground for opening or setting aside a judgment.<sup>54</sup> The general rule is that matters of defense of which the applicant had knowledge at the time of trial,<sup>55</sup> as well as those mat-

48. *Chappell v. Real-Estate, etc. Co.*, 91 Md. 754, 46 Atl. 982; *Bradburn v. Roberts*, 148 N. C. 214, 61 S. E. 617.

49. **U. S.**—*United States v. Taylor*, 157 Fed. 718. **Pa.**—*Forbes v. Kendig*, 20 Pa. Dist. 83. **Wash.**—*State v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

50. **U. S.**—*Folsom v. Ballard*, 70 Fed. 12, 16 C. C. A. 593. **Ga.**—*Mize v. Americus, etc. Co.*, 109 Ga. 359, 34 S. E. 583; *Clark, Cove, etc. Co. v. Steed*, 92 Ga. 440, 17 S. E. 967. **Ind.**—*Louisville, etc. R. Co. v. Rountree*, 90 Ind. 329.

51. **La.**—*Landry v. Bertrand*, 48 La. Ann. 48, 19 So. 126. **Md.**—*Chappell v. Real-Estate, etc. Co.*, 91 Md. 754, 46 Atl. 982. **Minn.**—*Grant v. Schmidt*, 22 Minn. 1. See also official syllabus in *Palmer v. Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893. **N. Y.**—*Clinton v. Eddy*, 54 Barb. 54; *Park v. Park*, 24 Misc. 372, 53 N. Y. Supp. 677. **S. C.**—*McMahon v. Pugh*, 62 S. C. 506, 40 S. E. 961.

52. **As to grounds for equitable relief**, see *infra*, XV, E.

53. **Ala.**—*Taylor v. Jones*, 52 Ala. 78. **Cal.**—*Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844 (deficiency judgment in mortgage foreclosure); *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899. **N. Y.**—*Williams v. Van Valkenburg*, 16 How. Pr. 144; *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913. **N. C.**—*Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Dobbin v. Gaster*, 26 N. C. 71; *Anonymous*, 1 N. C. 97. **Okla.**—*Foster v. Cimmarron Valley Bank*, 14 Okla. 24, 76 Pac. 145; *Phoenix Bridge Co. v. Street*, 9 Okla. 422, 60 Pac. 221. **Ore.**—*White v. Ladd*, 41 Ore. 324, 330, 68 Pac. 739, 93 Am. St. Rep. 732. **Pa.**

*Insurance Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172; *Maneval v. Jackson Tp.*, 141 Pa. 426, 21 Atl. 672; *Allen v. Krips*, 119 Pa. 1, 12 Atl. 759. See also *Tenan v. Cain*, 188 Pa. 122, 242, 41 Atl. 594; *Hatch v. Stitt*, 66 Pa. 264; *Stevenson v. Virtue*, 21 Pa. Co. Ct. 229. **Tenn.**—*Roche v. Washington*, 7 Humph. 142. **Tex.**—*Heath v. Layne*, 62 Tex. 686; *Burr v. Lewis*, 6 Tex. 76; *Fendrick v. Shea*, 1 Tex. Civ. Cas., §912; *Ruenbuhl v. Heffron* (Tex. Civ. App.), 38 S. W. 1028. See also *Metzger v. Wendler*, 35 Tex. 378; *Snow v. Hawpe*, 22 Tex. 168. **Wash.**—*Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858. **W. Va.**—*Rorer v. People's, etc. Assn.*, 47 W. Va. 1, 34 S. E. 758. **Wis.**—*Cummings v. Tabor*, 61 Wis. 185, 21 N. W. 72.

[a] Where a judgment of the trial court has been declared void on appeal therefrom, it is the duty of the trial court to strike off such judgment and all subsequent proceedings thereunder. *Insurance Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172.

**As to the time in which this may be done**, see *infra*, XIV, C, 2, b, (VI).

54. **Set-off.**—The mere fact that the defendant has an account against the plaintiff equal to the amount of the judgment will not entitle him to have the judgment opened. "In some manner, either at law or in equity, subject-matter of defense must have attached to the judgment or the consideration on which it rests." *Beaty v. Bordwell*, 91 Pa. 438, *followed* in *Cooke v. Edwards*, 15 Pa. Super. 412; *Croop v. Dodson*, 7 Kulp (Pa.) 13.

55. **U. S.**—*Jaeger v. United States*, 33 Ct. Cl. 214. **Ala.**—*Powell v. Washington*, 15 Ala. 803. **Cal.**—*Weisenborn v. Neuman*, 60 Cal. 376. **Del.**—*McDaniel v. Townsend*, 4 Penne. 359, 55 Atl. 6. **Ga.**—*Leathers v. Leathers*, 138 Ga. 740, 76 S. E. 44; *Sisson v. Pittman*, 113 Ga. 166, 38 S. E. 315; *Purity*

ters as to which he might, with reasonable diligence, have informed himself,<sup>56</sup> may not be urged on an application of this nature. On this principle a defendant who has elected to stand upon a demurrer may not, simply because he apparently has a good defense on the merits, have the judgment opened.<sup>57</sup>

b. *Illegality of Consideration.*—It is a general rule that mere illegality in the consideration for the obligation upon which a judgment is founded will not constitute sufficient grounds for vacating or setting aside of the judgment if this defense, although known to the applicant was not interposed at the time of trial,<sup>58</sup> although under the statutes in some jurisdictions an exception to this general rule is made in case of judgments founded upon gambling contracts,<sup>59</sup> or those which

*Ice Works v. Rountree*, 104 Ga. 676, 30 S. E. 385; *Thomason v. Fannin*, 54 Ga. 361. *Ill.*—*Fischer v. Stiefel*, 179 Ill. 53, 53 N. E. 407. *Ia.*—*Merrill v. Bowe*, 67 Iowa 636, 25 N. W. 840; *Brett v. Myers*, 65 Iowa 274, 21 N. W. 604. *Kan.*—*Elder v. National Bank*, 12 Kan. 242. *Md.*—*Malone v. Topfer*, 125 Md. 157, 93 Atl. 397. *Minn.*—*Deering Harvester Co. v. Donovan*, 82 Minn. 162, 84 N. W. 745; *Carlson v. Phinney*, 56 Minn. 476, 58 N. W. 38. *Mo.*—*O'Brien Boiler, etc. Co. v. Home Brew. & Ice Co.*, 189 Mo. App. 91, 175 S. W. 225; *Waters v. New York Life Ins. Co.*, 127 Mo. App. 683, 106 S. W. 1120. *N. Y.* *First Nat. Bank v. Hamilton*, 50 How. Pr. 116; *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 178. *N. C.* *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935. *Pa.*—*Lauer Brewing Co. v. Chmielewski*, 206 Pa. 90, 55 Atl. 841; *Smith v. Wachob*, 179 Pa. 260, 36 Atl. 221; *Clark v. Traveler's Ins. Co.*, 21 Pa. Dist. 678; *Speier v. Locust Laundry*, 56 Pa. Super. 323. *Utah.*—*Peterson v. Crosier*, 29 Utah 235, 81 Pac. 860. *Va.*—*Marshall's Admr. v. Cheatham*, 88 Va. 31, 13 S. E. 308. *Wash.* *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427, 58 Pac. 576. *Wis.* *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907. *Ore.*—*William Deering Co. v. Creighton*, 26 Ore. 556, 38 Pac. 710. *Pa.*—*Smith v. Hine*, 179 Pa. 203, 260, 36 Atl. 222; *Wurzbarger v. Carroll*, 8 Kulp 266. See also *Gillespie v. Rogers*, 184 Pa. 488, 39 Atl. 290; *Weldy v. Young*, 21 Pa. Co. Ct. 15.

[a] Where, in a suit on a promissory note, defendant knew, at the time of trial that the note sued upon was without consideration he will not be

permitted to attack the judgment therein rendered on this ground. *Gillespie v. Rogers*, 184 Pa. 488, 39 Atl. 290.

[b] In an appellate tribunal this principle will operate to defeat a motion of this sort. Thus, where it appeared on a motion in such a court to set aside its prior judgment refusing a writ of certiorari, that the facts upon which the motion was based could with reasonable diligence have been presented to the court on the hearing on the petition for the writ, the motion will be denied. *Williamson v. Boykin*, 104 N. C. 100, 10 S. E. 87.

56. *Ga.*—*Hightower v. Williams*, 104 Ga. 608, 30 S. E. 862. *N. C.*—*Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Grantham v. Kennedy*, 91 N. C. 148, 153. *Ohio.*—*Fackler v. Bavarian Relief Society*, 8 Ohio Dec. 56, 5 Wkly. L. Bul. 353.

[a] A judgment admitting a will to probate will not be set aside upon any ground which, with due diligence, might have been ascertained and pleaded in opposition to the probate of the will. *Hightower v. Williams*, 104 Ga. 608, 30 S. E. 862.

57. *William Deering & Co. v. Creighton*, 26 Ore. 556, 38 Pac. 710; *Fidelity Ins., etc. Co. v. Second Phoenix B. & L. Assn.*, 17 Pa. Super. 270. *Compare*, *Ide v. Booth*, 8 Pa. Co. Ct. 499.

58. *Ga.*—*Bell v. Hanks*, 55 Ga. 274; *Inman v. Jones*, 44 Ga. 44; *Ransone v. Grist*, 40 Ga. 241. *Ill.*—*Lucas v. Nichols*, 66 Ill. 41. *Pa.*—*Lauer's Appeal*, 12 W. N. C. 165. See also *Shumaker v. Reed*, 13 Pa. Co. Ct. 547. *Wis.*—*Thomas v. Thomas*, 88 Wis. 88, 59 N. W. 504.

59. See the statutes.

[a] In Illinois it is provided by statute that judgments founded upon a



are usurious,<sup>60</sup> upon a showing by the applicant that he had no way of presenting this defense at the time of trial.<sup>61</sup>

c. *Failure and Inadequacy of Consideration.*—It is not a ground for vacating a judgment that the consideration for the obligation upon which the judgment rests has failed or was, in the first instance, inadequate.<sup>62</sup>

3. *Defects as to Parties.*—a. *General Statement.*—Failure to join a necessary party defendant is not ground for setting aside the judgment;<sup>63</sup> nor is a technical objection to a party's capacity to sue, which must be shown de hors the record,<sup>64</sup> or a mere misnomer of a party, ground therefor.<sup>65</sup> In an action on a joint obligation a judgment rendered against defaulted defendants before the disposition of the issues as to other defendants, may be set aside on motion.<sup>66</sup>

b. *Death of Party.*—That a judgment was rendered after the death of a party and without a substitution of his personal representative, is sufficient cause for its subsequent vacation,<sup>67</sup> though the court

gambling contract may be set aside, and the courts of that state have declared that as a matter of policy this should not be made to depend upon whether or not this defense was raised at the time of trial. *Mallett v. Butcher*, 41 Ill. 382, *overruling* in this regard, *Abrams v. Camp*, 4 Ill. 290. And, to the same effect, *Boddie v. Brewer*, etc. *Brewing Co.*, 204 Ill. 352, 68 N. E. 394; *Lucas v. Nichols*, 66 Ill. 41; *Mallett v. Butcher*, 41 Ill. 382; *Boddie v. Brewer & Hoffman Brewing Co.*, 107 Ill. App. 357. See also *Harris v. McDonald*, 79 Ill. App. 638.

[b] In Mississippi, a judgment founded on a gambling contract has here been treated as absolutely void (*Smithers v. Keyes*, 30 Miss. 179), and accordingly one to be set aside. See *supra*, XIV, B, 1.

60. *Riddle v. Canby*, 2 Ohio Dec. (Reprint) 586.

61. *Bearce v. Barstow*, 9 Mass. 45, 6 Am. Dec. 25; *Corning v. Ludlum*, 28 N. J. Eq. 398.

62. *Del.*—*Townsend v. Townsend*, 5 Harr. 20. *Ga.*—*Powell v. Boring*, 44 Ga. 169. *Ill.*—*Blake v. State Bank*, 178 Ill. 182, 52 N. E. 957. *Pa.*—*Flaccus Leather Co. v. Heasley*, 50 Pa. Super. 127; *Pennock v. Claypole*, 1 Phila. 27.

63. *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608, action against two of the three parties to a contract obligation.

See generally as to effect of failure to join parties, the title "*Parties.*"

[a] But in *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77, which was a suit against a trustee to cancel the deed of

trust on the ground of coercion, it was held that a judgment by default should be set aside on motion, because the beneficiary was not made a party. "The court should not render a judgment, there being the want of a necessary party to a suit. The defendant in such case has a right to presume that the court will not render an erroneous judgment against him, and hence should not be held in default until the necessary party is brought before the court."

64. *Abram French Co. v. Marx*, 10 Misc. 384, 31 N. Y. Supp. 122.

65. *Jones v. San Francisco Sulphur Co.*, 14 Nev. 172; *National, etc. Milk Co. v. Brandenburg*, 40 N. J. L. 111. *Compare, Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830.

66. *Mullendore v. Silvers*, 34 Ind. 98.

As to entry of judgment against defaulted parties, see 14 STANDARD PROC. 898, et seq.

67. *Ala.*—*Moore v. Easley*, 18 Ala. 619. *Ill.*—*Bruggestratt v. Ludwig*, 184 Ill. 43, 56 N. E. 419; *Clafflin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Larimer v. Snell*, 181 Ill. App. 50. *Ia.*—*Bowen v. Troy Portable Mill Co.*, 31 Iowa 460. *Mass.*—*Stickney v. Davis*, 17 Pick. 169. *N. Y.*—*Borsdorff v. Dayton*, 17 Abb. Pr. 36; *Holmes v. Honie*, 8 How. Pr. 383. *N. C.*—*Burke v. Stokely*, 65 N. C. 569. *Pa.*—*Lawrence v. Smith*, 215 Pa. 534, 64 Atl. 776; *Stevenson v. Virtue*, 21 Pa. Co. Ct. 229. *S. C.*—*Hill v. Watson*, 10 S. C. 268, 275. *Tex.*—*Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537; *McClelland v. Moore*, 48 Tex. 355

may refuse this relief to one who has failed to call its attention to the death of a party.<sup>68</sup>

c. *Infant Defendants*.—A judgment rendered against an infant defendant, who was not represented by a guardian ad litem, will, as a general rule, be set aside.<sup>69</sup> Should it appear, however, that the infant has suffered no substantial injustice and that rights of innocent third parties have intervened, the court may properly deny such an application.<sup>70</sup>

d. *Coverture* is a ground for opening and vacating a judgment rendered against a married woman personally in jurisdictions where the common law disability still obtains.<sup>71</sup>

e. *Insanity of Party*.<sup>72</sup>—The insanity of a party is ground for opening and vacating a judgment, rendered against him without proper representation,<sup>73</sup> or where it prevents him entirely from appearing or defending the action in which the judgment was obtained.<sup>74</sup>

Utah.—*Park v. Higbee*, 6 Utah 414, 24 Pac. 524.

[a] Where a confirmation judgment had been entered by default after the death of the owner of the property who had, prior to his death, made an appearance, it was proper to set aside such judgment and permit this owner's heirs, who had no knowledge of this proceeding in time to effect a substitution before judgment, to defend. *Brueggstradt v. Ludwig*, 184 Ill. 24, 43, 56 N. E. 419.

[b] An unreasonable use of this ground of relief may not be made, however. Thus, the personal representatives of a deceased defendant will not be permitted to urge as a ground for vacating the judgment that their decedent died the same day that the judgment was rendered, but an hour before. *Mitchell v. Schoonover*, 16 Ore. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

[c] A judgment of dismissal, made after the plaintiff's death, where his representatives were not substituted, will be set aside on a timely application. *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612.

As to propriety and effect of entering judgment after a party's death, see 14 STANDARD PROC. 782, 1025.

68. *In re Hoopes' Estate*, 185 Pa. 167, 39 Atl. 840.

69. S. C.—*Hill v. Watson*, 10 S. C. 268, 275. Tex.—*Cruiger v. McCracken*, 87 Tex. 584, 30 S. W. 537. Utah.—*Park v. Higbee*, 6 Utah 414, 24 Pac. 524. Wis.—*Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265.

See 12 STANDARD PROC. 781.

[a] Judgment by Consent.—(1) It

being generally considered improper to render a judgment by consent against an infant (12 STANDARD PROC. 781, 768), (2) a judgment or decree so rendered, even when the infant was properly represented, will be set aside where no real defense was made. *Hare v. Hollomon*, 94 N. C. 14; *Levy v. Williams*, 4 S. C. 515.

70. *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480.

71. Ark.—*Richardson v. Mathews*, 58 Ark. 484, 25 S. W. 502. S. C.—*Hill v. Watson*, 10 S. C. 268, 275. Tex.—*Cruiger v. McCracken*, 87 Tex. 584, 30 S. W. 537. Utah.—*Park v. Higbee*, 6 Utah 414, 24 Pac. 524.

Judgments against married women, see 11 STANDARD PROC. 791, et seq.

72. Effect of insanity on judgment, see generally 13 STANDARD PROC. 613, et seq.

73. Ill.—*St. Louis Consolidated, etc. Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600. Ind.—*Judd v. Gray*, 156 Ind. 278, 59 N. E. 849. Kan.—*State v. Jehlik*, 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265. Pa.—*Ash v. Conyers*, 2 Miles 94.

See also 13 STANDARD PROC. 617, note 52.

[a] Lack of Jurisdiction of Party. It may be that the insanity of a party will operate to prevent the court from obtaining jurisdiction over his person. Thus upon ascertaining that jurisdictional process was served upon a party destitute of legal capacity, the judgment predicated thereon will be set aside. *Ash v. Conyers*, 2 Miles (Pa.) 94.

74. Southern Nat. Life Ins. Co. v. Ford's Admr., 151 Ky. 476, 152 S. W.

4. **Jurisdictional Defects.**<sup>75</sup> — a. *Generally.* — Where a court never acquired jurisdiction in an action, a judgment therein rendered may be set aside.<sup>76</sup> But, a party over whom jurisdiction has once been acquired, is bound to thereafter inform himself as to the various steps taken in the cause; a lack of notice of such intermediate proceedings will not warrant the vacation of a judgment subsequently rendered against him.<sup>77</sup>

b. *Defects in Service of Process.*<sup>78</sup> — It is a generally recognized ground for vacating a judgment that the court, through an omission of, or defect in the service of jurisdictional process, never acquired jurisdiction of the applicant.<sup>79</sup> Irregularities not affecting the juris-

243, under a statute providing that a judgment may be vacated "for unavoidable casualty or misfortune, preventing the party from appearing or defending."

75. As to jurisdiction generally, see the title "Jurisdiction."

76. **Ky.**—*Pague v. Ottumwa & K. R. R. Co.*, 1 Ky. L. Rep. 399. **Mich.** *People ex rel. Barrett v. Bacon*, 18 Mich. 247. **Miss.**—*Joiner v. Delta Bank*, 14 So. 464; *Newman v. Taylor*, 69 Miss. 670, 13 So. 831. **N. Y.**—*Williams v. Van Valkenburg*, 16 How. Pr. 144; *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913; *In re Broadway Ins. Co.*, 23 App. Div. 282, 48 N. Y. Supp. 299, 27 Civ. Proc. 154. **Wash.**—*Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161. **W. Va.**—*Rorer v. People's Building, etc. Assn.*, 47 W. Va. 1, 34 S. E. 758.

As to void judgments generally, see *supra*, XIV, B, 1.

[a] **Relationship of Judge.**—Where a judgment is void for want of jurisdiction by reason of the relationship of the judge of the trial court to one of the litigants, the judgment should be set aside on motion. *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913; *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190.

77. **Cal.**—*Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Dusy v. Prudom*, 95 Cal. 646, 30 Pac. 798. **Ill.**—*Culver v. Brinkerhoff*, 180 Ill. 548, 54 N. E. 585. **Kan.**—*Curry v. Janicke*, 48 Kan. 168, 29 Pac. 319. **Ky.**—*Kamman v. Otto*, 17 Ky. L. Rep. 1367, 34 S. W. 1070. **Mont.**—*Blaine v. Briscoe*, 16 Mont. 582, 41 Pac. 1002. **N. Y.**—*Eyring v. Hercules Land Co.*, 9 App. Div. 306, 41 N. Y. Supp. 191.

78. As to process see generally the titles "Process;" "Service of Process and Papers."

Waiver by general appearance see *infra*, XIV, B, 12, and the title "Appearances."

79. **U. S.**—*Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444; *Blythe v. Hineckley*, 84 Fed. 228; *Shuford v. Cain*, 1 Abb. 302, 22 Fed. Cas. No. 12,823. **Ala.**—*Jennings v. Pearce*, 101 Ala. 538, 14 So. 319; *Bruce's Exrx. v. Strickland's Admr.*, 47 Ala. 192. **Ark.** *Wells, Fargo & Co. v. Baker Lumber Co.*, 107 Ark. 415, 155 S. W. 122; *Moore v. Price*, 101 Ark. 142, 141 S. W. 501; *Hunton v. Euper*, 63 Ark. 323, 38 S. W. 517. **Cal.**—*Osmont v. All Persons*, 165 Cal. 587, 133 Pac. 480; *Fox v. Townsend*, 149 Cal. 659, 87 Pac. 82; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Norton v. Atchison, etc. R. Co.*, 97 Cal. 388, 30 Pac. 585; *People v. Applegarth*, 64 Cal. 229, 30 Pac. 805; *Altpeter v. Postal Tel. Cable Co.*, 25 Cal. App. 255, 143 Pac. 93; *Postal Tel. Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 Pac. 538. **Colo.** *Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005; *Lomax v. Besley*, 1 Colo. App. 21, 27 Pac. 167. **Ga.**—*Atlanta Home Ins. Co. v. Tullis*, 99 Ga. 225, 25 S. E. 401; *Harralson v. McArthur*, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; *Jeffers v. Ware*, 72 Ga. 135; *Dobbins v. Dupree*, 36 Ga. 108, 113. **Hawaii.** *Aki v. Aki*, 20 Hawaii 623. **Ill.**—*Thomson v. Patek*, 235 Ill. 341, 85 N. E. 603; *Brady v. Wash. Ins. Co.*, 67 Ill. App. 159. **Ia.**—*In re Behrens*, 104 Iowa 29, 73 N. W. 351; *Jamison v. Weaver*, 84 Iowa 611, 51 N. W. 65; *Davis v. Burt*, 7 Iowa 56. **Kan.**—*Alison v. Whitaker*, 81 Kan. 706, 106 Pac. 1050; *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998; *Osborne v. Schlich-*



diction of the court will not, however, suffice,<sup>60</sup> especially where it

enmeier, 68 Kan. 421, 75 Pac. 474; Quinton v. Durein, 59 Kan. 772, 51 Pac. 898; Hanson v. Wolcott, 19 Kan. 207; Simcock v. First Nat. Bank, 14 Kan. 529. **Md.**—Pattison v. Hughes, 80 Md. 559, 31 Atl. 320. **Mich.**—People v. Bacon, 18 Mich. 247; Hurlburt v. Reed, 5 Mich. 30. **Minn.**—Cremier v. Michelet, 114 Minn. 454, 131 N. W. 627. **Mo.** Miners' Bank v. Kingston, 204 Mo. 687, 103 S. W. 27; Smith's Admr. v. Rollins, 25 Mo. 408. **Neb.**—Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867; Wilkins v. Wilkins, 26 Neb. 235, 41 N. W. 1101. **N. Y.**—Edwards v. Woodruff, 90 N. Y. 396; Coon v. Noble, 2 How. Pr. 97; O'Connell v. Gallagher, 104 App. Div. 492, 93 N. Y. Supp. 643; People *ex rel.* Bicinelli v. Dunn, 54 N. Y. Supp. 194. **N. C.**—Calmes v. Lambert, 153 N. C. 248, 69 S. E. 138; Simmons v. Defiance Box Co., 148 N. C. 344, 62 S. E. 435; Flowers v. King, 145 N. C. 234, 58 S. E. 1074; Yeargin v. Wood, 84 N. C. 326; Blue v. Blue, 79 N. C. 69; Doyle v. Brown, 72 N. C. 393. See also Sumner v. Sessoms, 94 N. C. 371, 377. **Okla.**—Jackson v. Tenney, 17 Okla. 495, 87 Pac. 867. **Pa.** Wildoner v. Dodson, 23 Pa. Dist. 417; Kunes v. McCloskey, 10 Pa. Co. Ct. 542; Kauffman v. Bitting, 2 Woodw. 39. **R. I.**—Duhainme v. Monast, 20 R. I. 524, 40 Atl. 377; Locke v. Locke, 18 R. I. 716, 30 Atl. 422; Spooner v. Leland, 5 R. I. 348. **S. C.**—Wyman v. Hoover, 10 S. E. 135. **Utah.**—Blythe & Fargo Co. v. Swenson, 15 Utah 345, 356, 49 Pac. 1027. **Vt.**—Kimball v. Kelton, 54 Vt. 177. **W. Va.**—Midkiff v. Lusher, 27 W. Va. 439. **Wis.**—Sayles v. Davis, 20 Wis. 302; Carr v. Commercial Bank, 16 Wis. 50.

[a] **In South Dakota.**—Where the summons in an action contains a notice that, if the defendant fail to appear and answer, the plaintiff will apply to the court for the relief demanded, and a copy of the complaint is not served with the summons, but which is afterwards filed and states a cause of action in which the summons should have given notice that in the event of the defendant's failing to answer a judgment would be taken against him for a definite sum, it will be conclusively presumed that the defendant was injured by this variance and the judgment against him will be set aside.

St. Paul Harvester Co. v. Forberg, 2 S. D. 357, 50 N. W. 628.

[b] Where personal property was left with A as the agent of B and A thereafter instituted a suit against B and ordered an attachment therein and took judgment by default against B, it seems that B might have such judgment set aside on the ground of breach of trust on the part of A in not notifying him of the attachment on the personalty in his possession as well as upon the ground that he was not served with process. Spooner v. Leland, 5 R. I. 348.

[c] **Service of Process on Wrong Person.**—Where process was issued against A and served upon B, a judgment on default against A will be set aside on his application therefor, notwithstanding the fact that admittedly the process came to his hands through the hands of B. O'Connell v. Gallagher, 104 App. Div. 492, 93 N. Y. Supp. 643.

[d] **Conflict of Evidence as to Jurisdiction.**—Where the petition and depositions taken to support the same, show that no service of the writ was made on the defendants, and the defendants swear they had no notice of suit until after judgment was rendered against them for their default, but the sheriff's return shows a legal service, the court will open the judgment to permit the defendants to plead to the jurisdiction of the court. Keyes v. Moorhead, 11 Pa. Co. Ct. 43.

[e] **A decree of divorce** will be set aside on an application made within the statutory period where it appears that the defendant in such suit had no notice of the pendancy thereof, and this notwithstanding the officer's return to the contrary on the initial process. Locke v. Locke, 18 R. I. 716, 30 Atl. 422.

[f] **Provided for by Statutes.**—Kan. §6191, Dassler's Gen. St. 1909. Ohio. §5354, Bates' Ann. St., 5th ed. Utah. Blythe & Fargo Co. v. Swenson, 15 Utah 345, 49 Pac. 1027.

**Judgments on constructive service of process,** see *infra*, XIV, B, 11.

80. **Kan.**—Board of Education v. Nat. Bank of Com., 4 Kan. App. 438, 46 Pac. 36. **Minn.**—Glaeser v. St. Paul, 67 Minn. 368, 69 N. W. 1101; Bray v. Church, 39 Minn. 390, 40 N. W. 518.

appears that although the service was defective, the defendant had actual notice of the pendency of the suit.<sup>81</sup>

c. *Unauthorized Appearance*.—Where the court obtains jurisdiction only by virtue of the unauthorized appearance of an attorney, a judgment subsequently obtained against the party for whom the attorney appeared, will be set aside on motion.<sup>82</sup> In some jurisdictions, however, it must appear that the attorney who entered the appearance is insolvent,<sup>83</sup> while in others this principle is repudiated.<sup>84</sup> A party

**N. Y.**—Schaffer v. Lesowitz, 129 N. Y. Supp. 42. **Wash.**—Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053.

**81. N. C.**—Turner v. Case, etc. Mach. Co., 133 N. C. 381, 45 S. E. 781. **Utah.**—Blythe & Fargo Co. v. Swenson, 15 Utah 345, 352, 49 Pac. 1027. **Wis.**—Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037.

[a] This where the service of summons was conceded to be technically irregular, but it nowhere appeared that defendant was in any manner prejudiced thereby, the court properly refused to disturb a judgment rendered upon a default predicated upon such service. *Hull v. Canandaigua Electric Light Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865.

[b] A judgment against a corporation will not be set aside because the summons, properly entitled, was erroneously addressed to the president and general agent of the defendant instead of to the corporation. *Clark v. Porcelain Mfg. Co.*, 8 S. C. 22.

[c] The recital in a judgment that service was duly made is presumptively true and necessitates a clear showing to the contrary. **N. C.**—Ricaud v. Alderman, 132 N. C. 62, 43 S. E. 543. **R. I.**—Locke v. Locke, 18 R. I. 716, 30 Atl. 422. **S. D.**—Whitfield v. Howard, 12 S. D. 355, 81 N. W. 727. See *infra*, XVII, A.

**82. Cal.**—McKinley v. Tuttle, 34 Cal. 235; *Altpeter v. Postal Telegraph Cable Co.*, 26 Cal. App. 705, 148 Pac. 241. **Ga.**—Bigham v. Kistler, 114 Ga. 453, 40 S. E. 303; *Longman v. Bradford*, 108 Ga. 572, 33 S. E. 916; *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624; *Dobbins v. Dupree*, 39 Ga. 394. **Ill.**—Leslie v. Fischer, 62 Ill. 118; *Lyon v. Boilvin*, 7 Ill. 629. **Ia.**—Russell v. Pottawottamie County, 29 Iowa 256; *Rice v. Griffith*, 9 Iowa 539. **Kan.**—Mendenhall v. Robinson, 56 Kan. 633, 44 Pac. 610. **Mo.**—Bradley v. Welch, 100 Mo. 258, 12 S. W. 911; *Craig v.*

*Smith*, 65 Mo. 536. **Neb.**—Hurst v. Hotaling, 20 Neb. 178, 29 N. W. 299. **Nev.**—Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116. **N. Y.**—Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; *Ellsworth v. Campbell*, 31 Barb. 134; *Mayor, etc. v. Smith*, 20 N. Y. Supp. 666. **Ohio.**—Critchfield v. Porter, 3 Ohio 518. **Pa.**—Bryn Mawr Nat. Bank v. James, 152 Pa. 364, 25 Atl. 823. See also *Cyphert v. McClune*, 22 Pa. 195. **Utah.**—Blyth & Fargo Co. v. Swenson, 15 Utah 345, 355, 49 Pac. 1027. **Wash.**—Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161.

[a] The burden of proof is on the applicant and only a clear showing will suffice. **Ga.**—Heath v. Miller, 117 Ga. 854, 44 S. E. 13. **Ia.**—Russell v. Pottawottamie County, 29 Iowa 256. **Neb.**—Connell v. Galligher, 36 Neb. 749, 55 N. W. 229.

**83. Mass.**—Smith v. Bowditch, 7 Pick. 137. **Miss.**—Schirling v. Ceites, 41 Miss. 644. **N. C.**—Chadbourne v. Johnston, 119 N. C. 282, 25 S. E. 705; *University of North Carolina v. Laster*, 83 N. C. 38.

**84. Mo.**—Bradley v. Welch, 100 Mo. 258, 12 S. W. 911. **Nev.**—Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116. **N. Y.**—Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; *Ellsworth v. Campbell*, 31 Barb. 134; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237. *Compare*, *Blodgett v. Conklin*, 9 How. Pr. 442.

[a] "It was . . . wisely laid down by the King's bench in the time of Lord Holt (1 Salk. 88), that if the attorney for the defendant be not responsible or perfectly competent to answer to his assumed client, they would relieve the party, against the judgment, for otherwise a defendant might be undone. I am willing to go still farther and in every such case to let the defendant in to a defense."

may not, however, seek to retain the benefits accruing from an attorney's appearance and at the same time repudiate his authority so to do,<sup>85</sup> and if he ratifies the attorney's appearance, either expressly or impliedly, this ground of relief is lost.<sup>86</sup>

5. **Fraud.**—a. *General Statement.*—It is a firmly established rule that a judgment obtained or procured through fraud should be set aside.<sup>87</sup> The fraud complained of must, however, be unmixed with

Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237, *quoted* with approval in Ellsworth v. Campbell, 31 Barb. (N. Y.) 134.

[b] "The reason of this rule is well grounded. By licensing attorneys, the courts recommend them to the confidence of the public and the opposite party who has concerns with an attorney in litigation should not be required to look beyond the attorney for his authority." Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116.

85. Blaine v. Briscoe, 16 Mont. 582, 41 Pac. 1002.

86. Seale v. McLaughlin, 28 Cal. 668; Moss v. Raynor, 1 How. Pr. (N. Y.) 110.

87. **U. S.**—Jones v. Brittan, 1 Woods 667, 13 Fed. Cas. No. 7,455. **Ark.**—Hall v. Cox, 104 Ark. 303, 149 S. W. 80. **Colo.**—Jones v. Bradley, 8 Colo. App. 178, 45 Pac. 229. **Ga.**—Beverly v. Flesenthall Bros., 142 Ga. 834, 83 S. E. 942; Moore v. Moore, 139 Ga. 597, 77 S. E. 820; Wade v. Watson, 133 Ga. 608, 66 S. E. 922; Davis v. Albritton, 127 Ga. 517, 56 S. E. 514; Mobley v. Mobley, 9 Ga. 247. **Ill.**—Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192; City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; Lieserowitz v. West Chicago St. R. R. Co., 80 Ill. App. 248; Taylor v. Weagley, 17 Ill. App. 485; Pease v. Roberts, 16 Ill. App. 634. See also Anderson v. Field, 6 Ill. App. 307; Harbers v. Tribby, 5 Ill. App. 411; Baragwanath v. Wilson, 4 Ill. App. 80, and cases cited in following notes. **La.**—Prats v. His Creditors, 5 Rob. 288. **Md.**—Siewerd v. Farnen, 71 Md. 627, 18 Atl. 968; Smith v. Black, 51 Md. 247; Sarlouis v. Firemen's Ins. Co., 45 Md. 241. **Mich.**—Lorce v. Reeves, 2 Mich. 133. **Miss.**—Fairly v. Thompson, 34 Miss. 101; Person v. Nevitt, 32 Miss. 180; Hurd v. Smith, 5 How. 562. **N. Y.**—Stevens v. Central Nat. Bank, 144 N. Y. 50, 39 N. E. 68; Ludwin v. Siano,

36 Misc. 537, 73 N. Y. Supp. 940. **N. D.**—Freeman v. Wood, 11 N. D. 1, 88 N. W. 721. **Ohio.**—Carey v. Kemper, 45 Ohio St. 93, 11 N. E. 130; Pollock v. Pollock, 2 Ohio Cir. Ct. 140. **Pa.**—Fisher v. Hestonville M. & F. Railway Co., 185 Pa. 602, 40 Atl. 97; Maneval v. Jackson Tp., 141 Pa. 426, 21 Atl. 672; Monroe v. Monroe, 93 Pa. 520; Cochran v. Eldridge, 49 Pa. 365; Reeser v. Brenne-man, 4 Pa. Dist. 143; Humphreys v. Rawn, 8 Watts 78. **R. I.**—Pierce v. Probate Court, 19 R. I. 472, 34 Atl. 992. **S. C.**—Posey v. Underwood, 1 Hill 262. **Tenn.**—Williams v. Tenpenny, 11 Humph. 176; Bank of Tennessee v. Patterson, 8 Humph. 363; Smith v. Miller, 42 S. W. 182. **Tex.**—Buchanan v. Bilger, 64 Tex. 589; Fleming v. Seelingson, 57 Tex. 524; Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336; Snow v. Hawpe, 22 Tex. 168; Alexander's Heirs v. Maverick, 18 Tex. 179, 67 Am. Dec. 693; Kellum v. Smith, 18 Tex. 835. **Wis.**—Estate of O'Neill, 90 Wis. 480, 63 N. W. 1042; Thomas v. Thomas, 88 Wis. 88, 59 N. W. 504.

[a] The fraud practiced is not that in commencing the action, but in obtaining the judgment. Wheeler v. White, 2 Ohio Dec. (Reprint) 584.

[b] Where by agreement of counsel a cause was to be tried at a certain hour in the absence of notice to the contrary, and the plaintiff proceeded at a different time to try the case and obtained a judgment therein, this is fraudulent and sufficient to justify the court in subsequently setting aside such judgment. Harbers v. Tribby, 5 Ill. App. 411. And even though this stipulation or agreement be an oral one, it will, if not disputed, be sufficient for this purpose. Burnham v. Smith, 11 Wis. 258.

[c] **Collusion Between Counsel.** Where the judgment is the result of collusion between counsel for the opposing litigants the court will set such judgment aside. Smith v. Miller (Tenn.), 42 S. W. 182.



any fault of the applicant or his agent,<sup>88</sup> and must arise from some act of the prevailing party.<sup>89</sup>

Deception of an adverse party preventing the applicant from presenting his defense is a common form of fraud within the scope of this rule.<sup>90</sup> Some authorities, too, restrict the operation of this rule to cases where the alleged fraud was one which entered into the actual procurement of the judgment,<sup>91</sup> while others extend it to include cases where the fraud arose in connection with the cause of action.<sup>92</sup> A clear and unqualified<sup>93</sup> promise or agreement whereby the applicant is lulled into a sense of security and induced not to present his cause to the court will, if violated, operate as a fraud upon the party so deceived and entitle him to have the judgment thus obtained set

[d] **Failure to swear witness is not** per se evidence of fraud in procuring a judgment, but merely error which may be waived. *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581.

[e] **In divorce cases, a judgment** may be set aside for this cause, even though, by reason of a remarriage of the parties, innocent third parties may suffer. *Rush v. Rush*, 46 Iowa 648, 26 Am. Rep. 179.

**Equitable Relief for Fraud.**—See *infra*, XVI, E, 6.

**Fraud as ground for collateral attack,** see *infra*, XVII, A.

88. **Ill.**—*Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762. See also *Taylor v. Weagley*, 17 Ill. App. 485. **N. Y.**—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. **N. C.** *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581. **Ohio.**—*Fackler v. Bavarian Relief Society*, 8 Ohio Dec. (Reprint) 56; *Hildebrand v. Windisch & Co.*, 6 Ohio Dec. (Reprint) 784. **Wis.** *Thomas v. Thomas*, 88 Wis. 88, 59 N. W. 504.

[a] A petition for this relief is, on this principle, insufficient which recites that a suit was brought against applicant's decedent as surety on a bond; that bond was in German but counted upon in English; that relying upon the averment in the court that decedent was a surety on the bond, applicant pleaded to that state of the case; that in fact decedent was but a witness on the bond. It should have been made to appear further that she had either called for the original bond before pleading, or at least during the trial, or attempted in some way to inform herself. *Fackler v. Bavarian Relief Society*, 8 Ohio Dec. (Reprint) 56.

[b] "The fraud which will justify equitable interference in setting aside a judgment or decree must be actual and positive, not merely constructive. It must be fraud occurring in the concoction or procurement of the judgment or decree, which was not known to the party at the time, and for not knowing which he is not chargeable with negligence." *Ross v. Wood*, 70 N. Y. 8.

89. *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762.

90. **Cal.**—*Riddle v. Baker*, 13 Cal. 295. **Ind.**—*Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Douthit v. Douthit*, 133 Ind. 26, 32 N. E. 715; *Duringer v. Moschino*, 93 Ind. 495. **Ia.**—*Frisbie v. Chase*, 161 Iowa 133, 140 N. W. 842; *Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441; *Simmons v. Church*, 31 Iowa 284. **Mo.**—*Hulbert v. Treadway*, 159 Mo. 665, 60 S. W. 1035. **Neb.**—*Gutterson v. Meyer*, 68 Neb. 767, 94 N. W. 969. **N. Y.**—*Smith v. Weston*, 81 Hun 87, 30 N. Y. Supp. 649; *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852. **Pa.**—*Miller v. Neidzielska*, 176 Pa. 409, 35 Atl. 225.

91. *Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908; *Pelz v. Bollinger*, 180 Mo. 252, 79 S. W. 146; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836.

92. **U. S.**—*Guild v. Phillips*, 44 Fed. 461. **N. Y.**—*Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629. **N. C.**—*Smallwood v. Trenwith*, 110 N. C. 91, 14 S. E. 505.

93. **Cal.**—*Jenkins v. Gamewell Fire Alarm Co.*, 96 Cal. xvii, 31 Pac. 570. **Idaho.**—*Holland Bank v. Lieualen*, 6 Idaho 127, 53 Pac. 398. **Ill.**—*Hartford Life Insurance Co. v. Rossiter*, 196 Ill. 277, 63 N. E. 680. **Mo.**—*Robyn v.*

aside.<sup>94</sup> The showing must do more than give rise to a suspicion, however strong, that fraud was practiced in obtaining the judgment; the proof must be clear and convincing.<sup>95</sup>

b. *Perjury*.—Statutes sometimes provide for the vacation of judgments obtained through perjury.<sup>96</sup> The general rule, however, in the absence of statutes, is that false testimony given by or for the successful party will not justify the vacation of the judgment where it appears that there is sufficient competent evidence, without the testimony thus given, to support the judgment,<sup>97</sup> or where the party aggrieved,

Chronicle Publishing Co., 127 Mo. 385, 30 S. W. 130. **Neb.**—Funk v. Kansas Mfg. Co., 53 Neb. 450, 73 N. W. 931. **Nev.**—Haley v. Eureka Bank, 20 Nev. 410, 22 Pac. 1098.

94. **Ark.**—Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218. **Cal.**—Merchants Ad. Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; McGowan v. Kreling, 117 Cal. 31, 48 Pac. 980; Craig v. San Bernardino Investment Co., 101 Cal. 122, 35 Pac. 558. **Colo.**—State Board v. Meyers, 13 Colo. App. 500, 58 Pac. 879. **Fla.**—Purviance v. Edwards, 17 Fla. 140. **Ga.**—Jones v. Patterson, 138 Ga. 862, 76 S. E. 378; Southern Railroad Co. v. Planters' Fertilizer Co., 134 Ga. 527, 68 S. E. 95. **Ill.**—Harbers v. Tribby, 5 Ill. App. 411. **Ind.**—Douthitt v. Douthitt, 133 Ind. 26, 32 N. E. 715; McGaughey v. Woods, 92 Ind. 296; Hoag v. Old People's, etc. Benefit Society, 1 Ind. App. 28, 27 N. E. 438. **Ia.**—Council Bluffs Loan & Tr. Co. v. Jennings, 81 Iowa 470, 46 N. W. 1006. **Kan.**—McIntosh v. Crawford County Comrs., 13 Kan. 171. **Neb.**—Cadwallader v. McClay, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496. **N. Y.**—Mann v. Provost, 3 Abb. Pr. 446; McKechnie v. Spike, 42 Hun 652, 5 N. Y. St. 150. **N. C.**—Ellington, etc. Co. v. Wicker, 87 N. C. 14. **N. D.**—Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581. **Ohio.**—Mitchell & Co. v. Knight, 3 Ohio Cir. Dec. 729. **Wash.**—McBride v. McGinley, 31 Wash. 573, 72 Pac. 105; Bast v. Hysom, 6 Wash. 170, 32 Pac. 997. **Wis.**—Boutin v. Catlin, 101 Wis. 545, 77 N. W. 910; Stafford v. McMillan, 25 Wis. 566.

[a] **Compromise negotiations**, in which the plaintiff made no promise to even delay the progress of the suit will not have this effect. Sweet v. Burdett, 40 Cal. 97; Goldsberry v. Carter, 28 Ind. 59. See also, as to the effect of a compromise. Donnelly v. Clark, 6 Mont. 135, 9 Pac. 887.

95. **Kan.**—Wagner v. Beadle, 82 Kan. 468, 108 Pac. 859. **Mo.**—Obermeyer v. Einstein, 62 Mo. 341. **N. J.**—Caldwell v. Fifield, 24 N. J. L. 150. **Pa.**—Oberly v. Oberly, 190 Pa. 341, 42 Atl. 1105; Davis v. Pierce, 52 Pa. Super. 615; National Mut. Bldg., etc. Assn. v. Kondrak, 9 Kulp. 14. **Wash.**—Tacoma Lumb. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755.

96. **Ark.**—§4431, sub. 4, Kirby's Dig., 1904. **Ga.**—§5961, Code 1910. **Minn.**—Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89; Haas v. Billings, 42 Minn. 63, 43 N. W. 797; Wieland v. Shillock, 24 Minn. 345.

See generally the statutes.

[a] These statutes are in derogation of the salutary principle and policy of the common law, which forbids the retrial of issues once determined by a final judgment and are strictly construed. The statute should not be construed beyond its most obvious import. Haas v. Billings, 42 Minn. 63, 43 N. W. 797; Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89.

[b] **False testimony of successful party** is, by some statutes, ground for relief. Bates' Ann. Ohio St., 5th ed., §5354.

[c] **Minnesota statute not limited** in scope to cases in which, prior to its passage, equity would give relief. Spooner v. Spooner, 26 Minn. 137, 1 N. W. 838.

[d] **Statutes affording relief on the ground as to judgments previously rendered are unconstitutional as to judgments which had become absolute at the time of the enactment of the statute.** Wieland v. Shillock, 24 Minn. 345.

97. **Nugent v. Metropolitan St. Ry. Co.**, 46 App. Div. 105, 61 N. Y. Supp. 476; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669; Friedman v. Manley, 21 Wash. 675, 59 Pac. 490.

although aware that the testimony in question was of this character, made no effort to meet it.<sup>98</sup> Where, however, a judgment is obtained in this manner under circumstances which amount to fraud, it will be set aside.<sup>99</sup> An order procured from the court by deceiving it with false affidavits, may be set aside.<sup>1</sup>

**6. Newly Discovered Evidence and Subsequently Occurring Facts.**<sup>2</sup>—Whenever it is made to appear that newly discovered evidence, which could not with due diligence have been presented prior to the rendition of the judgment complained of,<sup>3</sup> which is probably true,<sup>4</sup> and material,<sup>5</sup> would, if introduced at the trial, have resulted in a different judgment,<sup>6</sup> this will justify the court in ordering such judgment opened or set aside. The judgment will not be disturbed, however, where the only object of the evidence is to impeach,<sup>7</sup> or

98. *Heathcote v. Haskins*, 74 Iowa 566, 38 N. W. 417.

[a] There must be connected with the alleged perjury such circumstances as will relieve the applicant from all implication of want of diligence and completely deceive him in the nature of the testimony. *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490.

99. **Kan.**—*Laithe v. McDonald*, 12 Kan. 340; *Laithe v. McDonald*, 7 Kan. 254. **N. Y.**—*Nugent v. Metropolitan St. Ry. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476. **Pa.**—*Reeser v. Brenneman*, 4 Pa. Dist. 143; *Humphreys v. Rawn*, 8 Watts. 78.

As a ground for equitable relief, see 4 STANDARD PROC. 476.

1. *Keating v. Hayes*, 78 Hun 599, 29 N. Y. Supp. 475, 61 N. Y. St. 419.

2. As ground for new trial, see the title "New Trial."

3. **U. S.**—*United States v. Millinger*, 7 Fed. 187, 19 Blatch. 202. **Ala.**—*Bruce's Exrx. v. Williamson*, 50 Ala. 313. **Ark.**—*Terry v. Logue*, 97 Ark. 314, 133 S. W. 1135; *Robinson v. Davis*, 66 Ark. 429, 51 S. W. 66. **Colo.**—See also *McGregor v. McGregor*, 52 Colo. 292, 297, 122 Pac. 390. **Ga.**—*Gladden v. Cobb*, 80 Ga. 11, 6 S. E. 163. **Ia.**—*Heathcote v. Haskins*, 74 Iowa 566, 38 N. W. 417. **Mich.**—*Mueller v. Marsh*, 116 Mich. 375, 74 N. W. 513. **Mo.**—*Stephens v. Gallagher*, 42 Mo. App. 245. **N. Y.**—*Nash v. Wetmore*, 33 Barb. 155. **N. C.**—*Turner v. Davis*, 132 N. C. 187, 43 S. E. 637; *Williamson v. Boykin*, 104 N. C. 100, 10 S. E. 87. **Ohio.**—See also *Fackler v. Bavarian Relief Society*, 8 Ohio Dec. (Reprint) 56. **Pa.**—*In re Irwin's Appeal*, 9 Sad. 479, 12 Atl. 840. **Tex.**—*Krall v. Campbell, etc. Co.*, 79 Tex. 556, 15 S. W. 565; *Fitzgerald v. Comp-*

*ton*, 28 Tex. Civ. App. 202, 67 S. W. 131.

4. *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637.

5. *Mueller v. Marsh*, 116 Mich. 375, 74 N. W. 513; *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637.

6. **U. S.**—*Heckling v. Allen*, 15 Fed. 196. **Ia.**—*Heathcote v. Haskins*, 74 Iowa 570, 38 N. W. 419; *Morrow v. Chicago R. I. & P. R. Co.*, 61 Iowa 487, 16 N. W. 572. **Minn.**—*Sheffield v. Mullin*, 28 Minn. 251, 9 N. W. 756. **Neb.**—*Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. **N. C.**—*Turner v. Davis*, 132 N. C. 187, 43 S. E. 637. **Ore.**—*Wells, Fargo & Co. v. Wall*, 1 Ore. 295. **Tex.**—*Allyn & Co. v. Willis & Bro.*, 65 Tex. 65; *Fitzgerald v. Compton*, 28 Tex. Civ. App. 202, 67 S. W. 131. **Wis.**—*Cooley v. Gregory*, 16 Wis. 303. **Can.**—*Brousseau v. Dechene*, 3 Quebec Pr. 397.

[a] Where a motion to vacate a judgment, based upon the ground of newly discovered evidence, was supported by an affidavit of a witness of the adverse party that he committed willful perjury at the trial of the cause, the motion was properly denied on the maxim *falsus in uno falsus in omnibus*. *Loucheine v. Strouse*, 49 Wis. 623, 6 N. W. 360.

[b] Evidence which was known to the applicant before the trial cannot be urged as "newly discovered" evidence because he had not sufficient time to obtain it and present it at the trial. In this event he should have asked for a continuance. *Cochrane v. Middleton*, 13 Tex. 275.

7. *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637; *Metzger v. Wendler*, 35



contradict a witness,<sup>8</sup> or it is merely cumulative.<sup>9</sup> Also, if facts have occurred since the rendition of a judgment which present an equitable reason why it should not be enforced such judgment should not be allowed to stand.<sup>10</sup>

**7. Errors and Irregularities.**<sup>11</sup>—As a general rule, irregularities,<sup>12</sup> of such a character as to materially prejudice<sup>13</sup> the rights of

Tex. 378; *Seranton v. Tilley*, 16 Tex. 183.

8. *Turner v. Davis*, 132 N. C. 187, 42 S. E. 637.

9. **U. S.**—*Briggs v. United States*, 29 Ct. Cl. 178. **Ind.**—*Lashley v. King*, 20 Ind. 232. **N. C.**—*Turner v. Davis*, 132 N. C. 187, 43 S. E. 637. **Phil. Isl.** *Cruz v. Lopez*, 19 Phil. Isl. 555.

10. **Colo.**—*Jones v. Bradley*, 8 Colo. App. 178, 45 Pac. 229. **Pa.**—*Harper v. Kean*, 11 Serg. & R. 280. **Wis.**—*Scheer v. Keown*, 34 Wis. 349.

11. Defects as to parties, see *supra*. XIV, B, 3.

Jurisdictional defects, see *supra*, XIV, B, 4.

Fraud in obtaining judgment, see *supra*, XIV, B, 5.

12. **Md.**—*Siewerd v. Farnen*, 71 Md. 627, 18 Atl. 968; *Sarlouis v. Fireman's Ins. Co.*, 45 Md. 241; *Hall v. Holmes*, 30 Md. 558. **Mo.**—*Woodward v. Woodward*, 84 Mo. App. 328. **N. Y.**—*Lord v. Vandenburg*, 15 How. Pr. 363; *Martin v. Universal Trust Co.*, 76 App. Div. 320, 78 N. Y. Supp. 465. **N. C.** *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838; *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233; *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840; *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Harrell v. Peebles*, 79 N. C. 26; *Blue v. Blue*, 79 N. C. 69; *Monroe v. Whitted*, 79 N. C. 508; *Dick v. McLaurin*, 63 N. C. 185; *Moore v. Mitchell*, 61 N. C. 304; *Dobbin v. Gaster*, 26 N. C. 71; *Anonymous*, 1 N. C. 97, 3 N. C. 73, *Tayl.* 146. See also *Turner v. Davis*, 132 N. C. 187, 43 S. E. 637; *Fowler v. Poor*, 93 N. C. 466; *Hervey & Co. v. Edmunds*, 68 N. C. 243. **N. D.** *State v. Donovan*, 10 N. D. 203, 86 N. W. 709. **Ohio.**—*Huntington v. Finck*, 3 Ohio St. 445; *Hunt v. Yeatman*, 3 Ohio 15. See also *Hocking Valley Bank v. Walters*, 1 Ohio St. 201.

[a] **Irregularity Defined.**—"An irregularity for which a judgment may be set aside has been defined to be the want of adherence to some prescribed rule or mode of procedure, either in omitting to do something that is necessary for the due and orderly conducting of the suit, or doing it in an unseasonable time, or improper manner." *Woodward v. Woodward*, 84 Mo. App. 328.

[b] A violation of any "prescribed rule or mode of procedure." *Jeude v. Sims*, 258 Mo. 26, 166 S. W. 1048.

[c] "An irregular judgment is one entered contrary to the cause of the court—contrary to the method of procedure and practice under it allowed by law in some material respect . . ." *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716.

[d] **Mistakes of the clerk** are, by some statutes, ground for relief. **Ia.** §4091, Code, 1897. **Kan.**—§6191, *Dassler's Gen. St.*, 1909. **Ky.**—§518, *Code Civ. Prac.*, 1906. **Neb.**—§8207, *Rev. St.*, 1913. **Ohio.**—§5354, *Bates' Ann. St.*, 5th ed. **Wash.**—*State v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

[e] **The statutes commonly provide for this.** **Kan.**—§6191, *Dassler's Gen. St.*, 1909. **Neb.**—§8207, *Rev. St.*, 1913. **N. D.**—By §6766, *Rev. Codes*, 1905, a judgment entered by a judge of any district contrary to the limitation imposed by §6765, preceding, may be vacated. **Ohio.**—§§5357, 5354, *Bates' Ann. St.*, 5th ed. **Wash.**—*Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

13. **Cal.**—*Block v. Kearney*, 132 Cal. xviii, 64 Pac. 267; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Kaufman v. Shain*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830. **Fla.** *Gainesville v. Johnson*, 51 So. 852. **Ill.** *Ettinghausen v. Marx*, 86 Ill. 475. See also *Pisa v. Rezek*, 206 Ill. 344, 69 N. E. 67. **Ia.**—*Sitzer v. Fenzloff*, 112 Iowa 491, 84 N. W. 514; *Keeney v. Lyon*, 10 Iowa 546. **Kan.**—*Foreman v. Carter*, 9 Kan. 674. **Mich.**—*Turner v. Ottawa*

the applicant, or which are likely to do so in the future.<sup>14</sup> will justify the opening or vacating of the judgment which they affect. Mere

Circuit Judge, 123 Mich. 617, 82 N. W. 247. **Mo.**—Downing *v.* Still, 43 Mo. 309; Bowers *v.* McIntire, 45 Mo. App. 331. **N. H.**—Claggett *v.* Simes, 31 N. H. 56. **N. Y.**—Crook *v.* Hamlin, 140 N. Y. 297, 35 N. E. 499; Judd Linseed Oil Co. *v.* Hubbell, 76 N. Y. 543; Kidd *v.* Phillips, 13 Jones & S. 633. **N. C.** Everett *v.* Reynolds, 114 N. C. 366, 19 S. E. 233; White *v.* Morris, 107 N. C. 92, 12 S. E. 80; Roberts *v.* Allman, 106 N. C. 391, 11 S. E. 424; Williamson *v.* Hartman, 92 N. C. 236; Stancill *v.* Gay, 92 N. C. 455. **Ohio.**—Huntington *v.* Finch, 3 Ohio St. 445. See also Carey *v.* Kemper, 45 Ohio St. 93, 11 N. E. 130. **Pa.**—Ash *v.* Guie, 97 Pa. 493, 39 Am. Rep. 818. See also Sweesey *v.* Kitchen, 80 Pa. 160. **S. C.**—Mills & Co. *v.* Dickinson, 6 Rich. L. 487. See also Cooper *v.* Smith, 16 S. C. 331. **Wash.**—Tacoma Lumb., etc. Co. *v.* Wolf, 7 Wash. 478, 35 Pac. 115. **Wis.** Horning *v.* E. Griesbach Brewing Co., 84 Wis. 71, 54 N. W. 105; Pormann *v.* Frede, 72 Wis. 226, 39 N. W. 385; Knowles *v.* Fritz, 58 Wis. 216, 16 N. W. 621; Bonnell *v.* Gray, 36 Wis. 574. See also Salter *v.* Hilgen, 40 Wis. 363.

[a] Deviations from accustomed rules of practice will not be sufficient to justify granting this relief unless the violation was very plain and likely to result in injustice. Ettinghausen *v.* Marx, 86 Ill. 475. See also Pisa *v.* Rezek, 206 Ill. 344, 69 N. E. 67.

[b] Where one falsely represented himself as being a person summoned as a juror and sat with the jury and entered into its deliberations, a judgment based upon the verdict thus rendered will be set aside. Illinois Steel Co. *v.* Szutenlach, 67 Ill. App. 280.

[c] "That the court misconstrued the law" is not such an irregularity as will justify the vacation of the judgment. "Irregularities generally invoked for the purpose of vacating a judgment after term time are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character." Kuhn *v.* Mason, 24 Wash. 94, 64 Pac. 182.

[d] In an action to recover a tract of land, defendant interposed an equitable defense. Without objection the matter went to the jury as a case at law. Two years later the defeated party obtained relief by having the judgment set aside as irregular. Cooper *v.* Smith, 16 S. C. 331.

[e] Where the original answer was not verified, as required by law, although the copy served on plaintiff's attorney purported to be, and this fact was not discovered by plaintiff until after judgment for defendant, the judgment should be set aside. Welsbach Com. Co. *v.* Popper, 59 N. Y. Supp. 1016.

[f] A judgment obtained in violation of an agreement to stay proceedings was considered irregular and accordingly set aside in *Murdock v. Steiner*, 45 Pa. 349.

[g] **Variance Between Verdict and Judgment.**—That there is a material variance between the verdict and the judgment thereupon entered will warrant the setting aside of the judgment. Eason *v.* Miller & Kelly, 15 S. C. 194. See *supra*, XI, D, 3.

Judgments which are void for irregularities, are disposed of on the ground of invalidity, not irregularity. See *supra*, XIV, B, 1.

[h] Where an amended complaint, setting up a demand for a sum in addition to that contained in the original pleading, was never served and judgment was rendered thereon, this is a sufficient irregularity to authorize the vacation of the judgment. Weatherford *v.* Van Alstyne, 22 Tex. 22.

[i] **Judgment Entered on a Default Prematurely Taken.**—James *v.* Signell, 60 App. Div. 295, 69 N. Y. Supp. 1106; Rothchild *v.* Link, 29 App. Div. 580, 51 N. Y. Supp. 253; Parker *v.* Linden, 59 Hun 623, 13 N. Y. Supp. 787; Kuhn *v.* Mason, 24 Wash. 94, 64 Pac. 182.

[j] Where defendant's last day to plead fell on Sunday, a default entered on the following Monday was, in *Rothchild v. Link*, 29 App. Div. 580, 51 N. Y. Supp. 253, held irregular.

14. Everett *v.* Reynolds, 114 N. C. 366, 19 S. E. 233; White *v.* Morris, 107 N. C. 92, 12 S. E. 80; Williamson *v.* Hartman, 92 N. C. 236.

technicalities or trivial irregularities are not sufficient.<sup>15</sup> The irregularity must, in any event affect the judgment directly, and an error in the taxation of costs will not warrant the vacation of the judgment to which they will attach.<sup>16</sup> Should the irregularity complained of be waived or cured, it is no longer available in support of an application of this nature.<sup>17</sup> In some jurisdictions it is held that the irregularity upon which the motion is predicated must be apparent from an inspection of the record,<sup>18</sup> but this rule has its exceptions as, for instance, where a judgment, otherwise apparently regular, was admittedly rendered against a deceased defendant.<sup>19</sup>

Errors of law, involving the exercise of judicial discretion, cannot be reached by proceedings to open or vacate the judgment.<sup>19a</sup> Error

15. Ga.—*Adams v. Walker*, 59 Ga. 506. Mass.—*East Tenn. Land Co. v. Leeson*, 185 Mass. 4, 69 N. E. 351. N. J.—*National, etc. Milk Co. v. Brandenburgh*, 40 N. J. L. 111. N. Y.—*Crook v. Hamlin*, 140 N. Y. 297, 35 N. E. 499; *Judd Linseed Oil Co. v. Hubbell*, 76 N. Y. 543; *Van Dolsen v. Abendroth*, 21 Jones & S. 35; *Grant v. Birdsall*, 16 Jones & S. 427, 2 Civ. Proc. 422; *Kidd v. Phillips*, 13 Jones & S. 633; *Stimson v. Huggins*, 16 Barb. 658, 9 How. Pr. 86; *Lewis v. Jones*, 13 Abb. Pr. 427; *Bullard v. Harris*, 66 Hun 628, 21 N. Y. Supp. 9. N. C.—*Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233; *White v. Morris*, 107 N. C. 92, 12 S. E. 80. Wash.—*Tacoma Lumb., etc. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115.

[a] Statutes so provide. See Cal. Code Civ. Proc., §475. Idaho.—*Rev. Codes*, 1908, §4231. Ind.—*Burns' Ann. St.*, 1914, §407. And generally the statutes of the several states.

[b] Failure of the court to comply with a rule of practice which is not mandatory, but merely directory, will not constitute a sufficient cause for the vacation of a judgment. *Hupfel v. Schoemig*, 2 Jones & S. (N. Y.) 476.

[c] Premature entry of judgment which does not prejudice the complaining party. *Kidd v. Phillips*, 13 Jones & S. (N. Y.) 633. See also *Lewis v. Jones*, 13 Abb. Pr. (N. Y.) 427.

16. *Harriman v. Swift*, 31 Vt. 385.

17. Ga.—*Crow v. American Mortg. Co.*, 92 Ga. 815, 19 S. E. 31. N. Y.—*Corn Exchange Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805; *Grant v. Birdsall*, 16 Jones & S. 427. N. C.—*Williamson v. Hartman*, 92 N. C. 236.

18. Ga.—*Sweet v. Latimer*, 112 Ga. 615, 46 S. E. 825; *Tietjen v. Merchants' Bank*, 117 Ga. 501, 43 S. E. 730. Ohio.

*Hunt v. Yeatman*, 3 Ohio 15. Pa.—*Davidson v. Miller*, 204 Pa. 223, 53 Atl. 773; *Hall v. West Chester Publishing Co.*, 180 Pa. 561, 37 Atl. 106; *North & Co. v. Yorke*, 174 Pa. 349, 34 Atl. 620; *Swartz v. Morgan & Co.*, 163 Pa. 195, 29 Atl. 974, 975; *Adams v. Grey*, 154 Pa. 258, 26 Atl. 423; *Huston Tp. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Stevenson v. Virtue*, 21 Pa. Co. Ct. 229. See also *Insurance Co. v. Tenan*, 204 Pa. 332, 54 Atl. 172; *Dikeman v. Butterfield*, 135 Pa. 236, 19 Atl. 938.

[a] "The judgment could not have been struck off on the application of the defendant, as there was no irregularity on the face of the record. 'A motion to set aside or strike off a judgment must be on the ground of irregularity appearing on the face of the record; a motion to open it is an appeal to the equitable power of the court to let the defendant into a defense.' . . . The distinction between these rules is very frequently overlooked in practice, and at times, owing to the admission of facts not in the record, it has not been observed in the language of the decisions." *Hall v. West Chester Publishing Co.*, 180 Pa. 561, 37 Atl. 106.

[b] As was said in *Hunt v. Yeatman*, 3 Ohio 15, "The power to set aside a judgment for manifest irregularity in entering it is exercised by all courts of justice."

19. This rule does not apply where the judgment is void. *Stevenson v. Virtue*, 21 Pa. Co. Ct. 229, where it was admitted that the judgment was rendered after the death of the party.

19½. Ark.—*Stewart v. Wood*, 86 Ark. 504, 111 S. W. 983. Cal.—*Leonis v. Leffingwell*, 126 Cal. 369, 58 Pac.



does not constitute irregularity nor necessarily enter into it.<sup>19½</sup> Should a judgment be imperfect merely because of some omission therefrom, the remedy is not by proceeding to open and vacate, but by an application to amend.<sup>19¾</sup>

**8. Accident and Mistake.**—Provision is found in most statutes bearing on this subject, for relief from a judgment taken against a party through his "mistake."<sup>20</sup> Unavoidable casualty or misfortune

940; *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775; *First Nat. Bank v. Dusy*, 110 Cal. 69, 42 Pac. 476; *Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554. **Ga.**—*East Tennessee, etc. R. Co. v. Greene*, 95 Ga. 35, 22 S. E. 36. **Ind.**—*Center v. Marion*, 110 Ind. 579, 10 N. E. 291; *Lawler v. Couch*, 80 Ind. 369. **Kan.**—*Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527; *Pierson v. Benedict*, 5 Kan. App. 790, 48 Pac. 996. **Mo.**—*Jeude v. Sims*, 258 Mo. 26, 166 S. W. 1048; *Craig v. Smith*, 65 Mo. 536; *Cooper v. Duncan*, 20 Mo. App. 355. **N. C.**—*May v. Stimson Lumb. Co.*, 119 N. C. 96, 25 S. E. 721; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Anonymous*, 1 N. C. 97. **N. D.**—*State v. Donovan*, 10 N. D. 203, 86 N. W. 709. **S. C.**—*Hill v. Watson*, 10 S. C. 268, 275. **Wash.**—*Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725. **Wis.**—*Landon v. Burke*, 33 Wis. 452; *Spafford v. City of Janesville*, 15 Wis. 474; *Edwards v. City of Janesville*, 14 Wis. 26. See also **Cal.**—*Canadian, etc. Trust Co. v. Clarita, etc. Inv. Co.*, 140 Cal. 672, 74 Pac. 301; *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225. **Ind.**—*Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474. **N. Y.**—*Corn Exchange Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805. **N. C.**—*Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022; *Harrell v. Peebles*, 79 N. C. 26. **Wis.**—*Quaw v. Lameraux*, 36 Wis. 626. **Wyo.**—*Lee v. Cook*, 1 Wyo. 413.

[a] Statutes providing for relief from judgments taken through the mistake, inadvertence, etc., of a party do not refer to errors of law. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118. <sup>19½</sup> *Skinner v. Moore*, 19 N. C. 138, 30 Am. Dec. 155.

[a] A distinction should be noticed between irregularities in the proceedings and such errors as are judicial, i. e., involve a question of judicial reasoning. *May v. Stimson Lumb. Co.*, 119 N. C. 96, 25 S. E. 721; *State v. Donovan*, 10 N. D. 203, 86 N. W. 709.

[b] Thus a judgment for an excessive sum is erroneous, if the result of wrong judicial reasoning and not inadvertence or mistake, and can be corrected only by an appeal to a higher tribunal. *Scott v. Mutual, etc. Life Assn.*, 137 N. C. 515, 50 S. E. 221; *Skinner v. Moore*, 19 N. C. 138, 30 Am. Dec. 155.

<sup>19¾</sup> *Union Bag & Paper Co. v. Allen Bros.*, 94 App. Div. 595, 88 N. Y. Supp. 368. See also *supra*, XIII, A, 3, b, (IV).

**20. Alaska.**—§93, Part IV, *Carter's Ann. Codes*, 1900. **Ariz.**—§600, Title 6, *Rev. Codes*, 1913. **Cal.**—§473, *Deering's 1915 Code Civ. Proc.* **Colo.**—§81, *Code*, 1910. **Idaho.**—§4229, *Rev. Codes*, 1908. **Ind.**—§405, *Burns' Ann. St.*, *Rev.* 1914. **Mont.**—§6589, *Rev. Codes*, 1907. **N. Y.**—§724, *Parson's Code Civ. Proc.*, 1915. **N. C.**—*Rev.* 1905, §513; *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289. **N. D.**—§6884, *Rev. Codes*, 1905. **Ore.**—*Brand v. Baker*, 42 Ore. 426, 71 Pac. 320; *Stites v. McGee*, 37 Ore. 574, 61 Pac. 1129.

See generally the statutes.

The mistake of the applicant is generally offered as an excuse for his neglect. See *infra*, XIV, B, 9.

[a] **Mistake of Court and Counsel.** A complaint was dismissed as being defective, an amendment being refused, though requested, the court stating that instead the plaintiff might bring a new action. Subsequently it was discovered that the statute of limitations would not permit this to be done. The judgment was accordingly vacated on the ground of mistake. *Patterson v. Hochster*, 21 App. Div. 432, 47 N. Y. Supp. 553.

[b] A mistake in the docket may excuse the default of a party as where the cause was entered under a wrong name. *Clifford v. Gruelle*, 17 Ky. L. Rep. 842, 32 S. W. 937.

[c] A mistake of date of service of summons is such a one as these statutes purpose to remedy. *Miller v. Carr*, 116

which prevents a party from prosecuting or defending, is the language found in some statutes.<sup>21</sup> Under these statutes the only mistake for which this relief will be granted, however, is a mistake of fact; a mistake of law being beyond the purview of their provisions.<sup>22</sup>

**9. Excusable Neglect.**—a. *In General.*—Under the statutes in many states a party will be relieved from a judgment taken against him through his excusable neglect.<sup>23</sup> Inadvertence is the term em-

Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180, involving §473, Cal. Code Civ. Proc., 1916.

[d] **A mistake in a regularly issued publication**, relied upon in such matters by the business community, whereby the defendant was misled, will justify the opening of the judgment therein rendered. *Watson v. San Francisco R. Co.*, 41 Cal. 17.

[e] **Mistake as to the court in which the party's suit was pending** is not such a mistake as will entitle him to have the judgment opened. *Robertson v. Bergen*, 10 Ind. 402.

[f] **Mistake of Counsel.**—"The mistake or ignorance of a party's counsel will not relieve him from a judgment against him." *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086.

[g] **Mistake as to Time of Trial.** It is no excuse that a party misunderstood his attorney's statement as to the time of trial. *Ross v. Louisville & N. R. Co.*, 92 Ky. 583, 18 S. W. 456.

**21. Ark.**—§4431, sub. 7th, Kirby's St., 1904. **Ia.**—§4091, Code, 1897. **Kan.** §6191, Dassler's Gen. St., 1909. **Ky.** §518, Civ. Code Prac., sub. 7, 1906. **Neb.**—§8207, Rev. St., 1913. **Ohio.** §5354, Bates' Ann. St., 5th ed. **Okla.** *Wynn v. Frost*, 6 Okla. 89, 50 Pac. 184.

[a] "Casualty or misfortune is something more than mere ignorance of the service of process by leaving a copy at the residence of the defendant, arising from his absence on business. There may be casualty or misfortune where all the facts are known, as well as when they are not. I cannot, but think that this provision was intended to apply, in a case where, some accidental injury or sickness, etc., has intervened to prevent a defense, rather than a want of knowledge of the service of summons arising from the cause stated." *Howard v. Abbey*, 2 Ohio Dec. (Reprint) 64.

[b] The act of an attorney in dishonestly permitting a judgment to be taken by default is an "unavoidable

casualty" within the statute. *Anthony v. Karbach*, 64 Neb. 509, 90 N. W. 243, 97 Am. St. Rep. 662.

[c] **Insanity of a party was considered as a "misfortune"** under such a statute in *Small v. Reeves*, 104 Ky. 289, 46 S. W. 726.

**22. Conn.**—*Jartman v. Pacific Fire Ins. Co.*, 69 Conn. 355, 37 Atl. 970. **Ind.**—*Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474; *Thacker v. Thacker*, 125 Ind. 489, 25 N. E. 595; *Center Tp. v. Board*, 110 Ind. 579, 10 N. E. 291. **Ia.**—*Stryker v. Rivers*, 47 Iowa 108. **Mont.**—*Canning v. Fried*, 48 Mont. 560, 139 Pac. 448; *Willoburn Ranch Co. v. Yegen*, 45 Mont. 254, 122 Pac. 915. **N. Y.**—*Cook v. Long Island R. Co.*, 65 Hun 619, 19 N. Y. Supp. 648; *In re Carr*, 19 N. Y. Supp. 647. **N. C.** *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118. **S. D.**—*Sing Yow v. Wong Free Lee*, 16 S. D. 383, 92 N. W. 1073.

[a] A "mistake," within the meaning of these statutes occurs where something right or wrong, is done which was not intended to be done; not when something, even admittedly wrong is done, if done advisedly. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

[b] On this principle judgments by consent are without the purview of these statutes. *Boyden v. Williams*, 80 N. C. 95.

[c] **Mistake of Law.**—The opinion entertained by a defendant that no one but an officer could serve a summons upon him in a civil action, being a mistake of law, will not excuse his failure to appear and defend a suit where the summons was served by an individual not a party. *Sing Yow v. Wong Free Lee*, 16 S. D. 383, 92 N. W. 1073.

**23. Alaska.**—§93, Part IV, Carter's Ann. Codes, 1900. **Ariz.**—§600, Title 6, Rev. Code, 1913. **Cal.**—§473, Code Civ. Proc. **Colo.**—§81, Code, 1910. **Idaho.**—§4229, Idaho Rev. Codes, 1908. **Ind.**—§405, Burns' Ann. St., Rev. 1914. **Mont.**—§6589, Rev. Codes, 1907. **N. Y.** §724, Code Civ. Proc. **N. C.**—Rev.

ployed in some statutes.<sup>24</sup> Whether or not the neglect of the defendant will be considered excusable within the meaning of these statutes depends upon the circumstances attending each individual case.<sup>25</sup> If the judgment attacked is one rendered upon a default the circumstances of the case must be such as to show a reasonable excuse for the failure of the applicant to appear in the cause at the proper time.<sup>26</sup> Under these statutes it has been held enough to excuse the

1905, §513; *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289. **N. D.**—§6884, Rev. Codes, 1905. **Ore.**—Durham v. Com. Nat. Bank, 45 Ore. 385, 77 Pac. 902 (involving B. & C. Comp. St., §103); *Stites v. McGee*, 37 Ore. 574, 61 Pac. 1129. **Wis.**—Wicke v. Lake, 21 Wis. 410, 94 Am. Dec. 552.

[a] A consent judgment is manifestly beyond the contemplation of such a statute. A judgment entered on a compromise between the attorneys of record will not be disturbed on this ground. *Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653; *Boyden v. Williams*, 80 N. C. 95. See also *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

24. **Alaska.**—§93, Part IV, Carter's Ann. Codes, 1900. **Ariz.**—§600, Title 6, Rev. Codes, 1913. **Cal.**—§473, Code Civ. Proc. **Colo.**—§81, Code, 1910. **Idaho.**—§4229, Rev. Codes, 1908. **Ind.**—§405, Burns' Ann. St., Rev. 1914. **Mont.**—§6589, Rev. Codes, 1907. **N. Y.**—§724, Code Civ. Proc.; *Weston v. Citizens' Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743. See also *In re Broadway Ins. Co.*, 23 App. Div. 282, 48 N. Y. Supp. 299. **N. C.**—Rev. 1905, §513; *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289. **N. D.**—§6884, Rev. Codes, 1905; *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836. **Ore.**—B. & C. Comp. St., §103.

25. **Cal.**—"It is difficult to lay down a rule which will apply to all cases of this character." *Savings Bank v. Schell*, 142 Cal. 505, 76 Pac. 250. **Mont.**—*Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693; *Morse v. Callatine*, 19 Mont. 87, 47 Pac. 635. **N. C.**—*Warren v. Harvey*, 92 N. C. 137; *Mebane v. Mebane*, 80 N. C. 34; *Sluder v. Rollins*, 76 N. C. 271. **Utah.**—*Utah Commercial Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033. **Wash.**—*Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351.

[a] "Of course there might be good grounds for denying a motion to vacate a judgment where there was a delay of only one day, and there might be good cause for granting it where

there was a longer delay. *Each case must depend upon its own circumstances.*" *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351.

[b] "It is impracticable to define in general terms and with greater accuracy, the scope and meaning of the words contained in the statute, 'surprise or excusable neglect,' . . . than the words themselves import. Hence, the necessity is imposed upon the court of determining in each presented case, whether the circumstances attending it can amount to a surprise, or reasonably excuse the neglect, for some neglect is assumed, of the defendant in making opposition thereto." *Warren v. Harvey*, 92 N. C. 137.

26. **Cal.**—*Reilly v. Ruddock*, 41 Cal. 312; *People v. O'Connell*, 23 Cal. 281; *Bond v. Karma*, etc. Min. Co., 15 Cal. App. 469, 115 Pac. 254. **Fla.**—*Roe-buck v. Batten*, 64 Fla. 424, 59 So. 942; *City of Gainesville v. Johnson*, 59 Fla. 459, 51 So. 852. **Ga.**—*Manry v. Twitty*, 132 Ga. 478, 64 S. E. 273; *Mitchell v. Allen*, 110 Ga. 282, 34 S. E. 851; *Fleetwood v. Equitable Mtg. Co.*, 108 Ga. 811, 33 S. E. 1014. **Idaho.**—*Hall v. Whittier*, 20 Idaho 120, 116 Pac. 1031. **Ill.**—*Utley v. Cameron*, 87 Ill. App. 71. **Ind.**—*Bass v. Smith*, 60 Ind. 40; *American Brewing Co. v. Jergens*, 21 Ind. App. 595, 52 N. E. 820. **Ia.**—*Walker v. Clark*, 8 Iowa 474. **Mo.**—*Robyn v. Chronicle Pub. Co.*, 127 Mo. 385, 30 S. W. 130. **Neb.**—*Burke v. Pepper*, 29 Neb. 320, 45 N. W. 466. **N. M.**—*Liverpool*, etc. Ins. Co. v. *Perrin & Co.*, 10 N. M. 90, 61 Pac. 124. **N. J.**—*Cooper v. Galbraith*, 24 N. J. L. 219. **N. Y.**—*Cowton v. Anderson*, 1 How. Pr. 145. See also *Jospe v. Lighte*, 22 Misc. 146, 48 N. Y. Supp. 645. **N. C.**—*Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838. **Ohio.**—*French Wax Figure Co. v. Jupp*, etc. Co., 21 Ohio Cir. Ct. 764, 12 Ohio Cir. Dec. 76; *Brownsberger v. Railway Co.*, 25 Ohio Cir. Ct. 765; *Fowble v. Walker*, 4 Ohio 64. **Pa.**—*Littster v. Littster*, 151 Pa. 474, 25 Atl. 117; *Com. ex rel.*



neglect of a party that such neglect was caused by the deception of the adverse party,<sup>27</sup> or was due to an irregularity in, or the insuffi-

*Henderson v. Masonic Home*, 7 Pa. Dist. 103. See also *Garman v. Charlier*, 10 Pa. Dist. 38. **R. I.**—See also *McDermott v. Rock Island Co.*, 60 Atl. 48. **Tenn.**—*Mabry v. Cowan*, 6 Heisk. 295; *Jones v. Cloud*, 4 Coldw. 236. **Tex.**—*Foster v. Martin*, 20 Tex. 118; *Watson v. Newsham*, 17 Tex. 437; *Calvert W. & B. V. Ry. Co. v. Driskill*, 31 Tex. Civ. App. 200, 71 S. W. 997; *Milam v. Gordon*, 29 Tex. Civ. App. 415, 68 S. W. 1003; *Ames Iron Works v. Chinn*, 20 Tex. Civ. App. 382, 49 S. W. 665. **Wis.**—*Milwaukee Mut. Loan Society v. Jazodzinski*, 84 Wis. 35, 54 N. W. 102.

[a] Thus, where defendant's demurrer was overruled and he was given fifteen days in which to answer, and this time was twice extended, and, eventually, judgment by default was taken against him, in the absence of a showing in his affidavit of anything tending to excuse his default, the judgment rendered against him will not be opened and this even though counsel for applicant says in a petition signed by him that it was impossible to obtain the facts necessary to proceed at any earlier date. *Garman v. Charlier*, 10 Pa. Dist. 38.

27. **Cal.**—*McGowan v. Kreling*, 117 Cal. 31, 48 Pac. 980. **Colo.**—*City Block Directory Co. v. App*, 4 Colo. App. 350, 35 Pac. 985. **Ind.**—*Nord v. Marty*, 56 Ind. 531. **Ky.**—*Hayden v. Moore*, 4 Bush 107. **Neb.**—*Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496. **N. Y.**—*Jay v. De Groat*, 28 How. Pr. 107; *Mutual, etc. Co. v. Kroehle*, 29 Misc. 481, 61 N. Y. Supp. 944; *Campbell v. Lumley*, 24 Misc. 196, 52 N. Y. Supp. 684; *United Wine, etc. Co. v. Platz*, 86 N. Y. Supp. 260. **Ohio.**—*Mitchell & Co. v. Knight*, 3 Ohio Cir. Dec. 729. See also *Smith v. Moreton Truck Co.*, 19 Ohio Cir. Ct. 628, 10 Ohio Cir. Dec. 532. **Pa.**—See *Coulson v. Conn*, 13 Pa. Co. Ct. 40; *Weir v. Craigie*, 13 Pa. Co. Ct. 46. **S. C.**—*Farmers & Mechanics', etc. Mfg. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226. **Tex.**—*Field & Co. v. Fowler*, 62 Tex. 65; *Sedberry v. Jones*, 42 Tex. 10. **Wis.**—*Heinemann v. Le Clair*, 82 Wis. 135, 51 N. W. 1101; *Stafford v. McMillan*, 25 Wis. 566.

[a] Where defendant's counsel withdrew from the case and opposing counsel promised defendant that they would take no further steps in the matter without first giving him notice and thereafter gave him so short a notice that he was not able to get to the court house in time to prevent the entering up of the judgment attacked, "he should not be made to suffer for the default of the party upon whose promise he relied, by reason of which he was led into a seeming neglect of his cause," and he should be relieved against a judgment thus obtained. *Field & Co. v. Fowler*, 62 Tex. 65.

[b] An affidavit filed the day after the entry of a default judgment, reciting that the affiant believed a compromise had been effected and therefore permitted the case to go by default, was considered as showing a case of excusable neglect. *Sedberry v. Jones*, 42 Tex. 10.

[c] A judgment entered upon a stipulation but in violation of its terms, is a judgment taken through "surprise" and the defendant's neglect is consequently excusable. *Durham v. Com. Nat. Bank*, 45 Ore. 385, 77 Pac. 902.

[d] A judgment obtained contrary to the agreement of the parties to extend defendant's time to answer is one obtained through his "surprise and excusable neglect." *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. Rep. 818, but this will not always relieve the defendant. See *Kerchner v. Baker*, 82 N. C. 169.

[e] Where a compromise was made of a litigated claim, whether or not the agent of the adverse party who effected such compromise was authorized is immaterial, so long as it is shown that the applicant was in this manner deceived and led to make no defense. *Mitchell & Co. v. Knight*, 3 Ohio Cir. Dec. 729, and for a similar case see *Minnesota Thresher Co. v. Holz*, 10 N. D. 16, 84 N. W. 581.

[f] **Promise of Infant To Dismiss Suit.**—Where the plaintiff, although an infant, had promised defendant to dismiss the suit, and in reliance upon such promise defendant had suffered a default, the judgment thereupon rendered

ciency of a notice;<sup>28</sup> or was caused by the delay of the adverse party in prosecuting the suit in which the judgment was had;<sup>29</sup> or by the serious illness of the party;<sup>30</sup> or by the party's ignorance, either of the existence of a defense or the proper manner of its presentation;<sup>31</sup> or by a mistake of the clerk of the court;<sup>32</sup> or by the stress of official

will be set aside. *Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496.

28. *Rosenberg v. Hassett*, 86 N. Y. Supp. 865; *Flanders v. Sherman*, 18 Wis. 575.

[a] Where service was made upon a director of a defendant corporation, and it was made to appear that the director was unfriendly to the corporation to whom he gave no notice of the service upon him of process, the defendant, upon showing a meritorious defense to the action, was entitled to have set aside a judgment rendered against it by default. *Farrar v. Consolidated, etc. Co.*, 12 S. D. 237, 80 N. W. 1079. And see to the same effect *Condon Hdw. Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022.

[b] Plaintiff noticed the cause for trial and obtained a place on the general calendar. Afterwards he ascertained that the case should have been placed upon the equity calendar. He obtained an ex parte order transferring it thereto where it received a different number. No notice was given defendant of this transfer and when case was reached, defendant not appearing, a judgment as on default was given. It was held that the default of the defendant was clearly due to the wrong or fault of plaintiff and the default should be opened. *Rosenberg v. Hassett*, 86 N. Y. Supp. 865.

29. *Bennett v. Jackson*, 34 W. Va. 62, 11 S. E. 734; *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677.

30. III.—*Stetham v. Shoults*, 17 Ill. 99. Pa.—*Lockard v. Keyser*, 18 Pa. Super. 172. S. C.—*Farmers & Mechanics', etc. Mfg. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226. Tex.—*City of Galveston v. Morton*, 58 Tex. 409.

[a] Mental unsoundness will excuse the party's neglect. *Small v. Reeves*, 104 Ky. 289, 46 S. W. 726 (under §518, Code Civ. Proc., 1906, "unavoidable casualty or misfortune, preventing the party from appearing or defending").

31. N. Y.—*Born v. Schrenkeisen*, 52 N. Y. Supp. 219. N. C.—*Williams v. Richmond & D. R. Co.*, 110 N. C. 466,

15 S. E. 197. Pa.—*Lawrence v. Price*, 24 Pa. Co. Ct. 524; *Coulson v. Conn*, 13 Pa. Co. Ct. 40. See also *Weir v. Craige*, 13 Pa. Co. Ct. 46. S. C.—*Farmers' & Mechanics', etc. Mfg. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226. Vt.—*Burnham v. Brewster*, 1 Vt. 87. Wis.—*Behl v. Schuett*, 95 Wis. 441, 70 N. W. 559; *Bertline v. Bauer*, 25 Wis. 486; *Wicke v. Lake*, 21 Wis. 410, 94 Am. Dec. 552; *Johnson v. Eldred*, 13 Wis. 482.

[a] Where a judgment by default was rendered upon a promissory note given for a patent right and it appeared that the right was of much less value than was represented by the patentee at the time of the execution of the note, but the inutility of the machine patented was not sufficiently known to the defendant at the time of the rendition of the judgment to afford him any opportunity to interpose a defense thereto on that ground, the court will vacate the judgment and permit the defendant to present his defense. *Burnham v. Brewster*, 1 Vt. 87.

[b] Where the neglect of the applicant was due to the fact that he mistook his remedy and spent considerable time in pursuing a wrong one, his failure to make proper application will be excused. *Adams's Appeal*, 101 Pa. 471.

[c] Where defendant showed upon his application to have the judgment opened that he could read only very imperfectly and that he misunderstood a notification from his attorney to appear for trial on Tuesday and was not present until the following Tuesday which was, as he thought, the time for trial, whereupon he immediately moved to open the judgment it was held that his failure to appear at the proper time was an "excusable mistake." *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440. 32. *Silverman v. Childs*, 107 Ill. App. 522.

[a] Where the defendant failed to appear at the trial because of the negligence of the court's clerk in failing to make a proper transfer from one calendar to another the court may, at

duties;<sup>33</sup> and generally, wherever, although attentive and diligent, the party was unable to present his cause for the consideration of the court.<sup>34</sup> On the other hand, it has been held to be no excuse for a party's neglect that it was caused by the stress of ordinary business;<sup>35</sup> or by his failure to inform his attorney as to matters concerning his defense;<sup>36</sup> or by the party's mistake as to a matter of fact, where, by due diligence, he would have discovered such mistake;<sup>37</sup> or by the

a subsequent term, set aside or vacate a judgment thus obtained. *Silverman v. Childs*, 107 Ill. App. 522.

[b] Where a party was misled by a clerical error in the process and suffered, unwittingly, a default to be had against him, his neglect was excused in *Browning v. Gosnell*, 91 Iowa 448, 59 N. W. 340, but where his application shows that he was not thereby misled, the error in the process will avail him nothing. *Irions v. Keystone Mfg. Co.*, 61 Iowa 406, 16 N. W. 349.

33. *Francks v. Sutton*, 86 N. C. 78.

34. Where a pleading was lost in the mails, although mailed to the clerk of the court in ample time, a judgment thereupon taken by default will be opened, on a showing of merits. *Boyd v. Williams*, 70 N. J. L. 185, 56 Atl. 135.

[a] Defendant filed a counterclaim and before plaintiff had replied thereto, without notice to plaintiff's counsel, who was a resident of another county, and who wrote several letters to the clerk of the county in which the cause was being tried asking as to the date of trial thereof, defendant set the case for trial on motion. Plaintiff's failure to appear at the time of trial was considered excusable and the judgment was set aside. *Western Loan, etc. Co. v. Berg*, 24 Utah 278, 67 Pac. 669.

[b] Where it appeared that the defendant against whom a judgment was rendered by default was absent from the state on business during the proceedings leading up to the entry of the judgment from which relief was sought; that he had engaged counsel to represent him and to defend the action; that through accident he did not receive a letter addressed to him by his counsel, who about this time withdrew from the case without notice to defendant; that defendant, upon learning of this withdrawal at once engaged other counsel, it was considered that he was not guilty of neg-

ligence. *Utah Commercial Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033.

35. *Kan.*—*Reed v. Wilson*, 13 Kan. 153; *Hill v. Williams*, 6 Kan. 117. *Mo.* *Wilson v. Scott & Hinkley*, 50 Mo. App. 329. *Mont.*—*Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135. *Wis.*—*Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Insurance Co. of N. A. v. Swineford*, 28 Wis. 257.

[a] Counsel's inability to attend because of other important business will not excuse his absence. *Wilson v. Scott*, 50 Mo. App. 329.

36. *Sluder v. Rollins*, 76 N. C. 271.

37. The application showed that applicant had employed counsel and had mailed to him whatever papers were served upon her; that applicant is an old lady, living alone, with nobody to advise her; that there was another action pending between the same parties in reference to the same subject-matter; that she supposed the papers related to that action. A general demurrer to the application was sustained. *Williams v. Heisley*, 4 Ohio Dec. (Reprint) 273.

[a] Where a party misunderstood his attorney's statement as to the time of trial and was consequently absent, his mistake is not such as will render his neglect excusable. *Ross v. Louisville & N. R. Co.*, 92 Ky. 583, 18 S. W. 456.

[b] Where defendant, (1) being served with summons, paid no attention thereto, supposing it to be some notice or other paper in another suit then pending between the same parties, his neglect was held inexcusable. *White v. Snow*, 71 N. C. 232. (2) And in a similar case the defendant, supposing the summons to be a subpoena, did not read it. This was held not to excuse his default. *State v. O'Neill*, 4 Mo. App. 221.

[c] Where a defendant was sued in his individual and representative capacity but, on account of gross indifference to the proceedings did not dis-



negligence,<sup>38</sup> or sickness of an agent;<sup>39</sup> or by financial difficulties,<sup>40</sup> and, mere forgetfulness;<sup>41</sup> or passive inattention, will not excuse the party's neglect.<sup>42</sup>

The inability of counsel to attend the trial will be sufficient to excuse the failure of the party to present his cause at the proper time if this inability of counsel was sudden and of such a nature as to

cover that he was being sued in his individual capacity, this mistake will not entitle him to relief from the judgment subsequently rendered on the ground of excusable neglect. *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963.

[d] An affidavit reciting that the defendant was absent at the time set for the trial of the cause for the reason that he mistook the distance he would have to travel on a journey he had undertaken and was therefore detained longer than he had anticipated, is not sufficient to excuse his neglect. *Almy v. Hess*, 2 Utah 223.

38. *Morris v. Liverpool L., etc. Ins. Co.*, 131 N. C. 212, 42 S. E. 577; *Norwood v. King*, 86 N. C. 80.

[a] The neglect of an officer of a municipal corporation will not be sufficient to relieve such corporation from a judgment by default rendered against it. *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477.

39. Where the agent of the plaintiff, who alone was familiar with the facts of the case at bar, was sick and unable to give this information to his principal, but where it further appeared that this agent had, at the time of their occurrence, reported the facts to his principal, and there was no showing of diligence, the principal's neglect was held inexcusable. *Fliedner v. Rockefeller*, 9 Ohio Cir. Dec. 266, 12 W. N. C. 20.

40. *Lytle v. Forest*, 16 Pa. Co. Ct. 239.

41. Ind.—*Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923. Mont.—*Lovell v. Willis*, 46 Mont. 581, 129 Pac. 1052. Vt.—*Davison v. Heffron*, 31 Vt. 687; *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290.

42. N. Y.—*Ball v. Mander*, 19 How. Pr. 468. N. C.—*Morris v. Liverpool L., etc. Insurance Co.*, 131 N. C. 212, 42 S. E. 577; *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963; *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64; *University of N. C. v. Lassiter*, 83 N. C. 38. See

also *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Simpson v. Brown*, 117 N. C. 482, 23 S. E. 441. Ore. *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320. Utah.—*Peterson v. Crosier*, 29 Utah 235, 81 Pac. 860. Wash.—*Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33. Wis.—*Stilson v. Rankin*, 40 Wis. 527; *Grootemaat v. Tebel*, 39 Wis. 576; *Pringle v. Dunn*, 39 Wis. 435, 439.

[a] In *Depriest v. Patterson*, 85 N. C. 376, the defendant was sick when process was served upon him, he told the officer making the service that he, the defendant, thought service was being made upon the wrong man, and understood that the officer was to find out about this and let him know before making a return of the summons. The officer did not do this and judgment was taken against him. His neglect was held inexcusable.

[b] Where defendant, upon being served with notice of motion for leave to issue execution, stated to the sheriff that he, the defendant, had a discharge in bankruptcy, and requested the sheriff to write to the plaintiff about it (they both thinking this sufficient to defeat the motion) and then paid no further attention to the case, his neglect was inexcusable and an order granting the motion for execution will not be set aside. *Hiatt v. Waggoner*, 82 N. C. 173.

[c] A judgment is not taken against a party through his "mistake and surprise" simply because he "did not know of it, unless the law requires him to be notified, when the means of knowledge were accessible, and he simply failed or neglected to avail himself thereof." *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320.

[d] A showing that defendant's counsel drew up an answer and mailed it to defendant, but, having changed his post office, defendant did not receive such answer until eleven months after it was mailed, where it further appeared that during this time the defendant made no inquiry concerning the

preclude the idea that other arrangements might have been made.<sup>43</sup> But the mere fact that counsel retained by a party was unable to appear for him is not sufficient; he must show further that he had no opportunity to employ other counsel and proceed with the cause.<sup>44</sup> The ignorance of a party as to a matter of law will not, as a general rule, excuse his failure to present his cause of action or defense.<sup>45</sup>

status of the case, is insufficient. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64.

43. **Ark.**—*Fire Ins. Co. v. Davis*, 85 Ark. 389, sickness of counsel. **N. Y.**—*Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459; *Ross v. Belden*, 72 App. Div. 628, 76 N. Y. Supp. 88. **Ohio.**—*Smith v. Moreton Truck Co.*, 19 Ohio Cir. Ct. 628. **Wis.**—*McArthur v. Slauson*, 60 Wis. 293, 19 N. W. 45; *Stoppelfeldt v. Milwaukee, etc. Ry. Co.*, 29 Wis. 688.

[a] A railroad accident by which counsel was prevented from attending at the time of trial was held to excuse the resultant neglect in *Stoppelfeldt v. Milwaukee, etc. R. Co.*, 29 Wis. 688.

[b] In *People v. Brett*, 79 App. Div. 631, 79 N. Y. Supp. 709, it was said, the applicant's counsel "was absent from the county on his wedding trip when the original motion was returnable, and the brief time (two days) allowed by the learned special term in appellant's absence proved entirely unavailing for a proper exhibition of his side of the controversy on the merits. We think he should be allowed his day in court."

[c] Where counsel were subpoenaed and were in attendance as witnesses in another department, a continuance should have been granted and a judgment on default rendered under such circumstances should be set aside. *Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459.

[d] **Sickness of Counsel.**—Counsel's inability to attend to the cause on account of sickness will excuse party's neglect where the sickness was sudden and precludes the idea that other arrangements might have been made. *Snell v. Iowa Homestead Co.*, 67 Iowa 405, 25 N. W. 678.

[e] Neglect excused on same ground in *White v. Gray*, 92 Iowa 525, 61 N. W. 173; *Wishard v. McNeil*, 78 Iowa 40, 42 N. W. 578.

44. **Kan.**—*Hill v. Williams*, 6 Kan. 17. **Ky.**—*Brashears v. Dickinson*, 23 Ky. L. Rep. 2182, 66 S. W. 1011. **Mo.**—*Wilson v. Scott*, 50 Mo. App. 329 (be-

cause of sickness in counsel's family); *Hurek v. St. Louis Expo., etc.*, 28 Mo. App. 629. **Mont.**—*Briscoe v. McCaffery*, 8 Mont. 336, 20 Pac. 691. **N. Y.**—*Greenberg v. Angerman*, 84 N. Y. Supp. 244. **N. C.**—*Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Simpson v. Brown*, 117 N. C. 482, 23 S. E. 441. But compare, *Wynne v. Prairie*, 86 N. C. 73. **S. D.**—*Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87. **Wash.**—*Sanborn v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466.

[a] He must employ counsel who ordinarily practice in the court where the cause is pending, or who are authorized and agree to do so. *Manning v. Roanoke, etc. R. Co.*, 122 N. C. 824, 28 S. E. 963.

[b] Several continuances had already been granted to defendant who, when the case was again reached, stated that his counsel was not present and that he desired a further continuance that he might engage other counsel, but he neither stated why his counsel was absent nor when he first discovered that he would not be present. His default was entered and a refusal to open was affirmed in *Greenberg v. Angerman*, 84 N. Y. Supp. 244.

[c] An affidavit which recited that "through the neglect of said counsel, or absence from C— . . ., said counsel having been delayed, hindered and detained at M— . . ., defendant was prevented from appearing and answering," was held insufficient to excuse the negligence of the applicant. *Sanborn v. Centralia Furniture Co.*, 5 Wash. 150, 31 Pac. 466.

45. **Cal.**—*Chase v. Swain*, 9 Cal. 130. **Mont.**—*Canning v. Fried*, 48 Mont. 560, 139 Pac. 448. **N. C.**—*Morris v. Liverpool L., etc. Insurance Co.*, 131 N. C. 212, 42 S. E. 577; *Churchill v. Brooklyn Life Ins. Co.*, 88 N. C. 205. **Pa.**—*Lomison v. Faust*, 145 Pa. 8, 23 Atl. 377. **Tex.**—*Pierce v. Cole*, 17 Tex. 259; *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086.

[a] Where a suit was against the makers of a joint and several note,

although there is authority to the contrary.<sup>46</sup> In any event, it must appear, on an application for relief on the ground of excusable neglect that the applicant has been as diligent as might, under the attending circumstances, be expected of a prudent man.<sup>47</sup>

b. *Neglect or Misconduct of Attorney.*—Although occasionally altered by statute,<sup>48</sup> it is a generally accepted rule that the negligence of an attorney will be visited upon his client, and that relief on that ground may not ordinarily be had.<sup>49</sup> This rule is not inflexible, however, and where, in the light of the attendant circumstances, to deny relief sought on this ground would be manifestly unjust, the force of

all of whom were served with process except one, and a judgment by default was rendered against the defendants served, the fact that they supposed no judgment could be had against them until the remaining defendant had been served will not entitle them to have the judgment set aside; their ignorance of the law cannot be considered as excusing their neglect. *Pierce v. Cole*, 17 Tex. 259.

[b] A party may not have a judgment and the case reopened "upon the ground that his counsel was ignorant of the law or the facts of the case," or that "the client had neglected to inform his counsel of evidence material to his defense." *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086.

[c] The defendant, a corporation, was served with summons, but, supposing that it would be necessary to also be served with the complaint before judgment could be taken against it, took no steps, either to inform itself upon this point, or to make a defense. This neglect was held inexcusable in *Churchill v. Brooklyn Life Ins. Co.*, 88 N. C. 205.

[d] A distinction has been observed between "ignorance of the law" and unfamiliarity with rules of practice and so where a defendant attempted, in good faith to appear and defend an action against him but was prevented from so doing by his ignorance of the practice of the court, this will excuse his seeming neglect. *Marx v. Epstein*, 1 White & W. Civ. Cas. (Tex.), §1317.

46. Where a defendant was sued in his capacity as executor, the validity of the will concerned being in dispute, he erroneously supposed he would not be required to answer until after the will under which he was acting had been admitted to probate, consequently suffered a default to be taken against

him. On his timely application therefore the judgment thus rendered should be opened. *Manwaring v. Lippincott*, 52 App. Div. 526, 65 N. Y. Supp. 428.

47. Ill.—*Pardridge v. Wing*, 75 Ill. 236; *Stenzel v. Sims*, 25 Ill. App. 538. Tex.—*Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254. Utah.—*Peterson v. Crozier*, 29 Utah 235, 81 Pac. 860.

48. N. J. Comp. St., 1910, §112.

49. Ill.—*Henry v. Seager*, 80 Ill. App. 172; *Stenzel v. Sims*, 25 Ill. App. 538. Ia.—*Grove v. Bush*, 86 Iowa 94, 53 N. W. 88; *Jones v. Leech*, 46 Iowa 186. Mo.—*Judah v. Hogan*, 67 Mo. 252; *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090. N. H.—*Butler v. Morse*, 66 N. H. 429, 23 Atl. 90; *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655. N. M.—*Liverpool, etc. Ins. Co. v. Perlin & Co.*, 10 N. M. 90, 61 Pac. 124. Ohio.—*Fliedner v. Rockefeller*, 9 Ohio Cir. Dec. 266, 12 W. N. C. 20; *Gordon v. Cowle*, 4 Ohio Dec. (Reprint) 92; *Williams v. Heisley*, 4 Ohio Dec. (Reprint) 273. Okla.—See also *Wynn v. Frost*, 6 Okla. 89, 50 Pac. 184. Ore.—*Brand v. Baker*, 42 Ore. 426, 71 Pac. 320; *Hicklin v. McClellan*, 19 Ore. 508, 24 Pac. 992. Pa.—See also *Boyer v. Jones*, 1 Woodw. 498. S. C.—*Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312; *Schroder v. Eason*, 2 Nott & McC. 291; *Wilkie v. Walton*, 2 Spears 473. See also *In re Estate of Bugg*, 71 S. C. 439, 444, 51 S. E. 263. Tenn.—*Panesi v. Boswell*, 12 Heisk. 323. Tex.—*Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Scrivner v. Malone*, 30 Tex. 773. See also *Missouri, K. & T. Ry. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

[a] New York presents an exception to this rule. "The neglect of an attorney is uniformly treated as the neglect of the client, except in New York." *Freem. Judgm.*, §112, quoted



the rule is lost,<sup>50</sup> and it has been held that where the party himself has been diligent he may be relieved from a default suffered by his

with approval in *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053. And see the following cases: *Sharp v. Mayor of New York*, 31 Barb. 578. **N. C.** *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269. See also *Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Manning v. Roanoke R. Co.*, 122 N. C. 824, 28 S. E. 963.

[b] A judgment by default will not be set aside where it appears that general counsel for the defendant, a corporation, was served with process twelve days before appearance day; that he forwarded the same to the attorneys charged with the defense of the case three days before appearance day, who because of unforeseen difficulties did not file an answer. *Missouri, K. & T. Ry. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

[c] A party cannot claim that a judgment was taken against him because of mistake, etc., where the immediate cause was the negligence of his counsel in not examining public records. *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312.

[d] Where a defendant handed the process which had been served upon him to his attorney, directing him as he did so to make a defense to the action, a judgment by default will not be set aside at his request, the negligence of his attorney being deemed his own. *Schroder v. Eason*, 2 Nott & McC. (S. C.) 291. Compare, *Sargent v. Wilson*, 2 McCord (S. C.) 512.

[e] Where a judgment was opened on condition that the applicant pay into court certain costs of the adverse party, and the applicant gave to his attorney a sufficient sum of money to comply with the terms imposed but the attorney neglected to pay the money into court and the judgment became final, the negligence of the attorney will be visited upon his client upon a subsequent application to open the judgment thus made final. (Under a statute providing for relief "for unavoidable casualty or misfortune preventing the party from prosecuting or defending.") *Wynn v. Frost*, 6 Okla. 89, 50 Pac. 184.

50. **Ia.**—*Ennis v. Fourth St. Building Assn.*, 102 Iowa 520, 71 N. W.

426; *Peterson v. Koch*, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 261. **Neb.**—*Anthony v. Karbach*, 64 Neb. 509, 90 N. W. 243, 97 Am. St. Rep. 662. **N. Y.**—*Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053. **N. C.**—*Manning v. Roanoke, etc. R. Co.*, 122 N. C. 824, 28 S. E. 963; *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257; *Ellington v. Wicker*, 87 N. C. 14; *Griel v. Vernon*, 65 N. C. 76. **Ohio.**—See also *French, etc. Co. v. Jupp Baxter Co.*, 21 Ohio Cir. Ct. 764, 12 Ohio Cir. Dec. 76. **Ore.**—See also *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320. **Pa.**—*Boyer v. Jones*, 1 Woodw. 498. See also *Ex parte Carolina Nat. Bank*, 56 S. C. 12, 33 S. E. 781.

[a] "In this case the party retained an attorney to enter a plea for him. That an attorney should fail to perform an engagement to do such an act as that, we think, may fairly be considered a surprise on the client, and that the omission of the client to examine the records in order to ascertain that it had been done was an excusable neglect." *Griel v. Vernon*, 65 N. C. 76.

[b] Where it appeared that the applicant was not represented in the cause on account of a mistake between his attorney and himself as to whether or not the attorney was employed in the case and where, upon discovering such mistake, applicant moved promptly for relief therefrom, the court should have set aside a judgment thus obtained. *Panesi v. Boswell*, 12 Heisk. (Tenn.) 323.

[c] The test, as laid down in *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320, is whether or not the conduct of the attorney is such as would be excusable if attributable to the party himself.

[d] Where an attorney, unknown to his client, has absconded and left the cause undefended, the party will be relieved. *Ennis v. Fourth St. Bldg. Assn.*, 102 Iowa 520, 71 N. W. 426, under the Iowa statute giving relief from "unavoidable casualty or misfortune."

[e] An attorney employed to retain another attorney at another place is simply an agent and his neglect will be imputed to his client. *Finlayson*

attorney.<sup>51</sup> So also, the neglect of counsel may, under certain circumstances be excusable, and, in such a case relief will, of course, be given,<sup>52</sup> as where counsel's default was directly or indirectly attribut-

*v. American Accident Co.*, 109 N. C. 196, 13 S. E. 739.

[f] Where defendant's counsel who lived in a county other than the one in which the cause was pending mailed to the clerk an answer which was filed two days before appearance day but which was not signed and a judgment by default was rendered, a motion to set aside such judgment made within two days after the rendition thereof should have been granted. *Fidelity, etc. Co. v. Lopatka*, 24 Tex. Civ. App. 536, 60 S. W. 268.

[g] The financial irresponsibility or insolvency of the attorney was formerly required to be shown (*Sharp v. Mayor of New York*, 31 Barb. [N. Y.] 578. See also *Sampson v. Ohleyer*, 22 Cal. 200; *Gordon v. Cowle*, 4 Ohio Dec. [Reprint] 92), but this is not now necessary. *Sharp v. Mayor of New York*, 31 Barb. (N. Y.) 578. However, this fact alone will not be sufficient ground for relief from the results of the inexcusable negligence of the attorney. *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260; *Phillips v. Taber*, 83 Ga. 565, 10 S. E. 270.

51. *Mont.*—*Simpkins v. Simpkins*, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641. *N. Y.*—*Simon v. Borden's Con. Milk Co.*, 84 N. Y. Supp. 476. *N. C.*—*Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530; *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661; *Whitson v. Railroad*, 95 N. C. 385; *Ellington v. Wicker*, 87 N. C. 14; *Wynne v. Prairie*, 86 N. C. 73; *Mebane v. Mebane*, 80 N. C. 34; *Bradford v. Coit*, 77 N. C. 72. See also *Brown v. Hale*, 93 N. C. 188.

[a] In *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530, the defendant employed counsel to represent him at the return term and himself remained at court four days, reminding his counsel, who was there, that he had been served with a summons returnable there and then. His counsel assured him that "he would attend to the case." Defendant thereupon left the court. Counsel was negligent and defendant's default was entered. His "neglect" was held excusable.

[b] In *Griel v. Vernon*, 65 N. C.

76, this was placed upon the ground that the failure of an attorney to enter a plea for a defendant who had engaged him to do this might well operate as a surprise upon the defendant and that his neglect to examine the records to see if his plea had been entered was excusable. And see also *Bradford v. Coit*, 77 N. C. 72, wherein the relief was based on the ground of excusable neglect, however, the court saying, "... that where a party employs counsel to enter his plea and the counsel neglects it, in consequence of which judgment is given against the party, it is excusable neglect in the party and the judgment may be vacated."

[c] Where a party defendant who resided in a part of the state far distant from the place where the action was brought, retained counsel in this last mentioned place to put in a defense for him and informed him as to the merits thereof, the act of the attorney in putting in an unverified answer to meet a verified complaint, will not be attributed to any lack of diligence on the part of the defendant and a default judgment taken against him for want of an answer will be set aside on his timely application. *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661.

52. *Cal.*—*Savings Bank v. Schell*, 142 Cal. 505, 76 Pac. 250. *Mont.*—*Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472. *N. Y.*—*Hewitt v. Hazard*, 33 App. Div. 630, 53 N. Y. Supp. 340. *Ore.*—See *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320.

[a] Defendant's counsel was informed by the court's clerk that no business would be transacted by the court until after a certain date. Relying thereupon the attorney did not appear to urge a demurrer interposed by him which was heard before that time. His demurrer was overruled and default entered. Held that his negligence was, under the circumstances, excusable. *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

able to the adverse party.<sup>53</sup> In any event, it must be made to appear that the plight of the applicant is not due, in any measure, to his own negligence or misconduct.<sup>54</sup> The employment of counsel does not relieve a party from all attention to the case. He must yet give the matter such consideration and attention as a man of ordinary prudence usually gives to his important business.<sup>55</sup>

*c. Erroneous Advice of Counsel.*—It has been held that erroneous advice given a party by his attorney as to the necessity of a defense will excuse the party's neglect,<sup>56</sup> although the weight of authority seems to be to the contrary.<sup>57</sup>

53. Cal.—*Saving Bank v. Schell*, 142 Cal. 505, 76 Pac. 250. Neb.—*Taylor v. Trumbull*, 32 Neb. 508, 49 N. W. 375. Tenn.—*Panesi v. Boswell*, 12 Heisk. 323. Tex.—*Scrivner & Palmie v. Malone*, 30 Tex. 773.

[a] Where counsel for defendant did not appear because opposing counsel failed to notify him according to agreement. *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880.

[b] In a motion to set aside a default judgment it appeared that an answer to the petition in the cause had not been drawn because the plaintiff's attorney had taken the petition from the files and defendant's counsel was thus prevented from framing an answer thereto. This was held sufficient to excuse the seeming neglect of defendant's counsel in *Selberg v. Davidson*, 4 Ohio Dec. (Reprint) 270.

54. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Manning v. Roanoke & T. Railroad*, 122 N. C. 824, 28 S. E. 963; *Taylor v. Pope*, 106 N. C. 267; *Whitson v. Railroad*, 95 N. C. 385. See also *Brown v. Hale*, 93 N. C. 188.

[a] A party "will be protected against the mistake or neglect of his attorney if it is shown that he has given reasonable attention to his interest. But he may not stand by for years without inquiry as to the situation of an action brought against him, and then ask that the court repair his own neglect on the ground that counsel had forgotten, when first employed, to enter an appearance." *Boyer v. Jones*, 1 Woodw. (Pa.) 498.

[b] But the party will not be compelled to exhaust every means available. Thus where the petition to which it was desired to draw an answer had been taken from the files, as it appeared, to prevent defendant

from answering, he will not be compelled to have sought an order of court for their return in order that he may subsequently have a judgment, rendered for want of his answer, set aside; to require this would be to permit the plaintiff to take advantage of his own wrong. *Selberg v. Davidson*, 4 Ohio Dec. (Reprint) 270.

55. *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64; *Manning v. Roanoke & T. Railroad*, 122 N. C. 824, 28 S. E. 963; *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424; *Whitson v. Railroad*, 95 N. C. 385; *Brown v. Hale*, 93 N. C. 188.

[a] The court would not be inclined to relieve a party where he did nothing more than address a communication to his attorney, informing him of the pendency of the action. *Hyman v. Capehart*, 79 N. C. 511.

56. Cal.—*Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623. Ia.—*Peterson v. Koch*, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 261. Minn.—*Baxter v. Chute*, 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633. N. C.—*Painter v. Norfolk & W. Railroad Co.*, 144 N. C. 436, 57 S. E. 151. S. D.—*Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

[a] The party has a right to rely upon his attorney to inform him as to the time of trial and as to what will be necessary to do to prepare for trial, and if, through the negligence of the attorney, and without fault of the party, he is prevented from making his defense, his seeming neglect will be excused. *Peterson v. Koch*, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 261.

57. Ala.—*Brock v. South & N. A. R. Co.*, 65 Ala. 79. Ky.—*Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448; *Cox v.*



d. *Sickness of Party or Counsel.*—Such illness of a party as will prevent his attendance at the trial<sup>58</sup> will, in a case where his cause of action or defense could not be properly or fully presented in his absence, constitute a sufficient ground for granting this relief,<sup>59</sup> but not in a case where it appears that, despite such illness, the party might, with reasonable diligence, have presented his cause at the proper time.<sup>60</sup> The illness of counsel is a sufficient cause for opening or vacating a judgment, provided it was of such a nature as to prevent him from conducting the case and occurred under such circumstances that the party could not retain other counsel in time to acquaint them with the matter in hand.<sup>61</sup> Illness in counsel's family of so serious a nature as to require his personal presence or to necessarily

Armstrong, 19 Ky. L. Rep. 1081, 43 S. W. 189. **Mo.**—Vasline v. Bast, 41 Mo. 493. **N. C.**—Hodgin v. Matthews, 81 N. C. 289. **Wis.**—Milwaukee Mut. Loan Assn. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102. *Compare*, Crebler v. Eidelbush, 24 Wis. 162.

58. **Ind.**—Clandy v. Caldwell, 106 Ind. 256, 6 N. E. 360; Flanagan v. Patterson, 78 Ind. 514; Monroe v. Pad-dock, 75 Ind. 422. **Ia.**—Brewer v. Hol-born, 34 Iowa 473; Luscomb v. Maloy, 26 Iowa 444. **Kan.**—Gheer v. Huber, 32 Kan. 319, 4 Pac. 290. **Mont.**—Ben-edict v. Spendiff, 9 Mont. 85, 22 Pac. 500. **N. C.**—Depriest v. Patterson, 85 N. C. 376. **Tex.**—Goodhue v. Meyers, 58 Tex. 405.

[a] In New York, under a statute authorizing the surrogate's court to vacate its decrees "for sufficient reason and in furtherance of justice," the sickness of the applicant was consid-ered as a sufficient reason within the meaning of this statute. *In re Traver*, 9 Misc. 621, 30 N. Y. Supp. 851.

[b] The illness of the party must be such as would prevent him from attending to the case. A "lame back" is not enough. *Reiher v. Webb*, 73 Iowa 559, 35 N. W. 631. To the same effect see *Scott v. Wright*, 50 Neb. 840, 70 N. W. 396.

59. **Ill.**—Edwards v. McKay, 73 Ill. 570; Shaffer v. Sutton, 49 Ill. 506; Stetham v. Shultz, 17 Ill. 99. **Ind.**—Jonsson v. Lindstrom, 114 Ind. 152, 16 N. E. 400. **Mont.**—See also *Herbst Im-porting Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135. **N. C.**—Osborn v. Leach, 133 N. C. 427, 45 S. E. 783.

[a] Sickness, urged as a reason for setting aside a judgment, will not be considered where it appears that the applicant was in attendance shortly be-

fore as well as after the trial. *Coch-rane v. Middleton*, 13 Tex. 275.

[b] Where a trial of the action was had, even though sickness prevented the defendant from attending in per-son, a judgment therein rendered can-not be said to have been had through the defendant's surprise, or excusable neglect. *Skinner v. Bryce*, 75 N. C. 287.

[c] The sickness of a party will not, standing alone, be sufficient to jus-tify the granting of this relief, espe-cially where it appears that his pres-ence was not necessary, that his wit-nesses all resided within the county and that his defense could have been fully interposed by counsel. *Stetham v. Shultz*, 17 Ill. 99.

60. **Ill.**—Shaffer v. Sutton, 49 Ill. 506. **Ky.**—Landrum v. Farmer, 7 Bush 46. **N. C.**—Osborn v. Leach, 133 N. C. 427, 45 S. E. 783; *Depriest v. Patter-son*, 85 N. C. 376. **Ohio.**—See also *Fliedner v. Rockefeller*, 9 Ohio Cir. Dec. 266, 12 W. N. C. 20.

[a] Where the applicant made no attempt to employ other counsel to take the place of counsel previously retained who was ill, and did not attend the trial, a judgment rendered against him will not be set aside. *Landrum v. Farmer*, 7 Bush (Ky.) 46.

[b] And it should also be made to appear that a continuance could not be obtained on this ground if properly presented. *Tschohl v. Machinery Mut. Ins. Assn.*, 126 Iowa 211, 101 N. W. 740.

61. **U. S.**—Cook v. Beall, 2 Cranch C. C. 264, 6 Fed. Cas. No. 3,153. **Ark.**—Capital Fire Ins. Co. v. Davis, 85 Ark. 385, 108 S. W. 202. **Ga.**—Harralson v. McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; *McNeill v. Morgan*, 8

divert his mind from professional business has, likewise, been regarded as sufficient ground for opening or vacating a judgment.<sup>62</sup>

**10. Surprise.**—Relief on the ground of "surprise" is now almost universally provided for by statute.<sup>63</sup> Just what will amount to a "surprise" within the meaning of these statutes must be determined from the circumstances of each case as it presents itself; no more accurate definition can be given than the word itself imports.<sup>64</sup> Such statutes have been held applicable to judgments taken in violation of a stipulation to extend the time to plead,<sup>65</sup> default judgments for an amount far in excess of the amount of the bill previously rendered to the defendant;<sup>66</sup> and judgments taken through the negligence<sup>67</sup> or

Ga. App. 323, 68 S. E. 1020. **Ill.**—Hittle v. Zeimer, 164 Ill. 64, 45 N. E. 419; Clark v. Erving, 93 Ill. 572. **Ind.**—Bristol v. Galvin, 62 Ind. 352. **Ia.**—Norman v. Iowa Cent. Railroad Co., 149 Iowa 246, 128 N. W. 319; Callanan v. Aetna Nat. Bank, 84 Iowa 8, 50 N. W. 69; Wishard v. McNeill, 78 Iowa 40, 44, 42 N. W. 578; Montgomery County v. Emigrant Co., 47 Iowa 91. **Minn.**—Nye v. Swan, 42 Minn. 243, 44 N. W. 9. **Mo.**—Armstrong v. Elrick, 177 Mo. App. 640, 160 S. W. 1019. **Ore.**—Weiss v. Meyer, 24 Ore. 108, 32 Pac. 1025. **Tex.**—Goodhue v. Meyers, 58 Tex. 405.

[a] Where counsel was a member of a firm and it did not appear that the case could not have been properly conducted by the other member of such firm, relief will be denied. Bristol v. Galvin, 62 Ind. 352.

**62. Ala.**—Powell v. Washington, 15 Ala. 803. **Fla.**—Tidwell v. Witherspoon, 18 Fla. 282. **Mo.**—Scott v. Smith, 133 Mo. 618, 34 S. W. 864; Stout v. Lewis, 11 Mo. 438; Martin v. St. Charles Tobacco Co., 53 Mo. App. 655. **Mont.**—Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 135.

[a] **Sickness in Family of Party's Counsel.**—The movant's affidavit stated that he was a non-resident of the state; that he intrusted his cause to local counsel; that the wife and only son of such counsel became, about this time, dangerously ill in another state, requiring his personal presence; that, in consequence thereof, counsel was absent at the time of trial, and, in the great anxiety of his mind touching the health of his family, omitted to ascertain the day when said cause was set for trial, or to advise the applicant to procure other counsel. This, the court says, "as men we are bound to recog-

nize" as an excuse for the evident lack of diligence. Martin v. St. Charles Tobacco Co., 53 Mo. App. 655.

**63. Alaska.**—§93, Part IV, Carter's Ann. Codes, 1900. **Ariz.**—§600, Title 6, Rev. Codes, 1913. **Cal.**—§473, Code Civ. Proc. **Colo.**—§81, Code, 1910. **Idaho.**—§4229, Rev. Codes, 1908. **Ind.**—§405, vol. 1, Burns' Ann. St., Rev. 1914. **Mont.**—§6589, Rev. Codes, 1907. **N. Y.**—§724, Code Civ. Proc. **N. C.**—Rev. 1905, §513; Becton v. Dunn, 137 N. C. 559, 50 S. E. 289. **N. D.**—§6884, Rev. Codes, 1905. **Ore.**—Durham v. Commercial Nat. Bank, 45 Ore. 385, 77 Pac. 902; Stites v. McGee, 37 Ore. 574, 61 Pac. 1129.

See generally the statutes.

**64.** "The necessity is imposed upon the court of determining in each presented case, whether the circumstances attending it can amount to a surprise, or reasonably excuse the neglect, for some neglect is assumed, of the defendant in making opposition thereto." Warren v. Harvey, 92 N. C. 137.

**65. Ia.**—Chicago & N. W. R. R. Co. v. Gillett, 38 Iowa 434. **Ore.**—Durham v. Commercial Nat. Bank, 45 Ore. 385, 77 Pac. 902. **Wis.**—Dunlop v. Schubert, 97 Wis. 135, 72 N. W. 350.

**66.** Dunlop v. Schubert, 97 Wis. 135, 72 N. W. 350.

**67. Negligence of Attorney as Surprise.**—In Griel v. Vernon, 65 N. C. 76 (quoted in part with approval in Taylor v. Pope, 106 N. C. 267, 271, 11 S. E. 257, 19 Am. St. Rep. 530) the court says: "In this case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may fairly be conceded a surprise on the client; and that the omission of the client to

confusion of counsel.<sup>68</sup> However, a party may not be said to be surprised, within the meaning of these statutes, by a ruling of the court,<sup>69</sup> nor, ordinarily, by a mistake<sup>70</sup> or incompetency of a witness,<sup>71</sup> nor by the evidence introduced at the trial where no continuance was sought in which to prepare to meet it.<sup>72</sup> A party will not, after having voluntarily withdrawn from a case be heard to say that a subsequent judgment rendered therein was a surprise to him.<sup>73</sup>

**11. Judgment Had on Constructive Service.**<sup>74</sup> — Relief from a judgment rendered upon constructive service of process is sometimes provided for by statute upon a showing by defendant that he had no notice, in fact, and that he has a good defense to the action.<sup>75</sup> Also, where the affidavit, upon which an order for publication of summons was predicated, is defective, the court may properly vacate the judgment thus obtained.<sup>76</sup>

examine the records in order to ascertain that it had been done was an excusable neglect."

**Negligence of attorney as excusable neglect,** see *supra*, XIV, B, 9, b.

**68.** *Mann v. Provost*, 3 Abb. Pr. (N. Y.) 446.

[a] Where defendant employed several attorneys to represent him in a pending suit, a confusion among them as to who was to file an answer was held to operate as a surprise in *Bradley v. McPherson* (N. J. Eq.), 56 Atl. 303.

[b] **Transfer of the case to another department may operate in this manner.** *Bennett v. Jackson*, 34 W. Va. 62, 11 S. E. 734.

**69.** *Breed v. Ketchum*, 51 Wis. 164, 7 N. W. 550.

[a] "The 'surprise' which entitles a party to relief under this statute must be something more than surprise at the ruling of the court." *Ean v. Chicago, etc. R. Co.*, 101 Wis. 166, 76 N. W. 329.

[b] The ruling of the court in permitting an amendment of the complaint will not be considered as a "surprise" within the meaning of these provisions. *Carlisle v. Barnes*, 102 App. Div. 582, 92 N. Y. Supp. 924.

**70.** A bona fide mistake of a witness as to a material fact, to which his attention was sufficiently called upon the examination, might operate as such a surprise as would entitle a party to this relief. But such a ground of surprise should be admitted with great caution. *Cochrane v. Middleton*, 13 Tex. 275.

**71.** Where it was discovered at the

time of trial that a witness by whom it was proposed to prove material facts was incompetent, this is not such a "surprise" as will require the vacation of the judgment. *Bank of Illinois v. Hicks*, 4 J. J. Marsh. (Ky.) 128.

**72.** *Robinson v. Davis*, 66 Ark. 429, 51 S. W. 66; *Hobbs v. Tipton County*, 122 Ind. 180, 23 N. E. 714.

**73.** *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

**74.** See generally the title "**Service of Process and Papers.**"

**As to void judgments,** see generally *supra*, XIV, B, 1.

**As to jurisdictional defects,** see *supra*, XIV, B, 4.

**75.** See the following: **Cal.**—*Zobel v. Zobel*, 151 Cal. 98, 90 Pac. 191. **Ga.** *Steers & Co. v. Morgan*, 66 Ga. 552. **Kan.**—*Wood v. Cobe*, 80 Kan. 496, 103 Pac. 101; *Satterlee v. Grubb*, 38 Kan. 234, 16 Pac. 475. **Minn.**—*Bogart v. Kiene*, 85 Minn. 261, 88 N. W. 748. **Neb.**—*Stover v. Hough*, 47 Neb. 789, 66 N. W. 825; *Reed v. Thompson*, 19 Neb. 397, 27 N. W. 391. **N. C.**—*Rev.* 1905, §449. **N. D.**—§6846, *Rev. Codes*, 1905. **Ohio.**—*Roberts v. Price*, 2 Ohio Dec. (Reprint) 681. **Pa.**—*Kauffman v. Bitting*, 2 Woodw. 39. **Tex.**—*Snow v. Hawpe*, 22 Tex. 168; *Roller v. Ried*, 87 Tex. Civ. App. 69, 24 S. W. 655.

[a] **Personal service outside the state** imparts actual knowledge and the defendant thus served may not have a judgment thus obtained against him set aside under these statutes. *Clark v. Tull*, 113 Iowa 143, 84 N. W. 1030.

**As to the time of making application for relief,** see *infra*, XIV, E, 2, d.

**76.** *Millage v. Richards*, 52 Colo. 512, 122 Pac. 788.



**12. Waiver of Grounds.**—It frequently happens that grounds for this relief which are both adequate and available are, by some act or omission of the parties, waived and forever lost.<sup>77</sup> For instance, the rule is well settled that, in moving to set aside a judgment for want of jurisdiction, the applicant must appear specially for that purpose and keep out of court for all others,<sup>78</sup> an appearance for any other purpose than to question the jurisdiction of the court being considered

**77. Grant v. Birdsall**, 16 Jones & S. (N. Y.) 427; **Hays v. Com.**, 14 Pa. 39. See also *Nat. Mut. B. & L. Assn. v. Kondrak*, 9 Kulp (Pa.) 14.

[a] The ground of fraud may be lost in this manner. *Nat. Mut. B. & L. Assn. v. Kondrak*, 9 Kulp (Pa.) 14.

[b] The payment of the amount of a judgment may amount to a waiver of grounds for opening the judgment. Thus where the defendant obtained a rule to open a judgment, conditioned upon securing the sheriff in the amount of his levy, and, instead of giving such security, the defendant paid the amount of the execution, it was held that payment under such circumstances was voluntary and the defendant was not entitled to have the judgment opened. *Murphy v. Cawley*, 7 Kulp (Pa.) 128.

[c] An agreement between the parties for a stay of execution and the subsequent payment by the defendant of a part of the judgment may amount to a waiver of the ground of irregularity as, by his acts, the defendant has impliedly recognized its regularity. *Drummond v. Lang*, 10 Sad. 627, 12 Atl. 658.

**78. N. C.**—*Scott v. Mutual Reserve Life Assn.*, 137 N. C. 515, 50 S. E. 221. See *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435. **N. D.**—*Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095. Compare, *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672. **Ohio.**—*Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468. 3 W. L. Bul. 195. **Ore.**—*Mayer v. Mayer*, 27 Ore. 133, 39 Pac. 1002. See *Belknap v. Charlton*, 25 Ore. 41, 34 Pac. 753. **S. C.**—See *Wren v. Johnson*, 62 S. C. 533, 544, 40 S. E. 937. **Wis.**—*Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Alderson v. White*, 32 Wis. 308.

As to the nature and effect of appearance see the title "**Appearances.**"

[a] "A party cannot come into court, challenging its proceedings on

account of irregularities, and after being overruled be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground. This is familiar doctrine." *Burdette v. Corgan*, 26 Kan. 102.

[b] It is not enough that the appearance be made solely for the purpose of having the judgment set aside; if the motion involves the merits of the case and is not made upon the single ground that the court is without jurisdiction it is essentially a general appearance and the fact that it is denominated a special appearance will not alter the nature thereof. *Scott v. Mutual Reserve Life Association*, 137 N. C. 515, 50 S. E. 221.

[c] But see *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672, where the court held that where the applicant appeared to contest the jurisdiction of the court, and recited in his notice of motion that he would also ask for "such other and further relief as the court may deem just" that although this was in the nature of a general appearance it would not strip the applicant of his right to relief.

[d] The reason for this rule as expressed in *Scott v. Mutual Reserve Life Assn.*, 137 N. C. 515, 518, 50 S. E. 221, is, "a party cannot be permitted to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of an action or proceeding, and, at the same time, seek a judgment in his favor on the ground that his adversary's allegations are false, or that his proofs are insufficient."

[e] On this principle a defendant who has appeared in court on supplementary proceedings may not thereafter have the judgment therein set

a general one, and amounting to a waiver of this objection.<sup>79</sup> Thus, a motion made on a ground which is inconsistent with the claim that the judgment is void for want of jurisdiction, constitutes a submission on the part of the movant to the jurisdiction of the court,<sup>80</sup> as where the motion is made on the ground that the costs were excessive or unwarranted,<sup>81</sup> or that the judgment was irregularly entered,<sup>82</sup> or that the action was prosecuted under a champertous agreement.<sup>83</sup> This objection is not lost, however, by an appearance for the purpose of obtaining relief on the ground of want of jurisdiction.<sup>84</sup> The right to rely upon irregularities such as would otherwise provide ample grounds for the granting of this relief may also be lost by waiver,<sup>85</sup> as, also, may the objection that an appearance of an attorney was, as to the applicant, unauthorized.<sup>86</sup> But a general appearance will not purge

aside on the ground that the service of summons was irregular. *Grant v. Birdsall*, 16 Jones & S. (N. Y.) 427.

79. *Cal.*—*Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026. *Ga.*—*Blalock v. Tidwell*, 56 Ga. 517. *Ia.*—*Corn Exchange Bank v. Applegate*, 97 Iowa 67, 65 N. W. 1007. *Mo.*—*Reilly v. Russell*, 39 Mo. 152, 90 Am. Dec. 457. *Neb.*—*Raymond v. Strine*, 14 Neb. 236, 15 N. W. 350. *N. Y.*—*Grant v. Birdsall*, 16 Jones & S. 427; *Waldman v. Mann*, 101 N. Y. Supp. 757. *N. C.*—*Scott v. Mutual Reserve Life Assn.*, 137 N. C. 515, 50 S. E. 221. *Wis.*—*Gray v. Gates*, 37 Wis. 614.

80. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468, 3 W. L. Bul. 195; *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

[a] This ground, lack of jurisdiction, may be lost or waived even by a faulty or ineffectual appearance as where, in resisting an application for this relief made on petition, where service of the summons thereupon issued was made constructively, a demurrer on the ground of the insufficiency of the petition, although unauthorized and unavailing, amounts to a submission to the jurisdiction of the court. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468, 3 W. L. Bul. 195. See also *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672.

81. *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

82. *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

83. *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

84. See also *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468, 3 W. L. Bul.

195; *Rorer v. People's, etc. Assn.*, 47 W. Va. 1, 34 S. E. 758.

85. *Grant v. Birdsall*, 16 Jones & S. (N. Y.) 427; *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409; *Harres v. Com.*, 35 Pa. 416. See also *Jones v. United States Slate Co.*, 16 How. Pr. (N. Y.) 129.

[a] Taking a premature default is an irregularity which will suffice to open the judgment if moved against at once; but where no steps are taken to have the judgment vacated this irregularity will be deemed to have been waived. *Bell v. Morrow*, 38 Wash. Law Rep. (D. C.) 655.

[b] **Irregularities in Service of Notice.**—The objection that the adverse party was not properly served with notice of this application may be lost in this manner. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468, 3 W. L. Bul. 195.

[c] Laches may amount to a waiver of irregularities under certain circumstances. *Grant v. Birdsall*, 16 Jones & S. (N. Y.) 427; *Jones v. United States Slate Co.*, 16 How. Pr. (N. Y.) 129.

86. *Lytle v. Forest*, 16 Pa. Co. Ct. 239. See also *Grant v. Birdsall*, 16 Jones & S. (N. Y.) 427.

[a] Where an attorney confesses judgment against several partners, under authority derived from only one, the omission of the other partners, after notice, to make immediate application to the court to open the judgment as to them, and permitting their lands to be levied upon and sold, will conclude them from thereafter seeking this relief against the sheriff's vendee. *Cyphert v. McClune*, 22 Pa. 195.

a judgment or decree of fraud,<sup>87</sup> or validate a judgment otherwise invalid.<sup>88</sup>

C. TIME FOR OPENING OR VACATING. — 1. During the Term. — It is a generally accepted rule that during the term at which a judgment is rendered it may be opened, vacated or otherwise modified, by the court which rendered it.<sup>89</sup>

87. *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095.

88. *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Knob Couch v. Heffron*, 15 Pa. Co. Ct. 636.

89. **U. S.**—*Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597; *Miocene, etc. Co. v. Moore*, 150 Fed. 483, 80 C. C. A. 301. **Ala.**—*Johnson v. Latimore*, 7 Ala. 200. **Ark.**—*Wells Fargo & Co. v. Baker Lumb. Co.*, 107 Ark. 415, 155 S. W. 122; *Underwood v. Sledge*, 27 Ark. 295; *McKnight v. Strong*, 25 Ark. 212; *Ashley v. May*, 5 Ark. 408. See also *Real Estate Bank v. Rawdon*, 5 Ark. 558. **Ga.**—*Ford v. Clark*, 129 Ga. 292, 58 S. E. 818; *McCandless v. Conley*, 115 Ga. 48, 41 S. E. 256; *Seals v. Stocks*, 100 Ga. 10, 30 S. E. 278; *Cooley v. Tybee Beach Co.*, 99 Ga. 290, 25 S. E. 691; *East Tenn. V. & G. R. R. Co. v. Greene*, 95 Ga. 35, 22 S. E. 36; *Jordan v. Tarver*, 92 Ga. 379, 17 S. E. 351; *Calloway v. McElmurray*, 91 Ga. 166, 17 S. E. 103; *Raspberry v. Harville*, 90 Ga. 530, 537, 16 S. E. 299; *Chattanooga R. & C. R. R. Co. v. Jackson*, 86 Ga. 676, 684, 13 S. E. 109; *Baker v. Thompson*, 75 Ga. 164; *Shaw v. Watson*, 52 Ga. 201; *Arnold v. Kendrick*, 50 Ga. 293; *Jobe v. State*, 28 Ga. 235. **Idaho.**—*Moore v. Taylor*, 1 Idaho 630. **Ill.**—*Rossville v. Smith*, 256 Ill. 302, 100 N. E. 292; *Briggs v. Dunne*, 163 Ill. 36, 46 N. E. 628; *Baldwin v. McClelland*, 152 Ill. 42, 38 N. E. 143; *Stanton v. Kinsey*, 151 Ill. 301, 37 N. E. 871; *People v. Springer*, 106 Ill. 542; *Becker v. Sauter*, 89 Ill. 596; *Edwards v. Irons*, 73 Ill. 583; *Leslie v. Fischer*, 62 Ill. 118; *Coughran v. Gutcheus*, 18 Ill. 390; *Gibson v. Manly*, 15 Ill. 140; *Kloekner v. Schafer*, 110 Ill. App. 391; *Major v. Rand*, 72 Ill. App. 279; *Mellon v. People*, 59 Ill. App. 467. See also *Bristol v. Ross*, 79 Ill. App. 261. **Ind.**—*Ginrich v. Ginrich*, 146 Ind. 227, 45 N. E. 101; *Burnside v. Ennis*, 43 Ind. 411; *Layman v. Graybill*, 14 Ind. 166; *Domestic Block Coal Co. v. Hol-*

*den*, 56 Ind. App. 634, 103 N. E. 73; *Foote v. Foote*, 53 Ind. App. 673, 102 N. E. 393. **Ia.**—*Fox v. Nolan*, 165 Iowa 302, 145 N. W. 491; *Kirby v. Gates*, 71 Iowa 100, 32 N. W. 191; *Taylor v. Lusk*, 9 Iowa 444. **Kan.**—*Hutchinson Salt, etc. Co. v. Baldridge*, 53 Kan. 522, 36 Pac. 1005; *State v. Sowders*, 42 Kan. 312, 22 Pac. 425. **Ky.**—*McIntosh v. Southern Engine, etc. Works*, 114 S. W. 1193. **Md.**—*Loney v. Bailey*, 43 Md. 10; *Merriek v. Baltimore & Ohio R. R. Co.*, 33 Md. 481; *Townshend v. Chew*, 31 Md. 247. **Miss.**—*Barker v. Justice*, 41 Miss. 240. **Mo.**—*Shuck v. Lawton*, 249 Mo. 168, 155 S. W. 20; *Robyn v. Chronicle Pub. Co.*, 127 Mo. 385, 30 S. W. 130; *Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574; *Childs v. Kansas City, St. J., etc. R. Co.*, 117 Mo. 414, 23 S. W. 373; *Morgan Harbor v. Pacific Ry. Co.*, 32 Mo. 423; *Smith v. Nevada, etc. Mines Co.*, 167 Mo. App. 592, 150 S. W. 1138; *Hesse v. Seypp*, 88 Mo. App. 66; *Woodward v. Woodward*, 84 Mo. App. 328; *Orvis v. Elliot*, 65 Mo. App. 96; *Martin v. St. Charles Tobacco Co.*, 53 Mo. App. 655; *McLaran v. Wilhelm*, 50 Mo. App. 658. See *In the Matter of Marquis*, 85 Mo. 615. **Neb.**—*Douglas County v. Broadwell*, 96 Neb. 682, 148 N. W. 930; *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152, 145 N. W. 344; *Hitchcock County v. Cole*, 87 Neb. 43, 126 N. W. 513; *Sherman County v. Nichols*, 65 Neb. 250, 91 N. W. 198; *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069; *State ex rel. Austrian, etc. Co. v. Duncan*, 37 Neb. 631, 56 N. W. 214; *Haris v. State*, 24 Neb. 803, 40 N. W. 317; *Volland v. Wilcox*, 17 Neb. 46, 22 N. W. 71. **Nev.**—*Ballard v. Purcell*, 1 Nev. 342. **N. C.**—*Gwinn v. Parker*, 119 N. C. 19, 25 S. E. 705; *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338; *Moore v. Hinnant*, 90 N. C. 163. **Ohio.**—*Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735; *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Manguo, etc. Co. v. Clymonts,*



**2. At Subsequent Term.**—a. *General Rule.*—At a subsequent term, however, a court may not, unless authorized by statute, open or set aside a final judgment which was regularly entered.<sup>90</sup> In view of this limitation on the power of the courts in this regard, statutes

10 Ohio Cir. Dec. 427, 19 Ohio Cir. Ct. 237; *Parker v. Robinson*, 5 Ohio Dec. (Reprint) 367. See *Jordan v. Russell*, 8 Ohio Dec. 467, 8 W. L. Bul. 91. **Okla.** *Simpkins v. Parsons*, 151 Pac. 588; *Carey v. Vickers*, 38 Okla. 643, 134 Pac. 851; *Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890. **Ore.**—First Christian Church v. Robb, 69 Ore. 283, 138 Pac. 856; *Brand v. Baker*, 42 Ore. 426, 71 Pac. 320. **Pa.**—*Fisher v. Hestonville M. & F. Pass. Ry. Co.*, 185 Pa. 602, 40 Atl. 97; *Philadelphia v. Coulston*, 118 Pa. 541, 12 Atl. 604; *Curran's Estate*, 9 Pa. Co. Ct. 514. See *Kellett v. Freeman*, 19 Pa. Super. 155; *Dean v. Munhall*, 11 Pa. Super. 69. **Tenn.** *Memphis & C. R. R. Co. v. Johnson*, 16 Lea 387; *Miller v. O'Bannon*, 4 Lea 398. **Tex.**—*Blackburn v. Knight*, 81 Tex. 326, 16 S. W. 1075; *Ragsdale v. Green*, 36 Tex. 193. **Vt.** *Arlington Mfg. Co. v. Mears*, 65 Vt. 414, 26 Atl. 587. **W. Va.**—*Barbour County Court v. O'Neal*, 42 W. Va. 295, 26 S. E. 182; *Kelty v. High*, 29 W. Va. 381, 1 S. E. 561; *Manion v. Fahy*, 11 W. Va. 482, 496; *Green & Co. v. Pittsburg, W. & K. R. Co.*, 11 W. Va. 685, 692. **Wis.**—See *Smith v. Milwaukee Elect. Ry. Co.*, 119 Wis. 336, 96 N. W. 823; *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Dufur v. Ashland*, 88 Wis. 574, 60 N. W. 829; *Scheer v. Keown*, 34 Wis. 349; *Landon v. Burke*, 33 Wis. 452.

As to amendment of judgment, see *supra*, XIII.

As to grounds for opening and vacating, see *supra*, XIV, B.

[a] "During the term at which the case is finally disposed of, the records are in the breast of the court and they may be corrected and set aside, or modified at the will of the trial judge." *Orvis v. Elliott*, 65 Mo. App. 96.

[b] A decree which has been pronounced by the court but not yet entered is under the control of the court and may be vacated. *Abbott v. Fagg*, 1 Heisk. (Tenn.) 742.

[c] Judgment of Dismissal.—Although it is the general rule that the court loses all control over a cause with the rendition of a judgment of

dismissal still, the court may, in a proper case, assume jurisdiction for the purpose of vacating or setting aside its judgment of dismissal. *Todd v. Todd*, 7 S. D. 174, 63 N. W. 777. See more fully 7 STANDARD PROC. 689.

**90. U. S.**—*Tubman v. Baltimore & Ohio R. Co.*, 190 U. S. 38, 23 Sup. Ct. 777, 47 L. ed. 946; *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597. **Ala.** *Singo v. Fritz*, 165 Ala. 658, 51 So. 867; *Soulard v. Vacuum Oil Co.*, 109 Ala. 387, 19 So. 414; *Buchanan v. Thomason*, 70 Ala. 401; *Griffin v. Griffin*, 40 Ala. 296; *Noland v. Lock*, 16 Ala. 52. **Ariz.**—*National Metal Co. v. Greene Con. Cop. Co.*, 9 Ariz. 192, 80 Pac. 397; *Guardianship of Zeekendorf*, 7 Ariz. 328, 64 Pac. 492; *Woffenden v. Woffenden*, 1 Ariz. 328, 25 Pac. 666. **Ark.**—*Melton v. St. Louis, etc. Co.*, 99 Ark. 433, 139 S. W. 289; *Terry v. Logue*, 97 Ark. 314, 133 S. W. 1135; *Walsh v. Hampton*, 96 Ark. 427, 132 S. W. 214; *Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 163, 116 S. W. 199; *Stewart v. Wood*, 86 Ark. 504, 111 S. W. 983; *Liddell v. Bodenheimer*, 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42; *State Nat. Bank v. Neel*, 53 Ark. 110, 13 S. W. 700; *Johnson v. Campbell*, 52 Ark. 316, 12 S. W. 578; *Crowley v. Mellon*, 52 Ark. 1, 11 S. W. 876; *Desha County v. Newman*, 33 Ark. 788; *Turner v. Vaughan*, 33 Ark. 454; *Patterson v. Temple*, 27 Ark. 202; *Ex parte Hardy*, 36 Ark. 94; *McKnight v. Strong*, 25 Ark. 212; *Rightor v. Gray*, 23 Ark. 228; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Lafferty v. Rutherford*, 10 Ark. 453; *Walker v. Walker*, 7 Ark. 542; *Colby v. Lawson*, 5 Ark. 303; *Smith v. Dudley*, 2 Ark. 60. **Cal.**—*Lattimer v. Ryan*, 20 Cal. 628; *Robb v. Robb*, 6 Cal. 21. **Colo.**—*Empire Const. Co. v. Crawford*, 57 Colo. 281, 141 Pac. 474; *People ex rel. Hart v. Dist. Court*, 33 Colo. 405, 80 Pac. 1065; *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449; *Morrell, etc. Co. v. Princess, etc. Co.*, 16 Colo. App. 54, 57, 63 Pac. 807. **D. C.**—*Tubman v. Baltimore & Ohio R. Co.*, 20 App. Cas. 541; *Juvenile Board of Children's Guardians v. Court*, 43 App. Cas. 599. **Fla.**—For

frequently vest in the courts a discretion to relieve against their judgments, within a limited period after notice of entry, for mistake, in-

cheimer v. Tarble, 23 Fla. 99, 1 So. 695; Internal Imp. Fund v. Bailey, 10 Fla. 238. Ga.—Cauley v. Wadley Lumb. Co., 119 Ga. 648, 46 S. E. 852; McCandlers v. Conley, 115 Ga. 48, 41 S. E. 256; East Tenn. V. & G. R. Co. v. Greene, 95 Ga. 35, 22 S. E. 36; Crow v. American Mtg. Co., 92 Ga. 815, 19 S. E. 31; Camp v. Phillips, 88 Ga. 415, 14 S. E. 580; Fort v. Strohecker, 58 Ga. 262. See Dyson v. Southern Ry. Co., 113 Ga. 327, 38 S. E. 749; Watkins v. Brizandine, 111 Ga. 458, 36 S. E. 807; Clements v. Empire Lumb. Co., 96 Ga. 319, 22 S. E. 987. **Haw.**—Su Wai v. Soper, 8 Hawaii 184. **Ill.**—Cramer v. Illinois Com. Men's Assn., 260 Ill. 516, 103 N. E. 459; Barnes v. Henshaw, 226 Ill. 605, 80 N. E. 1076; Doremus v. Chicago, 212 Ill. 513, 72 N. E. 403; Pisa v. Rezek, 206 Ill. 344, 69 N. E. 67; City of Chicago v. Nicholas, 192 Ill. 489, 61 N. E. 434; *In re Burdick*, 162 Ill. 48, 44 N. E. 413; Gaze v. City of Chicago, 141 Ill. 642, 31 N. E. 163; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Becker v. Sauter, 89 Ill. 596; Coursen v. Hixon, 78 Ill. 339; Fix v. Quinn, 75 Ill. 232; Windett v. Hamilton, 52 Ill. 180; McKindley v. Buck, 43 Ill. 488; Smith v. Wilson, 26 Ill. 186; Gibson v. Manly, 15 Ill. 140; Lampsett v. Whitney, 4 Ill. 170; McIntyer v. Houseman, 108 Ill. App. 276; Leavitt v. Bolton, 102 Ill. App. 582; Fish Furniture Co. v. Jenkins, 82 Ill. App. 551; Arnold v. Kilchman, 80 Ill. App. 229; Henry v. Seager, 80 Ill. App. 172; Bristol v. Ross, 79 Ill. App. 261; Reynertson v. Central Lumb. Co., 69 Ill. App. 131; Kelley, etc. & Co. v. Heath Mfg. Co., 66 Ill. App. 528; Stettauer v. Chicago, etc. Trust Co., 62 Ill. App. 31; Chambers v. Kirschhoff, 57 Ill. App. 615; Kuchne v. Goit, 54 Ill. App. 596; Davies v. Coryell & Co., 37 Ill. App. 505; Maple v. Havenhill, 37 Ill. App. 311; Baragwanath v. Wilson, 4 Ill. App. 80. See City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306; People v. Springer, 106 Ill. 542. **Ind.**—Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Bland v. State, 2 Ind. 608; Blair v. Russell, 1 Ind. 516. **Ia.**—McName v. Malvin, 56 Iowa 362, 9 N. W. 297; Emerson v. Tomlinson, 4 Greene 398. **Ky.**—Wickliffe v. Farmers' Bank, 142 Ky. 35, 133 S. W. 966; Forrester v. Howard, 124 Ky. 215, 98 S. W. 984; Lovelace v. Lovell, 107 Ky. 676, 55 S. W. 549; Hocker v. Gentry, 3 Mete. 463; Road Co. v. McMurty, 6 B. Mon. 214; Kelly v. Keizer, 3 A. K. Marsh. 268; Reed v. Hatcher, 1 Bibb 346; McDaniel v. Stum's Admr., 23 Ky. L. Rep. 1935, 65 S. W. 800; Johns v. Wandelohr's Admr., 5 Ky. L. Rep. 692. **Md.**—Girard F. & M. Ins. Co. v. Bankard, 107 Md. 538, 69 Atl. 415; McCormick v. Hogan, 48 Md. 404; Loney v. Bailey, 43 Md. 10; Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681. **Mass.**—Shawmut C. Paper Co. v. Cram, 212 Mass. 108, 98 N. E. 696; Radcliffe v. Barton, 154 Mass. 157, 28 N. E. 148; Pierce v. Lamper, 141 Mass. 20, 6 N. E. 223; Mason v. Pearson, 118 Mass. 61. **Mich.**—Campau v. Coates, 17 Mich. 235. **Mo.**—Childs v. Kansas City, St. J., etc. Ry. Co., 117 Mo. 414, 23 S. W. 373; *In re Marquis*, 85 Mo. 615; Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572; Orvis v. Elliott, 65 Mo. App. 96. **Neb.**—Meade Plumbing Co. v. Irwin, 77 Neb. 385, 109 N. W. 391; Sherman County v. Nichols, 65 Neb. 250, 91 N. W. 198; Schuyler Bldg. & Loan Assn. v. Fulmer, 61 Neb. 68, 84 N. W. 609; Hampton Lumb. Co. v. Van Ness, 54 Neb. 185, 74 N. W. 587; Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98. **N. M.**—De Baca v. Roth, 19 N. M. 620, 145 Pac. 492. **N. C.**—Turner v. Davis, 132 N. C. 187, 43 S. E. 637; Moore v. Hinnant, 90 N. C. 163; Powell v. Jopling, 47 N. C. 400; State v. Auman, 35 N. C. 241. See Dobbin v. Gaster, 26 N. C. 71. But see Cowles v. Hayes, 69 N. C. 406; Powell v. Jopling, 47 N. C. 400 (office judgments); Keaton v. Banks, 32 N. C. 381, 51 Am. Dec. 393. **Ohio.**—Huntington v. Finch, 3 Ohio St. 445; Exposition, etc. Co. v. Spiegel, 12 Ohio Cir. Ct. 761. **Okla.**—Carey Co. v. Vickers, 38 Okla. 643, 134 Pac. 851; McAdams v. Latham, 21 Okla. 511, 96 Pac. 584. **Ore.**—Stivers v. Byrket, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386; Brand v. Baker, 42 Ore. 426, 71 Pac. 320; Alexander v. Ling, 31 Ore. 222, 50 Pac. 915; William Deering & Co. v. Creighton, 26 Ore. 556, 38 Pac. 710. See also Ladd & Tilton v. Mason, 10 Ore. 308. **Pa.**—Pennsylvania Stave Co.'s

Appeal, 225 Pa. 178, 73 Atl. 1107; Fisher v. Hestonville, etc. Co., 185 Pa. 602, 40 Atl. 97; Philadelphia v. Coulston, 118 Pa. 541, 12 Atl. 604; Dean v. Munhall, 11 Pa. Super. 69; Hill v. Egan, 2 Pa. Super. 596; *In re Curran's Estate*, 9 Pa. Co. Ct. 514; Peterson v. Peterson, 13 Phila. 82. See King v. Brooks, 72 Pa. 363. But see Stephens v. Stephens, 1 Phila. 108. **R. I.** *In re* College Street, 11 R. I. 472. **S. C.**—Sarratt v. Gaffney Mfg. Co., 77 S. C. 85, 57 S. E. 616; Schroeder v. Eason, 2 Nott & McC. 291; Mitchell v. Humphries, Harp. 479. **Tenn.**—Bomar v. Hagler, 7 Lea 85; Conn's Lessee v. Whiteside, 6 Humph. 47; Hopkins v. Waterhouse, 2 Yerg. 230; Russell v. Colyar, 4 Heisk. 154. **Tex.**—Ragsdale v. Green, 36 Tex. 193; Caperton v. Wanslow, 18 Tex. 125; Rogers v. Watrous, 8 Tex. 62, 58 Am. Dec. 100; Merle v. Andrews, 4 Tex. 200; Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Imlay v. Brewster, 3 Tex. Civ. App. 103, 22 S. W. 226. See Bean v. Dove, 33 Tex. Civ. App. 377, 77 S. W. 242. **Utah.**—Jones v. New York Life Ins. Co., 14 Utah 215, 47 Pac. 74; Benson v. Anderson, 14 Utah 334, 47 Pac. 142; Park v. Higbee, 6 Utah 414, 24 Pac. 524. **Va.**—Enders' Exrs. v. Burch, 15 Gratt. (56 Va.) 64; Erwin v. Vint, 6 Munf. (20 Va.) 267; Halley's Admr. v. Baird, 1 Hen. & M. (11 Va.) 25. **Wash.**—Twigg v. James, 37 Wash. 434, 79 Pac. 959; Hancock v. Stewart, 1 Wash. Ter. 323. **W. Va.** Eureka Pipe Line Co. v. Riggs, 75 W. Va. 353, 83 S. E. 1020; Citizens' Trust, etc. Co. v. Young, 75 W. Va. 241, 83 S. E. 1007; State v. Boner, 57 W. Va. 81, 49 S. E. 944; Barbour County Court v. O'Neal, 42 W. Va. 295, 26 S. E. 182; Crawford v. Fiekey, 41 W. Va. 544, 23 S. E. 662; Clarke v. Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696; Green & Co. v. Pittsburgh W. & K. R. Co., 11 W. Va. 685, 692. See Rheims v. Standard Fire Insurance Co., 39 W. Va. 672, 20 S. E. 670; Kelty v. High, 29 W. Va. 381, 1 S. E. 561. **Wis.** Dufur v. Home Investment Co., 122 Wis. 470, 100 N. W. 831; State v. Circuit Court, 108 Wis. 77, 83 N. W. 1115; Zine Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; Milwaukee Mut. B. & L. Soc. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102; Pormann v. Frede, 72 Wis. 226, 39 N. W. 385; Frankfurth v. Anderson, 61 Wis.

107, 20 N. W. 662; Schobacher v. Germantown F. Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Baker v. Baker, 51 Wis. 538, 8 N. W. 289; Egan v. Sengpiel, 46 Wis. 703, 1 N. W. 467; Whitney v. Karner, 44 Wis. 563; Gans v. Harmon, 44 Wis. 323; Challoner v. Howard, 41 Wis. 355; Salter v. Hilgen, 40 Wis. 363; Seymour v. Board of Supervisors, 40 Wis. 62; Pringle v. Dunn, 39 Wis. 435; Fornette v. Carmichael, 38 Wis. 236; Quaw v. Lameroux, 36 Wis. 626; Bonnell v. Gray, 36 Wis. 574; Eaton v. Youngs, 36 Wis. 171; Scheer v. Keown, 34 Wis. 349; Aetna Life Ins. Co. v. McCormick, 20 Wis. 265.

As to equitable relief against judgments see *infra*, XV.

[a] "A court has *inherent* power to vacate its judgments . . . at any time during the term, but after that time it can only do so *in pursuance of the provisions of the statute.*" Brand v. Baker, 42 Ore. 426, 71 Pac. 320.

[b] The fact that after a final judgment against the defendant in an attachment proceeding is rendered some matters relating to the garnishee are to be determined at the next term will not extend the court's jurisdiction so as to include the power to vacate the judgment at such subsequent term. Baldwin v. McClelland, 152 Ill. 42, 38 N. E. 143.

[c] The reason for such a rule is aptly expressed by a quotation from Lord Coke in *Lee v. State*, 32 Ohio St. 113: "During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment, or proof to the contrary."

[d] Statutes dispensing with writs of error *coram nobis* do not affect this rule, their only object being to dispense with this old writ and give to a motion the same efficacy. *Coursen v. Hixon*, 78 Ill. 339; *Baragwanath v. Wilson*, 4 Ill. App. 80. See *Fix v. Quinn*, 75 Ill. 232.

[e] In Illinois, county courts may, in the administration of insolvent estates under the act relating to assignments for the benefit of creditors, so long as the estate remains undistributed, even though it be at a subsequent term, take any action which



advertence, surprise or excusable neglect,<sup>91</sup> or provide that courts may vacate their judgments after the term, on specified grounds.<sup>92</sup>

b. *Exceptions.* — (I.) **Generally.** — Judgments which are interlocutory, and not final,<sup>93</sup> and judgments by confession, are not affected by this limitation and may, in a proper case, be set aside at any time.<sup>93½</sup>

(II.) **Motion Continued to Subsequent Term.** — An application for this relief, made during the judgment term, and thereupon continued to a subsequent term, may be heard and disposed of at the term to which the matter is thus continued.<sup>94</sup>

would have been proper at the current term (*Weil v. Hart*, 73 Ill. App. 364; *Mowatt v. Cole*, 59 Ill. App. 345), but when the matter is once finally disposed of the court's power to act in this manner may not be exercised at a subsequent term. *Stettauer v. Chicago Title & Trust Co.*, 62 Ill. App. 31.

[f] If the judgment was entered in vacation the application to vacate or set aside may be made at any time during the term next succeeding that at which the judgment was rendered. *Egan v. Sengpiel*, 46 Wis. 703, 1 N. W. 467.

91. See *supra*, XIV, B, 9 and 10.

92. Ia.—§4091, Code, 1897. Ky. §518, Civ. Code Pr., 1906. Ohio. §5354, Bates' Ann. St., 5th ed.

[a] Statutes which thus provide for relief after the judgment term do not apply to or control applications made during the term. *Streeter v. Gleason*, 120 Iowa 703, 95 N. W. 242; *McConnell v. Avery*, 117 Iowa 282, 90 N. W. 604. See the section following.

93. D. C.—See *Fletcher v. Lipscomb*, 36 App. Cas. 47. Mo.—In the Matter of Marquis, 85 Mo. 615. N. M.—*Bent v. Miranda*, 8 N. M. 78, 42 Pac. 91. Ohio. *Potter, etc. Co. v. Jennman*, 4 Ohio Dec. 444, 4 Ohio N. P. 78. W. Va. *Barbour County Court v. O'Neal*, 42 W. Va. 295, 26 S. E. 182; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696.

[a] In Lunacy Proceedings.—This general rule limiting the power of the court to the judgment term does not apply to judgments declaring one insane. Thus it was said in the Matter of Marquis, 85 Mo. 615, "The correctness of the principle . . . may be conceded, but we think the application of it in *Dutcher v. Hill*, 29 Mo. 271, 77 Am. Dec. 572, is denied to cases of inquest of lunacy where ir-

regularities appear upon the face of the proceedings. It was ruled in that case that: 'The proceedings under the law concerning insane persons are not like a final judgment, which is unalterable after the end of the term at which it was rendered. They are *in fieri*, like a cause pending, and irregularities in them or defects of record may be obviated at any time so long as the lunatic is under the control of the guardian appointed for him.'"

93½. See 14 STANDARD PROC. 841.

94. Ill.—*People v. Wells*, 255 Ill. 450, 99 N. E. 606; *Grubb v. Milan*, 249 Ill. 456, 94 N. E. 927; *Donaldson v. Copeland*, 201 Ill. 540, 66 N. E. 844; *People v. Springer*, 106 Ill. 542; *Hibbard v. Mueller*, 86 Ill. 256 (*overruling* in this regard, *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22); *Windett v. Hamilton*, 52 Ill. 180; *Goodykoontz v. Kelly*, 185 Ill. App. 165; *Dwyer & Co. v. Moore Furniture Co.*, 178 Ill. App. 562; *Bottigliero v. Cozzi*, 176 Ill. App. 311; *Hartman v. Viera*, 113 Ill. App. 216; *Major v. Rand*, 72 Ill. App. 279. See *Page v. Wallace*, 87 Ill. 84. Kan.—*Babeock Hardware Co. v. Farmers', etc. Bank*, 50 Kan. 648, 32 Pac. 377. Mo.—*Childs v. Kansas City, St. J., etc. Ry. Co.*, 117 Mo. 414, 23 S. W. 373; *Miller v. Crawford*, 140 Mo. App. 711, 126 S. W. 984. Ohio.—*Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735; *Jordan v. Russell*, 8 Ohio Cir. Dec. 467, 8 W. L. Bul. 91. Okla.—*Carey Co. v. Vickers*, 38 Okla. 643, 134 Pac. 851. Pa.—*Dean v. Munhall*, 11 Pa. Super. 69. Wash.—*State v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974. W. Va.—*Bank of Princeton v. Johnston*, 41 W. Va. 550, 23 S. E. 517; *Green & Co. v. Pittsburgh W. & K. R. Co.*, 11 W. Va. 685, 692. Wis.—*James Sons & Co. v. Gott*, 55 Wis. 223, 47 S. E. 649; *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289.

See also *infra*, XIV, E, 2, d.

(III.) **Consent.** — A court may open or vacate a judgment rendered by it at a prior term when the interested parties consent thereto,<sup>95</sup> though there are authorities to the contrary.<sup>96</sup>

(IV.) **Fraud.** — A judgment which has been obtained through fraud or collusion may be opened or set aside at a subsequent term.<sup>97</sup>

(V.) **Irregularities.** — In some jurisdictions a judgment may be set aside after the term, for substantial irregularities in the proceedings

[a] "A motion to set aside a judgment strikes at its validity, and when filed at the term at which the judgment was rendered and continued to the next term has the effect to suspend the judgment so that the court can act upon the motion the same as at the prior term. The proceedings remain in the breast of the court until the motion is disposed of . . ." *Childs v. Kansas City, St. J., etc. Ry. Co.*, 117 Mo. 414, 23 S. W. 373.

[b] **A continuance by consent** operates in the same manner. *James Sons & Co. v. Gott*, 55 Wis. 223, 47 S. E. 649; *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289.

[c] **Continuance by General Order.** For this purpose an oral motion, entered upon the records of the court is sufficient (*Hartman v. Viera*, 113 Ill. App. 216) and it is not necessary that an order be made continuing that particular motion but a general order, made during the term, continuing all causes pending not otherwise disposed of is sufficient (*Hartman v. Viera, supra*), and in jurisdictions where it is provided by statute that all "causes and proceedings pending and undisposed of . . . shall stand continued till the next term." (Ill. R. S. 1901, 552) such continuance would occur by reason of the statute (*Hartman v. Viera, supra*).

95. **Ala.**—*Kidd v. McMillan*, 21 Ala. 325; *Hair v. Moody*, 9 Ala. 399. **Ill.** *Gage v. City of Chicago*, 141 Ill. 642, 31 N. E. 163; *Cooney v. Bonfield*, 172 Ill. App. 657; *Davis v. Coryell & Co.*, 37 Ill. App. 505. See *City of Chicago v. Nichols*, 192 Ill. 489, 61 N. E. 434. **Neb.**—*Royal Trust Co. v. Exchange Bank*, 55 Neb. 663, 76 N. W. 425. **N. C.**—*Pierce v. Eller*, 167 N. C. 672, 83 S. E. 758. **Okla.**—*Harrison v. Osborn*, 31 Okla. 103, 114 Pac. 331. **Pa.** *Philadelphia v. Coulston*, 118 Pa. 541, 12 Atl. 604.

[a] "But if the parties agree, the court may at any time strike off a judg-

ment . . . That agreement may either be submitted in writing, or orally stated in the presence of the court; and we think it may in some cases be fairly implied from the solemn acts of the parties in their dealings with the court." *Philadelphia v. Coulston*, 118 Pa. 541, 12 Atl. 604.

[b] **But a court is not compelled** by such an agreement of the parties to set a judgment aside. *Kidd v. McMillan*, 21 Ala. 325.

96. **Little Rock v. Bullock, 6 Ark. 282; *Anderson v. Thompson*, 7 Lea (Tenn.) 259.**

[a] In *Little Rock v. Bullock*, 6 Ark. 282, the court says: "The court not having the power to reopen the cause, it could not be done by consent of the parties, for consent cannot confer jurisdiction."

[b] Where, however, the court is, by statute empowered to grant this relief at a subsequent term, the consent does not confer jurisdiction or authority; it simply amounts to a stipulation that grounds for this relief exist. *Nat. Home, etc. v. Overholser*, 64 Ohio St. 517, 60 N. E. 628.

97. **U. S.** — *Leavenworth County Comrs. v. Chicago, etc. R. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064; *Ring Refrigerator, etc. Co. v. St. Louis Ice Mfg. Co.*, 67 Fed. 535; *Young v. Sigler*, 48 Fed. 182; *Guild v. Phillips*, 44 Fed. 461. **Ark.**—*Chambliss v. Reppy*, 54 Ark. 539, 16 S. W. 571. **Colo.**—*Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. **Ga.**—*East Tenn. V. & G. R. Co. v. Greene*, 95 Ga. 35, 22 S. E. 36. **Ill.**—*City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39. See *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Cook v. Wood*, 24 Ill. 295; *Baragwanath v. Wilson*, 4 Ill. App. 80. **Kan.** *Sanford v. Weeks*, 50 Kan. 339, 31 Pac. 1088. **Md.**—*Boggs v. Inter-American, etc. Min. Co.*, 105 Md. 371, 66 Atl. 259; *Siewerd v. Farnen*, 71 Md. 627, 18 Atl. 968; *Smith v. Black*, 51 Md. 247; *Abell v. Simon*, 49 Md. 318; *Craig v. Wroth*,

by which it was secured,<sup>98</sup> though in others the irregularity must be such as in some manner renders the judgment void.<sup>99</sup>

(VI.) Void Judgments. — Where the judgment proceeded against is an absolute nullity, it may be set aside at any time, before or after the expiration of the term,<sup>1</sup> as for example, where the court was without

47 Md. 281; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. **Mo.**—*Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 367; *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10; *Mayberry v. McClurg*, 51 Mo. 256; *Hyatt v. Wolfe*, 22 Mo. App. 191. **N. Y.** *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Nevitt v. First Nat. Bank*, 91 Hun 43, 36 N. Y. Supp. 294; *Hurlbut v. Coman*, 43 Hun 586, 7 N. Y. St. 215; *Mather v. Parsons*, 32 Hun 338. See *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852. **Ohio.** *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. **Pa.**—*Gould v. Gage*, 118 Pa. 559, 12 Atl. 476; *Peterson v. Peterson*, 13 Phila. 82.

But see *Manion v. Fahy*, 11 W. Va. 482, 496.

[a] "A county court sitting as a court of probate, may, at any time, in furtherance of justice, revoke an order which has been . . . procured by fraud." *In re Fisher*, 15 Wis. 511.

98. **Kan.**—*Seeds v. American Bridge Co.*, 68 Kan. 522, 75 Pac. 480. **Md.** *Siewerd v. Farnen*, 71 Md. 627, 18 Atl. 968; *Sarlouis v. Firemen's Ins. Co.*, 45 Md. 241; *Taylor v. Sindall*, 34 Md. 38. **N. C.**—*Scott v. Mutual Reserve Life Assn.*, 137 N. C. 515, 50 S. E. 221; *Beeton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840; *Vick v. Pope*, 81 N. C. 22; *Monroe v. Whitted*, 79 N. C. 508; *Harrell v. Peebles*, 79 N. C. 26; *Mabry v. Erwin*, 78 N. C. 45; *Wolfe v. Davis*, 74 N. C. 597; *Cowles v. Hayes*, 69 N. C. 406; *Moore v. Mitchell*, 61 N. C. 304; *Anonymous*, 1 N. C. 91. See *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935; *Whitehurst v. Merchants, etc. Transp. Co.*, 109 N. C. 342, 13 S. E. 937; *Davis v. Shaver*, 61 N. C. 18, 91 Am. Dec. 92. **Ohio.**—*Hunt v. Yeatman*, 3 Ohio 15. **Wis.**—*Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265.

[a] Where the defendant died pendente lite and his representatives were not substituted. *Aetna Life Ins. Co.*

*v. McCormick*, 20 Wis. 265. See *In re College Street*, 11 R. I. 472.

[b] Where a judgment was rendered against an infant defendant for whom there was no guardian ad litem appointed. *Keaton v. Banks*, 32 N. C. 381, 51 Am. Dec. 393. See *In re College Street*, 11 R. I. 472.

[c] **In Ohio.**—"It is well settled in this state that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered." *Huntington v. Finch & Co.*, 3 Ohio St. 445. See *Hocking Valley Bank v. Walters*, 1 Ohio St. 201.

[d] There is a well marked distinction to be observed in this connection between a judgment which is *irregular* and one which is *erroneous*. The former may be summarily set aside at a subsequent term but the latter cannot. Thus, it is said in *Orvis v. Elliott*, 65 Mo. App. 96, "While courts have the power to set aside, because of irregularities, their judgments on motions filed after the term at which the same are rendered, it is well settled that where the judgment is merely erroneous, such relief must be sought by a motion filed during the judgment term."

[e] As to what irregularities will warrant the opening or vacating of a judgment, see *supra*, XIV, B, 7.

99. **Fla.**—*Einstein v. Davidson*, 35 Fla. 342, 17 So. 563. **Ill.**—*Maple v. Havenhill*, 37 Ill. App. 311. **Pa.**—See *Clarion M. & P. R. Co. v. Hamilton*, 127 Pa. 1, 17 Atl. 752. **Wis.**—*Egan v. Sengpiel*, 46 Wis. 703, 1 N. W. 467.

1. **Ala.**—*Hobson-Starnes Coal Co. v. Alabama Coal, etc. Co.*, 189 Ala. 481, 66 So. 622; *Frazier v. McWhirter*, 121 Ala. 308, 25 So. 804; *Martin v. Atkinson*, 108 Ala. 314, 18 So. 888; *Wiggins v. Steiner*, 103 Ala. 655, 16 So. 8; *Kohn v. Haas*, 95 Ala. 478, 12 So. 577; *Morgan v. Lehman*, 92 Ala. 440, 9 So. 314; *Schwarz v. Oppenheimer*, 90 Ala. 462, 8 So. 36; *Buchanan v. Thomson*, 70 Ala. 401; *Bland v. Bowie*, 53 Ala. 152; *Bruce's Exrx. v. Strickland's Admr.*, 47 Ala. 192. **Ark.**—*Walsh v. Hampton*,



jurisdiction to enter the judgment complained of.<sup>2</sup> According to some cases the judgment must, however, be one which is void upon its face;

96 Ark. 427, 132 S. W. 214; *Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199. **Cal.**—*Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *People v. Blake*, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313; *People v. Greene*, 74 Cal. 400, 16 Pac. 197. **Fla.**—*Lord v. Dowling Co.*, 52 Fla. 313, 42 So. 585; *Einstein v. Davidson*, 35 Fla. 342, 17 So. 563. **Ga.**—*Regopoulos v. State*, 116 Ga. 596, 42 S. E. 1014; *Walker v. Equitable Mtg. Co.*, 114 Ga. 862, 40 S. E. 1010; *Prescott v. Bennett*, 50 Ga. 266, 271; *Jones v. Killebrew*, 55 Ga. 153. **Ill.**—*McIntyer v. Houseman*, 108 Ill. App. 276; *Parker v. Macoy*, 91 Ill. App. 313. See *Birdsell Mfg. Co. v. Independent, etc. Co.*, 87 Ill. App. 443. **Kan.**—*First Nat. Bank v. Grimes Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56. **Miss.**—*Kramer v. Holster*, 55 Miss. 243; *Muirhead v. Muirhead*, 23 Miss. 97; *Neylans v. Burge*, 14 Smed. & M. 201. **Mont.**—*State ex rel. Happel v. Dist. Court*, 38 Mont. 166, 99 Pac. 291. **N. Y.**—*Meurer v. Berlin*, 80 App. Div. 294, 80 N. Y. Supp. 240. **N. C.**—*Anonymous*, 1 N. C. 91. **Okla.**—*Nicoll v. Midland Savings, etc. Co.*, 21 Okla. 591, 96 Pac. 744; *Foster v. Cimarron Val. Bank*, 14 Okla. 24, 76 Pac. 145; *Phoenix Bridge Co. v. Street*, 9 Okla. 422, 60 Pac. 221. **Ore.**—*White v. Ladd*, 41 Ore. 324, 330, 68 Pac. 739, 93 Am. St. Rep. 732. **Pa.**—*Clarion M. & P. R. Co. v. Hamilton*, 127 Pa. 1, 17 Atl. 752. See *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789. **Utah.**—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027; *Park v. Higbee*, 6 Utah 414, 24 Pac. 524. **Wash.**—*Bailey v. Hood*, 38 Wash. 700, 80 Pac. 559; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446. **Wis.**—*Salter v. Hilgen*, 40 Wis. 363; *Scheer v. Keown*, 34 Wis. 349; *Landon v. Burke*, 33 Wis. 452; *Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265. See *State v. Circuit Court*, 108 Wis. 77, 83 N. W. 1115; *Egan v. Sengpiel*, 46 Wis. 703, 1 N. W. 467; *State v. Waupaca County Bank*, 20 Wis. 640.

[a] "A judgment appearing from the record to have been entered against a defendant without service of process

or appearance is void on its face, and may be set aside at any time by the court." *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[b] "A judgment which is void upon its face, and requires only an inspection of the judgment-roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power to do so exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant." *People v. Greene*, 74 Cal. 400, 16 Pac. 197.

**2. U. S.**—*Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444. **Ala.**—*Jennings v. Pearce*, 101 Ala. 538, 14 So. 319; *Baker v. Barclift*, 76 Ala. 414. **Ariz.**—*San Pedro Cattle Co. v. Williams*, 4 Ariz. 166, 36 Pac. 34. **Ark.**—*Hill v. Bates*, 12 S. W. 874. **Cal.**—*People v. Hemme*, 84 Cal. xxi, 24 Pac. 313; *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51; *People v. Blake*, 84 Cal. 611, 22 Pac. 1142. **Colo.**—*Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. **Ga.**—*Harralson v. McArthur*, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689. **Ill.**—*City of Chicago v. Noddeck*, 202 Ill. 257, 67 N. E. 39; *McIntyer v. Houseman*, 103 Ill. App. 276. **Ind.**—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Zerger v. Flattery*, 83 Ind. 399, 401. **Ia.**—*Corn Exchange Bank v. Applegate*, 97 Iowa 67, 65 N. W. 1007; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243; *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611. **Kan.**—*Satterlee v. Grubb*, 38 Kan. 234, 16 Pac. 475; *Pritchard v. Greenwood County*, 26 Kan. 584; *Simcock v. First Nat. Bank*, 14 Kan. 529; *Trust Co. of Pennsylvania v. Cowles*, 3 Kan. App. 660, 45 Pac. 605. **Mich.**—*First Nat. Bank v. Dwight*, 85 Mich. 509, 48 N. W. 696. **Neb.**—*Hyde v. Kent*, 47 Neb. 26, 66 N. W. 39; *Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Morse v. Engle*, 28 Neb. 534, 44 N. W. 859. **Ore.**—*Ladd & Tilton v. Mason*, 10 Ore. 308. **Pa.**—*Hamor & Kuntz v. Loeb*, 9 Pa. Co. Ct. 609. **R. I.**—*In re College Street*, 11 R. I. 472.

if its invalidity must be shown by matter dehors the record, relief cannot be obtained by motion after the term.<sup>3</sup>

(VII.) *Subsequently Occurring Facts.* — The court may, at a subsequent term, vacate a judgment where facts have occurred after judgment,<sup>4</sup> or before judgment but at such a time as to render them unavailing to the party,<sup>5</sup> from which it appears that the judgment should not be enforced against the applicant.

3. *In the Absence of Terms.* — In those jurisdictions where terms of court have been abolished it is considered that the power of the court to vacate or set aside its judgment exists up to,<sup>6</sup> but not after, the entry of such judgment on the record.<sup>7</sup> Thereafter the court has only such power in this regard as is conferred by statute.<sup>8</sup>

4. *After and Pending an Appeal.* — The power of a court of original jurisdiction to open or vacate its judgment is not lost simply because an appeal therefrom has been perfected;<sup>9</sup> it may, nevertheless,

3. Ala.—*Kohn v. Haas*, 95 Ala. 478, 12 So. 577; *Johnson v. Johnson*, 40 Ala. 247; *Pratt v. Keils*, 28 Ala. 390. Mont. State v. Dist. Court, 38 Mont. 166, 99 Pac. 291. Wash.—*Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481, *overruling*, in this regard, *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

Compare, *infra*, XIV, E, 2, d, (I).

[a] A judgment is "void upon its face" when its invalidity appears from the judgment roll. *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

4. *Scheer v. Keown*, 34 Wis. 349; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265.

5. *Scheer v. Keown*, 34 Wis. 349; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265.

6. *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86.

7. *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86.

8. *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Canadian & American Mtg. Co. v. Clarita Land & Inv. Co.*, 140 Cal. 672, 74 Pac. 301; *Estate of Eikerenkotter*, 126 Cal. 54, 58 Pac. 370; *Young v. Fink*, 119 Cal. 107, 50 Pac. 1070; *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86.

As to the statutes governing the time within which proceedings must be taken to set aside a judgment, see *infra*, XIV, E, 2, d.

[a] Under statutes which provide that after the expiration of a certain period from the rendition of a judgment, where no appeal is perfected within that time, the power of the court over such judgment is lost, the

passing of this statutory period operates upon the authority of the court to grant this relief in the same manner as the passing of the judgment term at common law. *Memphis & C. R. Co. v. Johnson*, 16 Lea (Tenn.) 387.

[b] In *New Mexico* in *Weaver v. Weaver*, 16 N. M. 98, 113 Pac. 599, the court says: "For ordinary cases, at least, the time within which a judgment can be vacated, is limited. If the court rendering the judgment has terms, its control of the judgment is usually limited to the term at which it was rendered. . . . But in this jurisdiction in view of the provisions of sec. 2875, C. L. 1897, that the district courts in several counties 'shall be at all times in session,' for the numerous purposes named in the statute, it can hardly be said that there are terms of court except for purposes connected with jury trials (*citing Territory ex rel. Hubbell v. Armijo*, 14 N. M. 202, 89 Pac. 275). That condition may possibly have the effect of limiting the literal meaning of Chap. 26, Laws of 1905, fixing a limit of sixty days for setting aside a judgment rendered on default 'out of term time.' But, C. L. 1897, sec. 2685, subsec. 137 (now §423, 1915, N. M. Sts.) plainly applies to all judgments and provides that they may be set aside for irregularity at any time within one year after rendition."

9. *Ariz.*—*Sullivan v. Woods*, 5 *Ariz.* 196, 50 Pac. 113. *Colo.*—*Scott v. Watkins*, 25 *Colo. App.* 310, 138 Pac. 432; *Higgins v. People*, 2 *Colo. App.* 567, 31 Pac. 951. *Ga.*—*Chattanooga R. & C.*

be exercised until, but not after, an affirmance thereof in the appellate tribunal.<sup>10</sup> The courts of some jurisdictions, however, differentiate in the application of this rule between those cases which involve errors of such a nature as to be available on an appeal and those which do not, holding that it is only judgments of the former class which may not be opened or vacated after an affirmance,<sup>11</sup> and that if the error on which the application is based is of such a nature that it could not be noticed on appeal, this relief may be granted, even after an affirmance.<sup>12</sup>

5. **After Execution and Satisfaction.**—A court may, if the dictates of justice require, open a judgment notwithstanding an execution may have been issued thereon.<sup>13</sup> Indeed, it has been held proper to do this even after the judgment has been satisfied,<sup>14</sup> although in such a case a very clear and strong showing will be required.<sup>15</sup>

6. **In Vacation and at Chambers.**<sup>16</sup>—A judgment may not be opened or vacated at chambers,<sup>17</sup> nor, it has been held, may this be done in vacation,<sup>18</sup> though as to the latter proposition, there is authority

Ry. Co. v. Jackson, 86 Ga. 676, 684, 13 S. E. 109. **Haw.**—Gouveia v. Nakamura, 13 Hawaii 450. **Ia.**—Chambliss v. Haas, 125 Iowa 484, 101 N. W. 153. **N. Y.**—Nash v. Wetmore, 33 Barb. 155. The surrogate's court is expressly authorized to meet out this relief at such a time. *In re Dev Ermand*, 24 Hun 1. **Tex.**—Blum v. Wettermark, 58 Tex. 125; *Imlay v. Brewster*, 3 Tex. Civ. App. 103, 22 S. W. 226.

As to amendment after appeal, see *supra*, XIII, A, 3, a, (IV).

10. *Schweizer v. Raymond*, 6 Abb. N. C. (N. Y.) 378; *Bassett v. Hughes*, 48 Wis. 23, 3 N. W. 770. *Compare*, *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597.

[a] Statutes authorizing the granting of this relief on the ground of surprise, etc., for a prescribed period, have been held to have no application to a judgment which has been affirmed on appeal. *Ean v. Chicago M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N. W. 329, *questioning if not overruling State ex rel. Turner v. Circuit Court*, 71 Wis. 595, 38 N. W. 192.

11. *Corn Exchange Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805.

12. *Maddox v. Williams*, 87 Ky. 147, 7 S. W. 907; *McLean v. Nixon*, 18 B. Mon. (Ky.) 768; *Speak v. Mattingly*, 4 Bush (Ky.) 310.

13. *Den v. Evald*, 1 N. J. L. 201.

[a] In Minnesota the St. Paul municipal court may grant this relief after execution has issued out of the district court on a transcript of the

municipal court's judgment. *Bofham v. Perkins*, 43 Minn. 158, 44 N. W. 1150.

[b] **Effect of Vacating After Execution.**—An execution issued on a judgment falls when the judgment is set aside and this without any express direction to that effect in the order directing the setting aside. *Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235.

14. *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043; *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656; *Arnold v. Norfolk*, etc. Hosiery Co., 19 N. Y. Supp. 957. See *Kidd v. Curry*, 29 Hun (N. Y.) 215.

15. *Cooper v. Galbraith*, 24 N. J. L. 219; *Miller v. Alexander*, 1 N. J. L. 400, 459.

16. As to the power generally of a court or judge to act at chambers or in vacation, see the title "Judicial Officers."

17. *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498; *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989; *Clawson v. Hutchinson*, 14 S. C. 517, 521. See also *Forcheimer v. Tarble*, 23 Fla. 99, 1 So. 695; *Kime v. Fenner*, 54 Neb. 476, 74 N. W. 869. But see *Freiberg v. La Clair*, 78 Wis. 164, 47 N. W. 178.

[a] A justice of an appellate court has no power or authority to set aside, at chambers, a judgment of the trial court. *Cosgrove v. Butler*, 1 S. C. 241.

18. *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498.

[a] In Nebraska it was held in *Fisk*



to the contrary,<sup>19</sup> and in some states statutes provide for the granting of this relief in vacation, subject to various restrictions.<sup>20</sup>

**7. Statutory Limitations as to Time.**—The time within which the court may exercise this power is in many states largely controlled by statutes, which prescribe the time within which relief may be obtained.<sup>21</sup> Where, however, the case, though an appropriate one for relief, does not fall within the statute, the common-law limitations as to time are applied.<sup>22</sup>

**D. KIND OR CHARACTER OF JUDGMENT AFFECTED.—1. General Statement.**—The power of the court in this regard is not confined to any particular kind of judgments.<sup>23</sup> It extends to all sorts of adjudications such as interlocutory judgments,<sup>24</sup> office judgments,<sup>25</sup> decrees<sup>26</sup> and

*v. Thorp*, 51 Neb. 1, 70 N. W. 498, that "Our statute does not confer power upon a judge as contradistinguished from a court, to hear a motion to vacate or modify the judgment of the court after the term at which it is rendered. Usually a judge has no power to vacate or amend orders and judgments in vacation or at chambers. It may or must be conferred by statute."

19. *Imlay v. Brewster*, 3 Tex. Civ. App. 103, 22 S. W. 226. See *Smith v. Knight*, 11 W. Va. 749.

20. *Colo.*—Code, 1910, §81. *Idaho*. Rev. Codes 1908, §4229. *N. J.*—Comp. Stats. 1910, §248, p. 4127. *Utah*.—*Elliott v. Bastian*, 11 Utah 452, 463, 40 Pac. 713. *Va.*—*Brown v. Chapman*, 90 Va. 174, 17 S. E. 855; *Davis v. Com.*, 16 Gratt. (57 Va.) 134.

21. These statutes are discussed, *infra*, XIV, E, 2, d.

22. *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; *Riley v. Ryan*, 45 Misc. 151, 91 N. Y. Supp. 952; *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852. See *infra*, XIV, E, 2, d.

23. *State v. Dist. Court*, 38 Mont. 166, 99 Pac. 291; *North & Co. v. Yorke*, 174 Pa. 349, 34 Atl. 620.

[a] Judgment for Costs.—In Oregon under §102, Hill's Code (B. & C. Codes, 1902, §103) the court may, on a proper showing relieve a party from a judgment for costs entered against him through his "surprise, etc." *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025.

[b] An order made through mistake allowing an attorney a certain sum for aiding the state in the prosecution of a criminal may be set aside by the court which made it. *State v. Moore*, 1 Ohio Dec. (Reprint) 506, 10 W. L. J. 219.

[c] After a nonsuit, the plaintiff may at any time within a year, bring a new action, but this will not prevent his having such a judgment set aside for excusable neglect, provided the facts of the case permit. *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022.

**Judgments Against Infants.**—See 12 STANDARD PROC. 779.

24. *N. Y.*—*Patterson v. Hare*, 74 Hun 269, 26 N. Y. Supp. 626. Compare, *Offinger v. DeWolf*, 8 Jones & S. 446. *N. C.*—*Miller v. Justice*, 86 N. C. 26. *Ohio*.—*Manguno, etc. Co. v. Clymonts*, 10 Ohio Cir. Dec. 427. *Tex.*—*Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100.

[a] The court may set aside an interlocutory order after final judgment where not to do so would leave the final judgment liable to reversal. *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100.

[b] Under a statute providing for a "new trial" relief may only be had where there has been a trial on the merits. Accordingly when the plaintiff was in default of appearance for trial and the defendant took a judgment as of nonsuit, proceedings to vacate under this section could not properly be had. *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590. See also *Scott v. Stewart*, 5 Vt. 57.

25. *Powell v. Jopling*, 47 N. C. 400.

[a] Such judgments may be set aside at a subsequent term. *Ala.*—*Wilson v. Torbert*, 3 Stew. 296. *N. C.*—*Powell v. Jopling*, 47 N. C. 400; *Williams v. Beasley*, 35 N. C. 112. *Ohio*.—*Bougher v. Bougher*, Tapp. 190. *W. Va.*—*James' Sons & Co. v. Gott*, 55 W. Va. 223, 229, 47 S. E. 649.

26. *State v. Dist. Court*, 38 Mont. 166, 172, 99 Pac. 291; *Hocking Valley Bank v. Walters*, 1 Ohio St. 201.

orders.<sup>27</sup> It has been held that judgments upon verdict are not covered by statutes providing for relief from judgments rendered against a party through his excusable neglect, surprise, etc.<sup>28</sup>

2. **Judgments by Consent.** — The power to open and vacate a judgment by consent is treated elsewhere in this work.<sup>29</sup>

3. **Judgments by Confession.** — The opening and vacating of judgments by confession is fully treated elsewhere in this work.<sup>30</sup>

4. **Judgments of Inferior Courts.** — Although sometimes altered by statutes,<sup>31</sup> the general rule is that a court of general jurisdiction may not open or set aside a judgment of a court of inferior jurisdiction.<sup>32</sup> This is true for the reason that jurisdiction of such a proceeding lies only in the court which rendered the judgment from which relief is sought.<sup>33</sup> Hence, the judgment of an inferior court if assailed at all must be attacked in that court.<sup>34</sup> Where the transcript of a judgment

As to setting aside decrees generally, see 6 STANDARD PROC. 789, et seq.

As to decrees of divorce, see 7 STANDARD PROC. 799.

27. *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Potter v. Jennman*, 4 Ohio Dec. 444. See also *Hutchinson, etc. Co. v. Baldrige*, 53 Kan. 522, 36 Pac. 1005; *Hiatt v. Waggoner*, 82 N. C. 173.

[a] **Order of dismissal in divorce proceedings** may be set aside and the case reinstated on the calendar to enable the court to make an order in the cause for alimony. *Woodward v. Woodward*, 84 Mo. App. 328.

28. *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840; *Flowers v. Alford*, 111 N. C. 248, 16 S. E. 319; *Beck v. Bellamy*, 93 N. C. 129. See *Skinner v. Bryce*, 75 N. C. 287.

[a] **The Reason.**—"If the judgment was vacated the verdict would stand. . . . The statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same [time] disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. To vacate both, is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place." *Flowers v. Alford*, 111 N. C. 248, 16 S. E. 319.

29. See 14 STANDARD PROC. 922.

30. See 14 STANDARD PROC. 837, et seq.

31. *Cooper v. Cooper*, 107 App. Div.

118, 94 N. Y. Supp. 814; *Parmelee v. Rosenthal*, 10 Misc. 433, 31 N. Y. Supp. 872.

32. N. Y.—*Daniels v. Southard*, 36 App. Div. 540, 55 N. Y. Supp. 692; *Hoffman v. Fish*, 18 Abb. Pr. 76. N. C. *Whitehurst v. Merchants', etc. Transp. Co.*, 109 N. C. 342, 13 S. E. 937; *Moore v. Edwards*, 92 N. C. 43; *Morton v. Rippey*, 84 N. C. 611; *Broyles v. Young*, 81 N. C. 315; *Birdsey v. Harris*, 68 N. C. 92. Pa.—*McKinney v. Brown*, 130 Pa. 365, 18 Atl. 642; *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789; *Boyd v. Miller*, 52 Pa. 431; *Lacock v. White*, 19 Pa. 495; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Weldy v. Young*, 21 Pa. Co. Ct. 15; *Brendle v. Gorley*, 14 Pa. Co. Ct. 113; *Rohrbacker v. Schultz*, 10 Pa. Co. Ct. 282; *Bradley v. Stephenson*, 3 Pa. Co. Ct. 397; *Knoblauch v. Heffron*, 3 Pa. Dist. 765; *Brown v. Long*, 8 Kulp 429; *Ward v. Fannon*, 7 Kulp 488. See also *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Rice v. Kitzelman*, 1 Chester Co. Rep. 174. S. D.—*Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. Vt.—See *Davison v. Heffron*, 31 Vt. 687. Wash. *State ex rel. Grady v. Lockhart*, 18 Wash. 531, 52 Pac. 315.

33. *Boyd v. Miller*, 52 Pa. 431. See *Daniels v. Southard*, 36 App. Div. 540, 55 N. Y. Supp. 692, and *infra*, XIV, E, 2, c.

34. *Boyd v. Miller*, 52 Pa. 431; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Weldy v. Young*, 21 Pa. Co. Ct. 15; *Merold v. Rush Township*, 18 Pa. Co. Ct. 389. See also *Lacock v. White*, 19 Pa. 495.

As to the power of inferior courts in this regard, see *supra*, XIV, A, 2.

of an inferior court is filed or docketed in a court of superior jurisdiction for the purposes of lien, the latter court may, if it is an improper judgment, strike it from its records, but it may not open or vacate it or impair its force as a judgment of the inferior court from which it came.<sup>35</sup>

5. **Judgments on Constructive Service.**—While judgments rendered on constructive service of process may, like other judgments, be set aside, they are specially provided for by statute in some states,<sup>36</sup> and in some respects the rules respecting them are different from other judgments.<sup>37</sup>

6. **Judgments In Rem.**—A judgment in rem is never so conclusive upon the court which rendered it as to prevent such court from vacating it for sufficient cause,<sup>38</sup> at least before it has been finally executed.<sup>39</sup>

35. **Ind.**—*Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455. **N. Y.**—*Daniels v. Southard*, 36 App. Div. 540, 55 N. Y. Supp. 692; *Hoffman v. Fish*, 18 Abb. Pr. 76. *Compare, Daniels v. Southard*, 23 Misc. 235, 51 N. Y. Supp. 1136. **N. C.**—*Whitehurst v. Merchants', etc. Transp. Co.*, 109 N. C. 342, 13 S. E. 937; *Morton v. Rippey*, 84 N. C. 611. **Pa.**—*McKinney v. Brown*, 130 Pa. 365, 18 Atl. 642; *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Weldy v. Young*, 21 Pa. Co. Ct. 15; *Merold v. Rush Township*, 18 Pa. Co. Ct. 389; *Brendle v. Gorley*, 14 Pa. Co. Ct. 113; *Howe Sew. Mach. Co. v. Larimer*, 5 Pa. Co. Ct. 660; *Gearhart v. Flegal*, 3 Pa. Co. Ct. 399; *Singer v. Singer Mfg. Co.*, 2 Pa. Co. Ct. 578 (*overruling*, in this regard, *Campbell v. Exler*, 1 Pa. Co. Ct. 394); *Knoblauch v. Hefron*, 3 Pa. Dist. 765; *Ward v. Fannon*, 7 Kulp 488. See also *Klinger v. Koons*, 13 Pa. Co. Ct. 641. **S. C.**—*O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930. **S. D.** *Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393. **Wis.**—*Wait v. Sherman*, 61 Wis. 119, 20 N. W. 653.

[a] "Undoubtedly the court below would be justified in striking off the judgment if it appears on its face to be void, notwithstanding the fact that it was entered upon a transcript; for a void judgment is no judgment. It would be a mere blur upon the record of the Common Pleas, a something which has no business there, and that court, having control of its own records, could doubtless strike therefrom anything which had been unlawfully placed there." *McKinney v. Brown*, 130 Pa. 365, 18 Atl. 642.

[b] "For all purposes except liens the judgment still remains before the justice, and if it be assailed for the reasons suggested, there is the place to attack it." *Boyd v. Miller*, 52 Pa. 431. See also to the same effect, *Lacock v. White*, 19 Pa. 495; *Weldy v. Young*, 21 Pa. Co. Ct. 15.

[c] When the judgment of the inferior court has itself been set aside, the transcript is properly stricken off. *Banning v. Taylor*, 24 Pa. 297.

[d] If, despite this rule, a court of general jurisdiction in the office of whose clerk a judgment of an inferior court has thus been docketed should set such judgment aside, the proper procedure is to apply to the first named court to set aside its order thus made. *Whitehurst v. Merchants', etc. Transp. Co.*, 109 N. C. 342, 13 S. E. 937.

36. **Ind.**—*Burns' Ann. St.*, Rev. of 1914, §627. **Neb.**—*Rev. St.*, 1913, §7646. **N. D.**—*Rev. Codes*, 1905, §6846. **Ohio.** *Roberts v. Price*, 2 Ohio Dec. (Reprint) 681.

See also *supra*, XIV, B, 11.

[a] Judgments or decrees of divorce obtained in this manner are sometimes excepted from the operation of these statutes. See the statutes above cited and *Yorke v. Yorke*, 3 N. D. 343, 353, 55 N. W. 1095. But see 7 STANDARD PROC. 799.

37. See *supra*, XIV, B, 11; *infra*, XIV, E, 2, e, (II); XIV, E, 2, f, (III).

38. *McLain v. Duncanson*, 57 Ark. 49, 20 S. W. 597; *In re City of Rochester*, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161.

See the title "Proceedings In Rem."

39. *In re City of Rochester*, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161.



E. PROCEEDINGS FOR RELIEF. — 1. **On Court's Own Motion.** — The rule generally followed is that during the term at which a judgment is rendered it may, good cause appearing, be opened or vacated by the court which rendered it upon its own motion.<sup>40</sup> At a subsequent term, however, this power of the court is limited to such of its judgments as are void upon their face.<sup>41</sup>

2. **On Application of Parties.** — a. *Nature of Application.* — Formerly relief in such cases was obtained by *audita querela*,<sup>42</sup> or by writ of error *coram nobis*,<sup>43</sup> or by a bill in equity.<sup>44</sup> However, the trend of legislative and judicial effort has been towards the end that relief might be had in a summary proceeding in the cause,<sup>45</sup> with the result

40. **U. S.**—*Aetna Life Ins. Co. v. Hamilton County*, 79 Fed. 575, 25 C. C. A. 94; *Wyler v. Union Pac. R. Co.*, 89 Fed. 41. **Cal.**—*Reher v. Reed*, 166 Cal. 525, 137 Pac. 263. **Ga.**—*Jordan v. Tarver*, 92 Ga. 379, 17 S. E. 351; *Jones v. Garage Equipment Co.*, 16 Ga. App. 596, 85 S. E. 940. **Ind.**—*Ray v. Moore*, 19 Ind. App. 690, 49 N. E. 1083. **Ia.**—*Wolmerstadt v. Jacobs*, 61 Iowa 372, 16 N. W. 217. **Mo.**—*Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574. **N. C.**—See *Whitehurst v. Merchants'*, etc. *Transp. Co.*, 109 N. C. 342, 13 S. E. 937. **Okla.**—*Georgia Home Ins. Co. v. Halsey*, 37 Okla. 678, 133 Pac. 202. **Tenn.**—*Timmons v. Garrison*, 4 Humph. 148. **Tex.**—*Blackburn v. Knight*, 81 Tex. 326, 16 S. W. 1075. **W. Va.**—*Kelty v. High*, 29 W. Va. 381, 1 S. E. 561; *Smith v. Knight*, 14 W. Va. 749. **Wis.**—*Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910. See also *Smith v. Milwaukee*, etc. *Co.*, 119 Wis. 336, 96 N. W. 823.

*Contra*, *Long v. Board of Commissioners*, 5 Okla. 128, 47 Pac. 1063. And see *Smead Foundry Co. v. Chesbrough*, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670.

[a] "If the . . . judgment was void, the court could set it aside . . . , either on motion of the plaintiff in that action, or its own motion . . . " *Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114.

41. **N. C.**—*Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Hervey & Co. v. Edmunds*, 68 N. C. 243. **Ore.**—*White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Ladd & Tilton v. Mason*, 10 Ore. 308. **Pa.**—*Smaltz v. Hancock*, 118 Pa. 550, 12 Atl. 464. **R. I.**—See *In re College Street*, 11 R. I. 472.

*Compare*, *supra*, XIV, C, 2, b, (VI); *infra*, XIV, E, 2, d, (I).

[a] The court may of its own motion set aside a void judgment at any time. *White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

42. **Kan.**—*McMillan v. Baker*, 20 Kan. 50. **N. C.**—*Foard v. Alexander*, 64 N. C. 69. **Pa.**—*Savage v. Kelley*, 11 Phila. 525, 32 Leg. Int. 5; *Stephens v. Stephens*, 1 Phila. 108, 7 Leg. Int. 183; *Harper v. Kean*, 11 Serg. & R. 280. See also *Fisher v. Hestonville*, etc. *Ry. Co.*, 185 Pa. 602, 40 Atl. 97; *North & Co. v. Yorke*, 174 Pa. 349, 34 Atl. 620; *Curtis v. Slosson*, 6 Pa. 265. **Wis.**—*Spafford v. Janesville*, 15 Wis. 474.

See 3 STANDARD PROC. 875.

[a] "Formerly the remedy in such cases was by *audita querela*; but the courts began about two centuries ago to give a more cheap, expeditious and equally efficient remedy by motion; the writ of *audita querela* has everywhere fallen into disuse." *Spafford v. Janesville*, 15 Wis. 474.

43. **Ga.**—*Swinney v. Watkins*, 22 Ga. 570; *Nicholson v. Wilborn*, 13 Ga. 467. **Pa.**—*Savage v. Kelley*, 11 Phila. 525, 32 Leg. Int. 5; *Stephens v. Stephens*, 1 Phila. 108, 7 Leg. Int. 183. See also *Fisher v. Hestonville*, etc. *Ry. Co.*, 185 Pa. 602, 40 Atl. 97; *North & Co. v. Yorke*, 174 Pa. 349, 34 Atl. 620. **Tex.**—*Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537. **Utah.**—*Elliott v. Bastian*, 11 Utah 452, 463, 40 Pac. 713.

As to writ of error *coram nobis*, see *infra*, XVI, C.

44. See *infra*, XV; and the titles "Bills of Review;" "Bills To Impeach Judgments and Decrees."

45. *Szerlip v. Baier*, 21 Misc. 331, 47 N. Y. Supp. 133; *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 267, 65 Am. St. Rep. 818.

[a] "The tendency of modern legis-

that these earlier remedies have been largely superseded<sup>46</sup> by more expeditious and less expensive proceedings, such as a rule<sup>47</sup> or order to show cause,<sup>48</sup> or, as in many states, by motion.<sup>49</sup> Frequently, however, the statutes provide that the proceedings shall be by petition or com-

lation and practice has been to greatly abridge the necessity for resort to equity by amplifying and enlarging the remedies in courts of law for many of the exigencies which formerly called for equitable interposition . . .” *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. Rep. 818.

46. **U. S.**—*Pickett's Heirs v. Legerwood*, 7 Peters 144, 147, 8 L. ed. 638. **Ga.**—*Swinney v. Watkins*, 22 Ga. 570; *Nicholson v. Wilborn*, 13 Ga. 467. **Ill.**—*McKindley v. Buck*, 43 Ill. 488. **Ohio.** See *Parker v. Robinson*, 5 Ohio Dec. (Reprint) 367, 5 Am. L. Rec. 189. **Pa.** *Harper v. Kean*, 11 Serg. & R. 280; *Savage v. Kelley*, 11 Phila. 525, 32 Leg. Int. 5. **S. C.**—*Hill v. Watson*, 10 S. C. 268, 275. **Utah.**—*Elliott v. Bastian*, 11 Utah 452, 40 Pac. 713. **Wis.**—*Second Ward Bank v. Upman*, 14 Wis. 596.

47. *Fisher v. Hestonville*, etc. Ry. Co., 185 Pa. 602, 40 Atl. 97 (during the term); *Harper v. Kean*, 11 Serg. & R. (Pa.) 280; *Stephens v. Stephens*, 1 Phila. (Pa.) 108.

[a] In Pennsylvania the proceeding is had by a rule to (1) show cause but “The rule to open judgment and let the defendant into a defense is peculiar to Pennsylvania practice, and is a clear example of our system of administering equity under common law forms.” *Wilson v. Buchanan*, 170 Pa. 14, 32 Atl. 620. See also *Anderson v. Woodworth*, 1 Lack. L. N. (Pa.) 264. But (2) even in Pennsylvania where the object is to strike the judgment from the record the party may still proceed by motion. *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789. Compare, *Drexel's Appeal*, 6 Pa. 272. And (3) formerly motion was the proper remedy to set aside a judgment even in this jurisdiction. *Harper v. Kean*, 11 Serg. & R. (Pa.) 280; *Stephens v. Stephens*, 1 Phila. 108, 7 Leg. Int. 183.

48. N. J. Comp. St., 1910, §249, p. 4127.

49. **Ga.**—*Storey v. Weaver*, 66 Ga. 296; *Jones v. Killebrew*, 55 Ga. 153; *Fannin v. Durdin*, 54 Ga. 476, 479. **Idaho.** *Bernhard v. Idaho Bank*, etc. Co., 21 Idaho 598, 123 Pac. 481. **Ill.**—*McKindley v. Buck*, 43 Ill. 488; *Lyon v.*

*Boiloin*, 7 Ill. 629. **Ia.**—*Manning v. Ferguson*, 103 Iowa 561, 72 N. W. 762. **Kan.**—*List v. Jockheck*, 45 Kan. 349, 748, 27 Pac. 184. **Mass.**—*Davis v. National Life Ins. Co.*, 187 Mass. 468, 73 N. E. 658. **Mo.**—*Craig v. Smith*, 65 Mo. 536; *State v. Heinrich*, 14 Mo. App. 146. **Neb.**—*Pollock v. Boyd*, 36 Neb. 369, 54 N. W. 560. **N. H.**—*Claggett v. Simes*, 31 N. H. 56. **N. Y.**—*Vilas v. Plattsburgh & M. R. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913; *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190; *Szerlip v. Baier*, 21 Misc. 331, 47 N. Y. Supp. 133. **N. C.**—*Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435; *Scott v. Mutual*, etc. Life Assn., 137 N. C. 515, 50 S. E. 221; *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Ricaud v. Alderman*, 132 N. C. 62, 43 S. E. 543; *Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838; *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Grant v. Harrell*, 109 N. C. 78, 13 S. E. 718; *Whitehurst v. Merchants*, etc. Transp. Co., 109 N. C. 342, 13 S. E. 937; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480; *Fowler v. Poor*, 93 N. C. 466; *Mabry v. Henry*, 83 N. C. 298; *Blue v. Blue*, 79 N. C. 69; *Harrell v. Peebles*, 79 N. C. 26; *Doyle v. Brown*, 72 N. C. 393. See also *Sumner v. Sessoms*, 94 N. C. 371, 377. **N. D.** *Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515; *Garr v. Spaulding*, 2 N. D. 414, 51 N. W. 867. **Ohio.**—*Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28. **S. C.**—*Wren v. Johnson*, 62 S. C. 533, 540, 40 S. E. 937; *Ex parte Carolina Nat. Bank*, 56 S. C. 12, 33 S. E. 781; *Ex parte Rountree*, 51 S. C. 405, 411, 29 S. E. 66; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; *Hill v. Watson*, 10 S. C. 268. See also *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913. **Tenn.** *Mabry v. Cowan*, 6 Heisk. 295; *Jones v. Cloud*, 4 Coldw. 236; *Bank of Tennessee v. Skillern*, 2 Sneed 698. **Tex.** *Cruger v. McCracken*, 87 Tex. 584, 30

plaint in certain designated cases,<sup>50</sup> and by motion in other classes of

S. W. 537; *Krall v. Campbell Printing Press Co.*, 79 Tex. 556, 15 S. W. 565. **Utah**.—*Elliott v. Bastian*, 11 Utah 452, 463, 40 Pac. 713. See also *Park v. Higbee*, 6 Utah 414, 24 Pac. 524. **Va.**—*Brown v. Chapman*, 90 Va. 174, 17 S. E. 855; *Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235. **Wash.**—*State v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Spokane, etc. Lumb. Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748. **Wis.**—*Cooley v. Gregory*, 16 Wis. 303; *Spafford v. Janesville*, 15 Wis. 474. **Wyo.**—*Iba v. Central Assn. of Wyoming*, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

[a] "It is well settled in modern practice that for facts arising after judgment, or after the time has passed before judgment in which the party can avail himself of them in the action, showing that the judgment ought not to be executed in whole or in part, relief may be given upon motion to vacate the judgment . . ." *Cooley v. Gregory*, 16 Wis. 303.

[b] In Indiana the remedy is by "complaint or motion." *Burns' Ann. St.*, 1914, §405. And see *Smith v. Noe*, 30 Ind. 117.

[c] In Missouri the (1) form of proceeding to open an interlocutory judgment on a default is by motion. (*Rev. St.*, 1909, §2094, *construed* in *Showles v. Freeman*, 81 Mo. 540; *Campbell v. Garton*, 29 Mo. 343). But (2) when the judgment has been made final the remedy is "by petition for review" (*Rev. St.*, 1909, §2101). In this state it is (3) provided (*Rev. St.*, 1909, §2121), that a motion to set aside shall be the remedy for irregularity. The irregularity, it has been held, contemplated by this section, is one patent on the record, not one depending upon proof dehors the record. *Jeude v. Sims*, 258 Mo. 26, 166 S. W. 1048; *State ex rel. Potter v. Riley*, 219 Mo. 667, 118 S. W. 647; *Phillips v. Evans*, 64 Mo. 17, 20.

[d] In New York, where the ground alleged is fraud, it is discretionary with the court to permit the application to be made by motion or to direct that an independent action be instituted. *Beards v. Wheeler*, 76 N. Y. 213.

[e] In North Carolina if (1) the ground upon which it is sought to have a judgment set aside is that of fraud

the attack must be by an independent action and not by motion in the cause. *Scott v. Mutual, etc. Life Assn.*, 137 N. C. 515, 50 S. E. 221; *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935; *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271; *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Sharp v. Danville, etc. R. Co.*, 106 N. C. 308, 11 S. E. 530; *Smallwood v. Trenwith*, 110 N. C. 91, 14 S. E. 505; *Moech v. Coggin*, 101 N. C. 366, 7 S. E. 899; *Fowler v. Poor*, 93 N. C. 466. But (2) in partition proceedings the attack may be by petition in the cause. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271.

[f] A motion in the cause made upon proper grounds will not fall simply because it contains allegations of fraud. These may be treated as surplusage and the motion be upheld as sufficient on the other grounds. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716.

50. **Ark.**—*Kirby's Dig.*, 1904, §4433. **Ga.**—See *Union Compress Co. v. Lefler*, 122 Ga. 640, 50 S. E. 483. **Ia.**—*Code*, 1897, §4094. **Kan.**—*Dassler's Gen. St.*, 1909, §6195. **Ky.**—*Code Civ. Proc.*, 1906, §520. **Neb.**—*Rev. Sts.*, 1913, §§8207-8208. **Ohio.**—*Bates' Ann. St.*, 5th ed., §5358, *cited and construed* in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572; *Ralston v. Wells*, 49 Ohio St. 298, 30 N. E. 784; *Kingsborough v. Tousley*, 56 Ohio St. 450, 460, 47 N. E. 541; *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28; *Wellman v. Wellman*, 9 Ohio Cir. Ct. 72, 6 Ohio Cir. Dec. 61. **Okla.**—*Phoenix Bridge Co. v. Street*, 9 Okla. 422, 60 Pac. 221, *involving Civ. Code*, *St.*, 1893, §§586, 590.

See generally the statutes, and *infra*, XV.

[a] Under the Iowa statute the proceedings are commenced as in an original action. *Perry v. Kaspar*, 113 Iowa 268, 85 N. W. 22.

[b] In Washington, where the proceeding is by petition in certain cases, it is provided that all proceedings be conducted as nearly as possible in the same manner as an original action, except that the allegations in the petition shall be deemed denied without answer. *Roberts v. Shelton R. R. Co.*, 21 Wash. 427, 58 Pac. 576.



cases.<sup>51</sup> As to whether these statutory remedies are exclusive, the authorities are in conflict.<sup>52</sup> An application for this relief is, as regards its intrinsic nature, analogous to a proceeding in equity; it is addressed to the discretionary or equitable side of the court<sup>53</sup> and is

[c] In Georgia the remedy by motion is limited by the code to cases where the defect appears on the face of the record, but if the irregularities are of a nature which could have been taken advantage of by motion at common law, the same relief may be obtained by petition. *Union Compress Co. v. Leffler*, 122 Ga. 640, 50 S. E. 483. *Compare*, *Lawton v. Branch*, 62 Ga. 350; *Dugan v. McGlann*, 60 Ga. 353; *Boston v. Cummins*, 16 Ga. 102; *Wiley v. Kelsey*, 13 Ga. 223, 236; *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389.

51. Ark.—*Kirby's Dig.*, 1904, §4432. Ia.—*Code*, 1897, §4093. Kan.—*Dassler's Gen. Sts.*, 1909, §6194. Neb.—*Rev. Sts.*, 1913, §§8207-8. Ohio.—*Bates' Ann. St.*, 5th ed., §§5354, 5357, 5358, *cited and construed* in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572; *Ralston v. Wells*, 49 Ohio St. 298, 30 N. E. 784; *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28. See also *Wellman v. Wellman*, 9 Ohio Cir. Ct. 72, 6 Ohio Cir. Dec. 61; *Glass-Erdell Paper Co. v. Tel. Pub. Co.*, 11 Ohio Dec. (Reprint) 899, 30 W. L. Bul. 369. Okla.—*Phoenix Bridge Co. v. Street*, 9 Okla. 422, 60 Pac. 221. Wash.—*Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106; *Sturgis v. Dart*, 23 Wash. 244, 62 Pac. 858.

[a] Grounds for Both Proceedings. Should a case arise in such a jurisdiction where a party has grounds for relief both by motion and on petition, it has been held, that he need not institute two separate proceedings, but may join both grounds in his petition. *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103.

[b] For Unauthorized Appearance. The proper method of setting aside a judgment where an unauthorized appearance has been made, is by motion. *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844, *citing* *Critchfield v. Porter*, 3 Ohio 518. But as to right to resort to equity in such case, see *infra*, XV.

52. Exclusive Remedy.—*Ex parte*

*Carolina Nat. Bank*, 56 S. C. 12, 33 S. E. 781; *Peyton v. Peyton*, 28 Wash. 278, 301, 68 Pac. 757.

[a] Not Exclusive.—*List v. Jockheck*, 45 Kan. 349, 748, 27 Pac. 184; *Wheeler v. White*, 2 Ohio Dec. (Reprint) 584, 4 W. L. M. 110.

As to right to resort to equity rather than motion or other remedy at law, see *infra*, XV.

53. Ill.—*Fields v. Brown*, 89 Ill. App. 287. N. D.—*Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. Pa.—*Commonwealth v. Mellet*, 196 Pa. 243, 46 Atl. 434; *Lytle v. Hoover*, 175 Pa. 408, 34 Atl. 734; *Hunter v. Mahoney*, 148 Pa. 232, 23 Atl. 1004; *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335; *Wise's Appeal*, 99 Pa. 193; *Sniveley v. Fisher*, 21 Pa. Super. 56; *O'Brien v. Sylvester*, 12 Pa. Super. 408; *Knarr v. Elgren*, 7 Sad. 172, 9 Atl. 875; *Chandler v. Bennett*, 3 Pa. Co. Ct. 155; *Savage v. Kelley*, 11 Phila. 525, 32 Leg. Int. 5; *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. 128. See also *Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000; *Fisher v. Hestonville*, etc. Ry. Co., 185 Pa. 602, 40 Atl. 97; *Welton v. Littlejohn*, 163 Pa. 205, 29 Atl. 871; *Gottlieb v. Middleberg*, 23 Pa. Super. 525; *Zartman v. Spangler*, 21 Pa. Super. 647; *Nat. Mut. B. & L. Assn. v. Kondrak*, 9 Kulp 14. S. D.—*Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027. Tex.—*Cochrane v. Middleton*, 13 Tex. 275. Utah.—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027. Wash.—*Tacoma Lumber, etc. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115.

See *infra*, XIV, E, 2, h, (II).

[a] "A motion to set aside a judgment . . . is, in effect, the same as a bill to set a judgment aside . . ." *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[b] "A motion to vacate a judgment is in the nature of a bill in equity and the judgment defendant can only have such relief as he or she is equitably entitled to." *Fields v. Brown*, 89 Ill. App. 287.

[c] The control exercised by a court over its own judgment, during

to be determined upon equitable principles.<sup>51</sup> Generally it is not an independent action but is instead a special proceeding in the cause.<sup>55</sup> As regards its effect or the relief obtained it is similar to a motion for a new trial.<sup>56</sup> It is a direct attack upon the judgment,<sup>57</sup> as indeed it must be where the judgment is voidable merely.<sup>58</sup>

b. *Where Commenced.*—It is a generally recognized rule that a judgment may only be opened or vacated by the court which rendered it.<sup>59</sup> Thus, an application to set aside the judgment of an appellate

the term at which it was rendered, is a *common-law* right. "But at the expiration of the term . . . the further control over it for that purpose (to set it aside) is *equitable*, and was asserted originally in a bill in chancery." *Fisher v. Hestonville, etc. Ry. Co.*, 185 Pa. 602, 40 Atl. 97.

[d] "The remedy on motion to open judgment and let defendant in to defend is a *substitute*, not an exact *equivalent* for the more formal and cumbersome writs of *audita querela* and *error coram nobis*. Its nature is rather that of a bill in chancery . . ." *Savage v. Kelley*, 11 Phila. 525, 32 Leg. Int. 5.

54. **N. Y.**—*Vilas v. Plattsburgh, etc. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844. **N. D.**—*Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. **Pa.**—*Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335; *Rehm v. Frank*, 16 Pa. Super. 175. See also *Knarr v. Elgren*, 7 Sad. 172, 9 Atl. 875. **Tex.**—*Foster v. Martin*, 20 Tex. 118; *Cochrane v. Middleton*, 13 Tex. 275.

See *infra*, XIV, E, 2, h, (II).

55. **Ia.**—*Johnson, etc. Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760. **N. C.**—*Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581. **Ohio.**—*Bever v. Beardmore*, 40 Ohio St. 70, 78; *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28.

See also *Whitehead v. Post*, 2 Ohio Dec. 468. But see *List v. Jockheck*, 45 Kan. 349, 748, 27 Pac. 184.

*Compare, supra*, XIII, D, 2, a.

[a] In Ohio this proceeding should not, as regards this feature, be confused with an application for a new trial under *Bates' Ann. Sts.*, 5th ed., §5309, which is considered as an independent and original action. *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28.

As to independent proceedings in equity, see *infra*, XV.

56. *Foster v. Martin*, 20 Tex. 118. See also *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127, 25 W. L. Bul. 28, and the title "New Trial."

57. **Cal.**—*People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448. *Compare, People v. Norris*, 144 Cal. 422, 77 Pac. 998. **N. C.**—*Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435; *Ricaud v. Alderman*, 132 N. C. 62, 43 S. E. 543. **Pa.**—*Milleisen v. Senseman*, 4 Pa. Super. 455. See also *Drexel's Appeal*, 6 Pa. 272. **Tex.**—*Mikeska v. Leon*, 63 Tex. 44; *Fendrick v. Shea*, 1 Tex. Civ. Cas., §912.

58. *Mikeska v. Leon*, 63 Tex. 44; *Fleming v. Seeligson*, 57 Tex. 524.

As to collateral attack on judgments, see *infra*, XVII, A.

59. **U. S.**—*Elder v. Richmond, etc. Min. Co.*, 58 Fed. 536, 7 C. C. A. 354. **Ala.**—*Bagby v. Chandler*, 8 Ala. 230. **Colo.**—*Comet Con. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506. **Ga.**—*Haskens v. State*, 114 Ga. 837, 40 S. E. 997; *Brady v. Brady*, 71 Ga. 71, 77. **Ill.**—*Lyon v. Boilvin*, 7 Ill. 629. See also *McKindley v. Buck*, 43 Ill. 488. **Ind.**—*Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537. **Minn.**—*Buffham v. Perkins*, 43 Minn. 158, 44 N. W. 1150; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71. **Mo.**—*Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911. **Neb.**—*State v. Duncan*, 37 Neb. 631, 56 N. W. 214. **N. H.**—*Claggett v. Simes*, 31 N. H. 56. **N. Y.**—*In re Directors of Broadway Ins. Co.*, 23 App. Div. 282, 48 N. Y. Supp. 299. **N. C.**—*Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435; *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074; *Koonce v. Butler*, 84 N. C. 221, 226; *Harrell v. Peebles*, 79 N. C. 26. **N. D.**—*Rev. Code*, 1905, §6766; *Garr v. Spaulding*, 2 N. D. 414, 51 N. W. 867. See also *Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540. **Ohio.**—*Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130. **Pa.**—*McKinney v. Brown*, 130 Pa. 365, 18 Atl.

tribunal must be addressed to that court,<sup>60</sup> and an appellate court may not entertain an application to vacate or set aside a judgment of a trial court,<sup>61</sup> unless it is expressly authorized to do so by statute.<sup>62</sup> For the same reason any attack upon the judgment of an inferior court even though a transcript thereof be filed in a higher court must be made in the former rather than the latter.<sup>63</sup>

c. *Parties.* — (I.) *The Applicant.* — (A.) *GENERAL RULE.* — It is a generally accepted rule that the applicant for relief must be a record party to the action in which the judgment attacked was rendered,<sup>64</sup> and that a stranger to the record will not be heard on such a pro-

642. See also *Boyd v. Miller*, 52 Pa. 431; *Wilson v. Hayes*, 18 Pa. 354. **R. I.** See also *In re College Street*, 11 R. I. 472. **S. C.**—*Thew v. Southern Porcelain Mfg. Co.*, 8 S. C. 286; *Posey v. Underwood*, 1 Hill 262. **Tex.**—*Metzger v. Wendler*, 35 Tex. 378. See also *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537. **Vt.**—*Scott v. Stewart*, 5 Vt. 57. **W. Va.**—*Carlson's Admr. v. Ruffner*, 12 W. Va. 297. See also *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

[a] "One circuit court has no jurisdiction to open, ' . . . or 'set aside' . . . 'the judgment of another circuit.'" *Cardinal v. Eau Claire Lumb. Co.*, 75 Wis. 404, 44 N. W. 761.

[b] "It would violate all rules of judicial procedure, as well as common courtesy, for one court to overhaul a judgment which remains within the jurisdiction of the court that rendered it." *Boyd v. Miller*, 52 Pa. 431.

[c] *Where a judgment is reversed* and the cause remanded with directions to render a judgment in accordance with the opinion of the appellate court, the judgment rendered pursuant to that opinion should be proceeded against in the court of original jurisdiction for the reason that it is a judgment not of the appellate court, but of the trial court and it is only over their own judgments that courts may exercise this power of opening or vacating. "A judgment is rendered by the court that hears the case and applies the law to it; and it is immaterial in this regard from what source it derived its knowledge of the law applicable to the case." *Carey v. Kemper*, 45 Ohio St. 93, 11 N. E. 130.

[d] *In inferior courts this same rule applies.* *Boyd v. Miller*, 52 Pa. 431; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Weldy v. Young*, 21 Pa. Co. Ct. 15;

*Whitehurst v. Merchants', etc. Transp. Co.*, 109 N. C. 342, 13 S. E. 937; *Neville v. Pope*, 95 N. C. 346.

[e] *Court must act within the county* (1) where judgment was rendered (*Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793; *Birdsey v. Harris*, 68 N. C. 92), except (2) by consent of the parties which must be made in some manner to appear from the records, as by written stipulation filed, or by a recital to that effect in the order determining the application. *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793. See also *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

60. *Thew v. Southern Porcelain Mfg. Co.*, 8 S. C. 286.

61. *Veeder v. Baker*, 83 N. Y. 163.

62. *Kirby's Dig. (Ark.)*, 1904, §4426; *Rev. Laws (Haw.)*, 1905, §1867.

63. *Mabbett v. Vick*, 53 Wis. 158, 10 N. W. 84.

See also *supra*, XIV, A, 2.

64. **Cal.**—*Smith v. Roberts*, 1 Cal. App. 148, 81 Pac. 1026. **Ga.**—*Merchants', etc. Bank v. Haiman*, 80 Ga. 624, 5 S. E. 795; *Cathing v. State*, 62 Ga. 243. **Ill.**—*In re Burdick*, 162 Ill. 48, 44 N. E. 413. **N. Y.**—*Lowler v. New York*, 26 Barb. 262, 5 Abb. Pr. 484, 15 How. Pr. 123. **N. J.**—*Leonard v. New York Bag Co.*, 28 N. J. Eq. 192; *Ward v. Montclair Ry. Co.*, 26 N. J. Eq. 260. **N. C.**—*Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6; *Hervey & Co. v. Edmunds*, 68 N. C. 243. **Okla.** See *Brown v. Massey*, 13 Okla. 670, 76 Pac. 226. **Pa.**—*Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603, 23 Am. St. Rep. 282; *Harper v. Biles*, 115 Pa. 594, 8 Atl. 466; *Milleisen v. Senseman*, 4 Pa. Super. 455; *Philadelphia v. Fraley*, 2 Pa. Co. Ct. 439. **R. I.**—See also *Pierce v. Probate Court*, 19 R. I. 472, 34 Atl. 992. **S. D.**—*Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167. **Tenn.**—*Pettit*



ceeding,<sup>65</sup> except in those cases where a statute permits it.<sup>66</sup> That the applicant is a record party, however, whether he be a plaintiff,<sup>67</sup> or a

*v. Cooper*, 9 Lea 21. **Vt.**—*Robinson v. Stevens' Admr.*, 63 Vt. 555, 22 Atl. 80. *Wash.*—*Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. **Wis.**—*Pier v. Oneida Co.*, 124 Wis. 398, 102 N. W. 912; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107; *Bean v. Fisher*, 14 Wis. 57; *Packard v. Smith*, 9 Wis. 184. See also *Gray v. Gates*, 37 Wis. 614.

[a] This rule is restricted to cases where the attack is a direct one and when such a judgment is offered in evidence or sought in any manner to be enforced against strangers, as to whom it is not res adjudicata, they may by a collateral assault impeach it for fraud or collusion. *In re Burdick*, 162 Ill. 48, 44 N. E. 413.

[b] Defendant as against whom a suit has been discontinued is not a proper party to an application to open the judgment obtained in such suit. *Hathaway v. Fullerton*, 11 Wis. 287.

[c] "It is well settled that a stranger to an action has no right to disturb a judgment by a motion to vacate it without first having obtained the status of a party . . ." *Pier v. Oneida Co.*, 124 Wis. 398, 102 N. W. 912.

[d] A receiver of a corporation against which an action had been instituted is a proper party to a motion to vacate the judgment rendered in such action. *Denton v. Merchants Nat. Bank*, 18 Wash. 387, 51 Pac. 473.

[e] A obtains a judgment, establishing his lien upon certain property, against B. Subsequently A. sues C. for conversion of this property whereupon C. makes application to the court to set aside the judgment against B. It was held that he did not have such an interest, at least no such record interest, as would constitute him a proper party to such a proceeding. *Robinson v. Stevens' Admr.*, 63 Vt. 555, 22 Atl. 80.

[f] In Pennsylvania a subsequent judgment creditor may not apply to have a judgment against his debtor opened. The proper practice is to cite the plaintiff and the sheriff to show cause why the money raised at the sale under the execution issuing out of the original action should not be paid into court and then proceed to dispute

the validity of the judgment. *Moore v. Dunn*, 147 Pa. 359, 23 Atl. 596.

65. **U. S.**—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853; *Foster v. Mansfield C. & L. M. R. Co.*, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. ed. 899. **Cal.**—*Smith v. Roberts*, 1 Cal. App. 148, 81 Pac. 1026. **Ga.**—*Suwannee Turp. Co. v. Baxter*, 109 Ga. 597, 35 S. E. 142; *Tarver v. New England Mortg. Sec. Co.*, 96 Ga. 536, 23 S. E. 507. See also *Cathing v. State*, 62 Ga. 243. **Ill.**—*West v. Carter*, 129 Ill. 249, 21 N. E. 782. **Ind.**—*Cassel v. Case*, 14 Ind. 393. **Ia.**—*Wood v. Wood*, 136 Iowa 128, 113 N. W. 492; *Coleman v. Case*, 66 Iowa 534, 24 N. W. 31. **Mich.**—*People ex rel. Hyde v. Judges of Cir. Ct.*, 1 Doug. 417. **Neb.**—*Powell v. McDowell*, 16 Neb. 424, 20 N. W. 271. **N. C.**—*McDonald v. McBryde*, 117 N. C. 125, 23 S. E. 103; *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566; *Walton v. Walton*, 80 N. C. 26; *Smith v. Newbern*, 73 N. C. 303. **Pa.**—*Drexel's Appeal*, 6 Pa. 272; *Milleisen v. Senseman*, 4 Pa. Super. 455; *Philadelphia v. Fraley*, 2 Pa. Co. Ct. 439; *Coleman's Petition*, 4 Clark 199. **Wis.**—*Aetna Ins. Co. v. Aldrich*, 38 Wis. 107; *Bean v. Fisher*, 14 Wis. 57.

[a] Trustees of a mortgage may not have a judgment against the mortgagor set aside. *Indianapolis D. & W. Ry. Co. v. Crockett*, 2 Ind. App. 136, 28 N. E. 222.

[b] The assignee of a defendant was refused a standing in court upon an application for this relief, in *Jacobs v. Burgwyn*, 63 N. C. 196.

66. **N. Y.** Code Civ. Proc., §1285. See *Milleman v. New York*, 18 How. Pr. (N. Y.) 542; *Outwater v. New York*, 18 How. Pr. (N. Y.) 572.

67. **Cal.**—*Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554. **N. Y.**—*Weston v. Citizens Nat. Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743. **N. C.**—See *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511. **Pa.**—*Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603, 23 Am. St. Rep. 282; *Milleisen v. Senseman*, 4 Pa. Super. 455. See also *Herdie v. Woodward*, 75 Pa. 479. **S. C.**—*Turner v.*

defendant,<sup>68</sup> or an unnecessary party,<sup>69</sup> is ordinarily sufficient, even though he seeks to have set aside a judgment rendered in his own favor.<sup>70</sup>

(B.) LIMITATIONS AND EXCEPTIONS. — In some instances the general rule has been relaxed to the extent of permitting one in privity with a record party<sup>71</sup> or who is possessed of rights or equities which are directly and injuriously affected, to seek relief in this manner;<sup>72</sup> and

Foreman, 47 S. C. 31, 24 S. E. 989, involving Rev. St., 1872, Part III, ch. CV, §2, p. 197. S. D.—*Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778.

[a] Only by Party Who Is Prejudiced.—An application to set aside or vacate a judgment because of an alleged irregularity may be urged only by a party prejudiced thereby. *Havermeyer v. Brooklyn Sugar Co.*, 13 N. Y. Supp. 873; *Hinsdale v. Hawley*, 89 N. C. 87; *Hervey & Co. v. Edmunds*, 68 N. C. 243; *Jacobs v. Burgwyn*, 63 N. C. 196.

68. *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554; *Milleisen v. Senseman*, 4 Pa. Super. 455. See also *Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603, 23 Am. St. Rep. 282.

[a] Interpleader.—An apparent exception to the general rule just stated is presented by a case in which a third party is ordered, at a defendant's instance, to interplead with the plaintiff; in such a case the original defendant is thereafter, at least so far as an application for this relief is concerned, a stranger to the action within the meaning of the general rule above. *Lippman v. Warren*, 94 Mo. App. 486, 68 S. W. 225.

69. It is not essential that a defendant seeking to have a judgment set aside should have been a necessary party to the action in which such judgment was rendered. It is enough that he was made so. *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511.

70. Cal.—*Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686; *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344. Conn.—*Porter v. Orient Insurance Co.*, 72 Conn. 519, 45 Atl. 7. Mo.—*Downing v. Still*, 43 Mo. 309. N. Y.—*Montgomery v. Ellis*, 6 How. Pr. 326; *Weston v. Citizens' Nat. Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743; *Graef v. Bernard*, 7 Misc. 246, 27 N. Y. Supp. 263. Pa.—*Herdie v. Woodward*, 75 Pa. 479. Tex.

*Richardson v. Ellett*, 10 Tex. 190. Wash. *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

[a] A plaintiff who has procured a default to be entered may (1) have the same set aside (*Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686), where he (2) discovers that the initial process was defective (*Richardson v. Ellett*, 10 Tex. 190), or (3) that he has been proceeding upon an erroneous theory and he desires to amend. *Herdie v. Woodward*, 75 Pa. 479.

71. *Dimick v. Deringer*, 32 Cal. 488; *In re Burdick*, 162 Ill. 48, 44 N. E. 413.

[a] In a suit against A. and B. and other "unknown owners" of real estate C. was permitted, as an "unknown owner," to come in and move the court to vacate its judgment. *Gray v. Gates*, 37 Wis. 614.

72. Ala.—*Alabama Nat. Bank v. Mary Lee Co.*, 108 Ala. 288, 19 So. 404; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 20 So. 84; *Gay v. Brierfield Iron Co.*, 94 Ala. 303, 11 So. 353. Ill.—*In re Burdick*, 162 Ill. 48, 44 N. E. 413. N. Y.—*Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; *Marshall v. McGee*, 33 Hun 354. Pa.—*Stephens v. Stephens*, 1 Phila. 108, 7 Leg. Int. 183. See also *Entenman v. Keebler*, 13 Phila. 56. S. C.—*Posey v. Underwood*, 1 Hill 262. Tex.—See *Moser v. Hussey*, 67 Tex. 456, 3 S. W. 688. Wash.—*Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481.

[a] In *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748, it was said that the court "may open them (its judgments) upon the application of anyone, in the furtherance of justice."

[b] A landlord, against whose tenant a default judgment has been rendered in an action of ejectment, may ask for this relief. *Dimick v. Deringer*, 32 Cal. 488. See also *Moser v. Hussey*, 67 Tex. 456, 3 S. W. 688.

it has been held that a person who has a substantial interest in the matter may become a party by intervention.<sup>73</sup> So also where the record party is only the nominal and not the real party in interest, the latter will be treated as having a standing in court on an application of this sort.<sup>74</sup> It is sometimes provided by statute that not only a record party, but any one affected by a void judgment, may apply to the court to have such judgment set aside.<sup>75</sup> Although a creditor of a party against whom a judgment has been rendered may, under some circumstances, apply to the court for this relief, the mere fact that the applicant stands in that relation to the defendant and that the judgment, if undisturbed, will diminish his fund, will not give him standing in court on a proceeding to obtain this relief.<sup>76</sup> Should the attacking creditors, however, proceed upon the ground of fraud or collusion, he will be entitled to be heard and, after a sufficient showing, the judgment may be opened at his instance.<sup>77</sup>

73. *Walker v. Equitable Mtg. Co.*, 114 Ga. 862, 40 S. E. 1010.

74. *N. Y.*—*Jakobi v. Gorman*, 2 Misc. 190, 21 N. Y. Supp. 762. *S. D.*—*Brettell v. Deffebach*, 7 S. D. 21, 60 N. W. 167. *Wis.*—*Pier v. Oneida Co.*, 124 Wis. 398, 102 N. W. 912; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107.

[a] The principle upon which this exception rests is stated in *Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167, where the court says that "although disinterested intermeddlers should not be permitted to disturb society and encourage litigation by undertaking to overturn adjudications to which the original parties make no objection . . . the real party in interest . . . can move, and in a proper case secure the vacation of a judgment . . ." *Brettell v. Deffebach*, 7 S. D. 21, 60 N. W. 167.

[b] *Indemnitors of a Sheriff.*—Where a sheriff who has been indemnified makes willful default in a replevin suit, his indemnitors may apply to have the judgment thereupon rendered opened. *Jakobi v. Gorman*, 2 Misc. 190, 21 N. Y. Supp. 762.

75. *Phoenix Bridge Co. v. Street*, 9 Okla. 422, 60 Pac. 221.

76. *Evans v. Adams*, 15 N. J. L. 373; *Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603, 23 Am. St. Rep. 282.

[a] *Judgment Creditor.*—It has been said that only a judgment creditor may pursue this remedy. *Melville v. Brown*, 16 N. J. L. 363. See also *Cochran v. Eldridge*, 49 Pa. 365. Compare, *Geist v. Geist*, 2 Pa. 441.

[b] But an attaching creditor of a defendant has been held to be a proper party to an application to have a judgment by confession against the defendant set aside. *Posey v. Underwood*, 1 Hill (S. C.) 262.

77. *U. S.*—*Smith v. Schwed*, 9 Fed. 483. *Ia.*—*Bernard v. Douglas*, 10 Iowa 370. *N. Y.*—*Markell v. Hill*, 34 Misc. 133, 69 N. Y. Supp. 537, reversed on the facts in 64 App. Div. 191, 71 N. Y. Supp. 924. See also *Beards v. Wheeler*, 76 N. Y. 213. *N. C.*—See also *Jacobs v. Burgwyn*, 63 N. C. 196. *Pa.*—*Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603, 23 Am. St. Rep. 282; *Harper v. Biles*, 115 Pa. 594, 8 Atl. 466; *Lewis v. Rogers*, 16 Pa. 18. See also *Drexel's Appeal*, 6 Pa. 272; *Milleisen v. Senseman*, 4 Pa. Super. 455; *Whiting v. Johnson*, 11 Serg. & R. 328. *S. C.*—*Posey v. Underwood*, 1 Hill 262.

[a] A judgment on an irregular default, one prematurely entered, is not fraudulent, it is only irregular and as such may not be set aside by a creditor. *Rothchild v. Link*, 29 App. Div. 580, 51 N. Y. Supp. 253.

[b] *Creditor of Deceased.*—Where an administrator appealed from a decree of the probate court disallowing certain items in his account, and other creditors joined with the appellees in resisting the appeal, a creditor who, with full knowledge of these proceedings, stood passively by and took no part therein, will not be permitted to have set aside a decree entered by agreement of the litigants in said appeal on the ground that it was entered through collusion and in fraud of his



(C.) **SUCCESSOR TO INTEREST OF RECORD PARTY.** — Ordinarily the successor in interest of a party entitled to this relief will be given a standing in court on such an application.<sup>76</sup> Thus, when the interest of a defendant is transferred, *pendente lite*, but, no substitution being made on the record, judgment is rendered against the original defendant, the real defendant who has succeeded to the interest of the record defendant may apply to the court to set aside the judgment.<sup>79</sup> The legal representatives of a deceased party may properly apply for relief of this nature from a judgment rendered in an action to which their decedent was a party,<sup>80</sup> and this is expressly provided for by statutes in some states.<sup>81</sup>

(D.) **JOINDER.** — While all of the defendants in a joint judgment have been held necessary parties to a proceeding to vacate it,<sup>82</sup> there are authorities to the effect that a joint judgment may be set aside or vacated on the application of one of the defendants thereto.<sup>83</sup>

(II.) **The Adverse Parties.** — Generally all parties adversely interested in maintaining a judgment should be made parties to the proceeding to vacate it.<sup>84</sup> Legal representatives are necessary parties in proceedings to set aside a judgment in favor of their decedent.<sup>85</sup>

d. **Time of Making Application.** — (I.) **General Statement.** — An ap-

rights. *Pierce v. Probate Court*, 19 R. I. 472, 34 Atl. 992.

78. Cal.—*Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *People v. Mul-lan*, 65 Cal. 396, 4 Pac. 348. Minn.—*Krip v. Clinger*, 97 Minn. 125, 106 N. W. 108. N. J.—*Reed v. Bainbridge*, 4 N. J. L. 351. N. Y.—*Kendall v. Hodgins*, 7 Abb. Pr. 309, 1 Bosw. 659. Okla.—*Brown v. Massey*, 13 Okla. 670, 76 Pac. 226. Utah.—*Thomas v. Morris*, 8 Utah 284, 31 Pac. 446.

[a] The assignee of a defunct corporation may apply to the court to set aside a judgment rendered against such corporation, for the entire amount claimed, with costs, upon an offer made by the attorney of the corporation and its president, and in the face of an injunction restraining such corporation from incumbering any of its property. *Willie v. Rapid Valley Horse Ranch Co.*, 7 S. D. 114, 63 N. W. 546.

79. *Thomas v. Morris*, 8 Utah 284, 31 Pac. 446.

80. Cal.—*Davidson v. All Persons*, 18 Cal. App. 723, 124 Pac. 570. Ia.—*Wood v. Wood*, 136 Iowa 128, 113 N. W. 492. N. Y.—*Hartigan v. Nagle*, 11 Misc. 449, 32 N. Y. Supp. 220. Pa.—*Harper v. Biles*, 115 Pa. 594, 8 Atl. 446. See also *Dick v. Mahoney*, 21 Pa. Co. Ct. 241; *Stephens v. Stephens*, 1 Phila. 108, 7 Leg. Int. 183.

[a] A special administratrix may

intervene in an action for the purpose of moving to set aside a judgment against her intestate. *Jefferson County Bank v. Robbins*, 67 Wis. 68, 29 N. W. 209, 893.

81. Cal.—Code Civ. Proc., §473. Colo.—Code, §81. Idaho.—Where summons in the action was not personally served. Rev. Codes, 1908, §4229. N. Y. Code Civ. Proc., §1824.

82. *Bever v. Beardmore*, 40 Ohio St. 70.

83. Ind.—*Fall v. Evans*, 20 Ind. 210. Ia.—*Broghill v. Lash*, 3 G. Gr. 357. Mont.—*Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635. N. Y.—*Weston v. Citizens' Nat. Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743; *Parker v. Linden*, 59 Hun 623, 13 N. Y. Supp. 787. Vt. *Franks v. Lockey*, 45 Vt. 395.

As to granting relief to one of several parties, see *infra*, XIV, F, 2.

84. Ga.—See *Turner v. Jordan*, 67 Ga. 604. Kan.—*Ferguson v. Smith*, 10 Kan. 394. Ohio.—*Bever v. Beardmore*, 40 Ohio St. 70, 79.

[a] After a sheriff's sale, the judgment, to satisfy which the sale was made, cannot be opened or set aside upon an application to which the sheriff's vendee is not a party. *Howe Sew. Mach. Co. v. Larimer*, 5 Pa. Co. Ct. 660.

85. *Grier v. Jones*, 54 Ga. 154.

plication for this relief, made after the court has, by the lapse of time, been stripped of its power to grant the relief sought, would obviously be barren of results and so the general rule is that the application must be made before the close of the term at which the judgment was rendered;<sup>86</sup> and in a case where the court's power to vacate the judgment extends beyond the term,<sup>87</sup> the applicant must nevertheless be diligent in the pursuit of his remedy.<sup>88</sup> This question is now largely regulated by statutes prescribing the time within which an application shall be made or limiting the time within which relief may be granted, upon grounds therein specified.<sup>89</sup> Under these statutes an application may be made within the time therein prescribed without regard to the term of court,<sup>90</sup> but after this statutory period has run an application

86. See *supra*, XIV, C, 2.

87. See *supra*, XIV, C, 2, b; and *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

88. See *infra*, XIV, E, 2, d, (II).

89. **Alaska.**—Carter's Ann. Codes, 1900, §93, Part IV. **Ariz.**—Rev. Codes, 1913, §600, Title 6. **Cal.**—Code Civ. Proc., §473. **Ga.**—Girardey v. Bessman, 77 Ga. 483. **Idaho.**—Rev. Codes, 1908, §4229; Bunnell & E. Inv. Co. v. Curtis, 5 Idaho 652, 51 Pac. 767. **Ill.**—Courtright's St., 1916, ch. 44, §382 (applying to municipal courts); Gage v. City of Chicago, 141 Ill. 642, 31 N. E. 163; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834; Gibson v. Manly, 15 Ill. 140. **Ind.**—Burns' Ann. St., Rev. 1914, §§405, 627; Grayson v. Patterson, 7 Ind. 238. **Ia.**—Code, 1897, §4093-4. And see Priestman v. Priestman, 103 Iowa 320, 72 N. W. 535; Hunt v. Stevens, 26 Iowa 399. **Kan.**—Dassler's Gen. St., 1909, §6192; Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; First Nat. Bank v. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56. **Ky.**—Civ. Code Prac., 1906, §519. **Minn.**—Rev. L. 1905, §4160; Code, 1906, §4160. And see Hoffman v. Freimuth, 101 Minn. 48, 111 N. W. 732; Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108. **Mo.**—Downing v. Still, 43 Mo. 309; Harkness v. Austin, 36 Mo. 47. **Neb.**—Rev. St., 1913, §§7646, 8214; Rine v. Rine, 91 Neb. 248, 135 N. W. 1051. **N. J.**—Comp. St., 1910, §112, p. 4087. **N. M.**—St., 1915, §§4224, 4230 (Act of Mar. 1897; L. 1897, c. 73, §137; C. L. 1897, §2685); Weaver v. Weaver, 16 N. M. 98, 113 Pac. 599; Lasswell v. Kitt, 11 N. M. 459, 70 Pac. 561; Rio Grande Irr. & C. Co. v. Gildersleeve, 9 N. M. 12, 48 Pac. 309. **N. Y.** Code Civ. Proc., §§724, 1282, 1290. See *Corn Exchange Bank v. Blye*, 119 N. Y.

414, 23 N. E. 805; *In re City of Buffalo*, 78 N. Y. 362; *Schweizer v. Raymond*, 6 Abb. N. C. 378; *In re Mather's Estate*, 41 Misc. 414, 84 N. Y. Supp. 1105; *Feist v. Third Ave. R. Co.*, 13 Misc. 240, 34 N. Y. Supp. 57; *In re Foulks' Est.*, 18 Civ. Proc. 175, 10 N. Y. Supp. 515; *Dept. of Health v. Babcock*, 84 N. Y. Supp. 604; *In re Post*, 14 N. Y. Supp. 427. **N. C.**—Rev. 1905, §§449, 513. **N. D.**—See Rev. Codes, 1905, §§6765, 6766, 6846, 6884; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581; *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296. **Ohio.** *Bates' Ann. St.*, 5th ed., §5357. See *Wohlgemuth v. Taylor*, 25 Ohio Cir. Ct. 271. **Ore.**—See *Durham v. Com. Bank*, 45 Ore. 385, 77 Pac. 902. **Tenn.**—*Brown v. Brown*, 86 Tenn. 277, 302, 6 S. W. 869, 7 S. W. 640. **Utah.**—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027. **Vt.**—See *Arlington Mfg. Co. v. Mears*, 65 Vt. 414, 26 Atl. 587. **W. Va.** *Buskirk v. Ferrell*, 51 W. Va. 198, 41 S. E. 123. **Wis.**—*Pier v. Storm*, 37 Wis. 247. **Wyo.**—*Lee v. Cook*, 1 Wyo. 413.

See generally the statutes.

[a] Statutes limiting the time for making this application have been held to apply to future cases only. *Health Dep. v. Babcock*, 84 N. Y. Supp. 604; *Lee v. Cook*, 1 Wyo. 413.

[b] **Waiver.**—The requirements of the statutes in this respect may be waived. *Hudgins v. White*, 65 N. C. 393.

90. **Neb.**—Rev. St., 1913, §8214. **N. Y.**—Code Civ. Proc., §724. **N. C.**—Rev., 1905, §513; *Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838; *McLean v. McLean*, 84 N. C. 366. **N. D.** See Rev. Codes, 1905, §§6846, 6884; *Minnesota Thresher Mfg. Co. v. Holz*,

for this relief will be unavailing.<sup>91</sup> Whether the mere filing of an application within the period prescribed constitutes a compliance with the statute depends upon its provisions and whether the time limit relates merely to the application or governs the power of the court<sup>92</sup> to

- 10 N. D. 10, 81 N. W. 581; *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826. Wash.—See also *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042. Wis.—*Loomis v. Rice*, 37 Wis. 262; *Scheer v. Keown*, 34 Wis. 349; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265; *Flanders v. Sherman*, 18 Wis. 575; *Spafford v. City of Janesville*, 15 Wis. 474.
91. U. S.—*Elder v. Richmond G. & S. Min. Co.*, 58 Fed. 536, 7 C. C. A. 254. Ala.—*Ex parte Payne*, 130 Ala. 189, 29 So. 622; *Schwarz v. Oppenheimer*, 90 Ala. 462, 8 So. 36; *Lawson v. Moore*, 45 Ala. 519; *State v. Gardner*, 45 Ala. 46; *G. U. O. O. F. v. Harvey*, 6 Ala. App. 239, 60 So. 602. Ariz.—*Coates v. Santa Fe Co.*, 15 Ariz. 25, 135 Pac. 717. Cal.—*Canadian & American Mtg. Co. v. Clarita Land Co.*, 140 Cal. 672, 74 Pac. 301; *Butler v. Soule*, 124 Cal. 69, 56 Pac. 601; *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22; *Thomas v. Superior Court*, 6 Cal. App. 629, 92 Pac. 739. Colo.—*Empire Const. Co. v. Crawford*, 57 Colo. 281, 141 Pac. 474; *People v. District Court*, 33 Colo. 405, 80 Pac. 1065. Del.—*Woolley v. Corbit*, 3 Penne. 501, 51 Atl. 601; *Thomas v. Adams Exp. Co.*, 1 Penne. 142, 39 Atl. 1014. Fla.—*Zapp v. Lasseter*, 53 Fla. 239, 44 So. 171; *Dudley v. White*, 44 Fla. 264, 31 So. 830. Ga.—*O'Connell Bros. v. Friedman*, 118 Ga. 831, 45 S. E. 668; *Ingalls v. Lamar*, 115 Ga. 296, 41 S. E. 573; *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272; *In re Bradley*, 64 Ga. 535; *Fulton v. Graham*, 11 Ga. App. 659, 75 S. E. 990. See also *Kelly v. Brooks*, 50 Ga. 582; *Prescott v. Bennett*, 50 Ga. 266. Idaho.—*Chandler v. Probate Court*, 26 Idaho 173, 141 Pac. 635; *Vane v. Jones*, 13 Idaho 21, 88 Pac. 1058; *Kerns v. McAulay*, 8 Idaho 558, 69 Pac. 539; *Runnell & E. Inv. Co. v. Curtis*, 5 Idaho 652, 51 Pac. 767. Ill.—*People v. Wells*, 255 Ill. 450, 99 N. E. 606; *Gage Hotel Co. v. Kantoos*, 185 Ill. App. 223. See also *Datschen v. Wilson*, 108 Ill. 257. Ind.—*Hunter v. Francis*, 56 Ind. 460; *Young v. Foster*, 58 Ind. App. 253, 104 N. E. 769. Ia.—*Andres & Co. v. Schlueter*, 140 Iowa 389, 118 N. W. 429; *Manning v. Nelson*, 107 Iowa 34, 77 N. W. 503; *Priestman v. Priestman*, 103 Iowa 320, 72 N. W. 535; *Worth v. Wetmore*, 87 Iowa 62, 54 N. W. 56; *Walker v. Freeloove*, 79 Iowa 752, 45 N. W. 303; *Hunt v. Stevens*, 26 Iowa 399. Kan.—*Duphorne v. Moore*, 82 Kan. 159, 107 Pac. 791. Ky.—*Wingfield v. Cotton*, 9 Ky. L. Rep. 275, 56 S. W. 813. Me.—*McNamara v. Carr*, 84 Me. 299, 24 Atl. 856. Mich.—*McDowell v. Mecosta Circuit Judge*, 178 Mich. 103, 144 N. W. 498; *Carpenter v. Superior Court*, 126 Mich. 8, 85 N. W. 265; *Petley v. Carpenter*, 124 Mich. 14, 82 N. W. 666. Minn.—*McCluer v. Crotty*, 69 Minn. 426, 72 N. W. 701; *Grimm v. Jorgenson*, 22 Minn. 92. Mo.—*State ex rel. Potter v. Riley*, 219 Mo. 667, 118 S. W. 647; *Fidelity & Deposit Co. v. Schuchman*, 189 Mo. 468, 88 S. W. 626; *Swan v. Chicago, S. F. & C. R. Co.*, 37 Mo. App. 588. Mont.—*State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291; *Whitbeck v. Mont. Cent. Ry. Co.*, 21 Mont. 102, 52 Pac. 1098. Nev.—*Lang Syne G. Mining Co. v. Ross*, 20 Nev. 127, 18 Pac. 358. N. M.—*Weaver v. Weaver*, 16 N. M. 93, 113 Pac. 599; *Rio Grande Irr. & C. Co. v. Gildersleeve*, 9 N. M. 12, 48 Pac. 309. N. Y.—*Jex v. Jacob*, 9 Daly 293; *Cooper v. Cooper*, 107 App. Div. 118, 94 N. Y. Supp. 814; *Atkinson v. Abraham*, 78 App. Div. 498, 79 N. Y. Supp. 680; *Health Dept. v. Babcock*, 84 N. Y. Supp. 604; *Mather's Estate*, 41 Misc. 414, 84 N. Y. Supp. 1105. N. C.—*Steljes v. Simmons*, 86 S. E. 801; *McLean v. McLean*, 84 N. C. 366. Phil. Isl.—*Almadin v. Almadin*, 1 Phil. Isl. 748. R. I.—*Johnson v. Hoxsie*, 19 R. I. 703, 36 Atl. 720. S. C.—*Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989. Tenn.—*Ellis v. Ellis*, 92 Tenn. 471, 22 S. W. 1. Tex.—*El Paso & S. W. R. Co. v. Kelley*, 99 Tex. 87, 87 S. W. 660; *Fleming v. Seeligson*, 57 Tex. 524. Utah.—*Elliott v. Bastian*, 11 Utah 452, 40 Pac. 713. Wash.—*Twigg v. James*, 27 Wash. 434, 79 Pac. 959. Wis.—*Uecker v. Thiedt*, 133 Wis. 148, 113 N. W. 447; *Buchan v. Nelson*, 114 Wis. 234, 90 N. W. 114.
92. See *Bush v. Bush*, 46 Ind. 70; *Gray v. Gates*, 37 Wis. 614; and the



act in the matter. The statute may be in such form as to require an application in such time as to give notice thereof or bring the case to a hearing within the prescribed limit.<sup>93</sup> And under statutes which limit the time for granting the relief, the hearing must actually be had and the matter decided within the prescribed time,<sup>94</sup> though to prevent injury to a suitor who has brought the matter to a hearing within the prescribed time, the court may enter its order nunc pro tunc as of the time when the motion was submitted.<sup>95</sup> Under such of these statutes as provide that the court may, in a proper case, grant relief at any time within a certain period after "notice" of entry of judgment, the application may be a timely one even though more than the prescribed time has elapsed since the date of the rendition of the judgment, where no notice was given or received.<sup>96</sup> The notice of entry of judgment referred to need not be in any particular form, actual knowledge thereof, in whatever manner obtained, being sufficient.<sup>97</sup> In some states the application must be made "within a reason-

cases cited in the preceding and following notes.

93. Ind.—*Temple v. Irvin*, 34 Ind. 412; *Young v. Foster*, 58 Ind. App. 253, 104 N. E. 769. Compare, *Bush v. Bush*, 46 Ind. 70. Kan.—*Satterlee v. Grubb*, 38 Kan. 234, 16 Pac. 475. Mo.—*Underwood v. Dollins*, 47 Mo. 259.

94. N. D.—*Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826. Ore.—*Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993, 52 Am. St. Rep. 790. Wis.—*McKnight v. Livingston*, 46 Wis. 356, 1 N. W. 14 (*overruling* in this regard, *Butler v. Mitchell*, 15 Wis. 355); *Whitney v. Karner*, 44 Wis. 563; *Knox v. Clifford*, 41 Wis. 458.

But see *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[a] "A statute conferring power to modify a judgment or decree after the term at which it was rendered, being in derogation of the common law, is to be strictly construed; and hence a party, . . ., must apply therefor and obtain a decision thereon within the time prescribed by the statute, or his laches will preclude the court from thereafter amending the record." *Nicklin v. Robertson*, 28 Ore. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

[b] "The period within which the discretion is to be exercised is expressly limited to a year after notice of the judgment; and this time cannot be enlarged or extended by merely giving notice of the motion to vacate the judgment. The party is required to act, and must bring his motion to a hearing within the year, or the power

to relieve under the statute is gone." *Knox v. Clifford*, 41 Wis. 459.

[c] It is not enough to satisfy the language of the statute that the application for relief is made within the year, or that it is submitted within the year. But the court must take action upon the application within that time. *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826.

95. *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826. See also *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

96. Mass.—*James v. Townsend*, 104 Mass. 367. Minn.—*Foster v. Coughran*, 113 Minn. 433, 129 N. W. 853; *Coleman v. Akers*, 87 Minn. 492, 92 N. W. 408. N. Y.—See *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852. Wis.—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Turner v. Leathem*, 84 Wis. 633, 54 N. W. 1001.

[a] Twenty Years After Rendition. *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852.

97. N. D.—*Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581. Wash.—*Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042. Wis.—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Schobacher v. Germantown F. M. Ins. Co.*, 59 Wis. 86, 17 N. W. 969; *Butler v. Mitchell*, 17 Wis. 52.

See generally the title "Notice."

[a] Notice to party's attorney is a sufficient compliance with the statute. *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826.

able time," provided that an application made after the lapse of a prescribed period shall not be considered as being thus made.<sup>98</sup> If the statutory period for making application for this relief upon specified grounds, has run, the party may yet have relief, should the facts of the case permit, on some one of the common-law grounds,<sup>99</sup> such as fraud,<sup>1</sup> or, for example, where the court never had jurisdiction

[b] A transcript of a judgment served upon the party is amply sufficient to start the running of this statutory period. *Jex v. Jacob*, 7 Abb. N. C. (N. Y.) 452, 461.

[c] **Written Notice Unnecessary.**—It is true that in matters of practice where notice is required, it must generally be a written notice. But the very nature of the provision in §38, chap. 125, Rev. St., shows conclusively that no written notice was intended there, but the party was required to act upon any reasonable knowledge of the fact . . .” *Butler v. Mitchell*, 17 Wis. 52.

[d] A party who has been personally served with process in an action must be deemed to have legal notice of any judgment thereafter entered at a regular term of the court in such action; only such parties as are not affected by such service of process may avail themselves of a want of notice to enable them to make this application after the lapse of a year from the date of the judgment. *Sluder v. Graham*, 118 N. C. 835, 23 S. E. 924; *McLean v. McLean*, 84 N. C. 366.

98. **Colo.**—Code, 1910, §81. **Idaho.** Rev. Codes, 1908, §4229. **Mont.**—Rev. Codes, 1907, §6589. **Utah.**—Comp. St., 1888, §3256; *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[a] In Idaho (1) the lapse of six months from the close of the term divests the court of its power to grant relief. *Vane v. Jones*, 13 Idaho 21, 88 Pac. 1058. (2) But the application is not too late because more than six months has elapsed since the rendition of the judgment. *Kerns v. McAulay*, 8 Idaho 558, 69 Pac. 539.

99. **U. S.**—*United States v. Williams*, 67 Fed. 384, 14 C. C. A. 410. **Cal.** *Norton v. Atchison, T. & S. F. R. Co.*, 97 Cal. 388, 30 Pac. 585, 32 Pac. 452; *Ex-Mission L. & W. Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9

Pac. 313. **Ia.**—*Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544. **Ky.**—*Newland v. Gentry*, 18 B. Mon. 666. **Minn.**—*Stocking v. Hanson*, 22 Minn. 542. **N. Y.** *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852; *Kiefer v. Grand Trunk Ry. Co.*, 55 Hun 604, 8 N. Y. Supp. 230; *Corn Exch. Bank v. Blye*, 54 Hun 312, 7 N. Y. Supp. 434; *Hurlbut v. Coman*, 43 Hun 586. **N. C.**—*Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *Cowles v. Hayes*, 69 N. C. 406.

[a] The length of time within which this relief may be granted is to be distinguished from the length of time within which application may be made. *Gray v. Gates*, 37 Wis. 614.

[b] But unless the case presents one of the several common-law exceptions, the power to thus disturb its judgments may, at a subsequent term, be exercised only in accordance with statutes providing therefor. *Potter, Teare & Co. v. Jennman*, 4 Ohio Dec. 444, 4 Ohio N. P. 78.

1. **N. Y.**—*Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852; *Riley v. Ryan*, 45 Misc. 151, 91 N. Y. Supp. 952. **N. C.** *Smith v. Hahn*, 80 N. C. 240. **Ore.**—See also *William Deering & Co. v. Creighton*, 26 Ore. 556, 38 Pac. 710. **S. D.** *Whittaker v. Warren*, 14 S. D. 611, 619, 86 N. W. 638. **Wis.**—*Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037; *Milwaukee Mut. L. & Bldg. Society v. Jagodzinski*, 84 Wis. 35, 54 N. W. 102; *Black v. Hurlbut*, 73 Wis. 126, 40 N. W. 673; *Pier v. Miller*, 63 Wis. 33, 22 N. W. 759; *Breed v. Ketchum*, 51 Wis. 164, 7 N. W. 550; *Whitney v. Karner*, 44 Wis. 563; *Knox v. Clifford*, 41 Wis. 458; *Seymour v. Supervisors*, 40 Wis. 62; *Pringle v. Dunn*, 39 Wis. 435; *Fornette v. Carmichael*, 38 Wis. 236; *Loomis v. Rice*, 37 Wis. 262; *Scheer v. Keown*, 34 Wis. 349; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265; *Flanders v. Sherman*, 18

to render the judgment in question,<sup>2</sup> or the judgment is void,<sup>3</sup> or, in some jurisdictions, so irregular that it should not stand.<sup>4</sup>

Legal disability will also extend the time for seeking relief in some jurisdictions,<sup>5</sup> but the application must be made promptly after the removal of the disability.<sup>6</sup>

(II.) Effect of Laches and Intervening Rights.—An application to open or set aside a judgment being an appeal to the equitable power of the court,<sup>7</sup> it is one of the cardinal requirements thereof that the applicant proceed with promptness.<sup>8</sup> And where statutes prescribe a time within which application for this relief must be made, the applicant may, in a case where relief is discretionary, be guilty of such laches as will defeat his application even though the full time prescribed by statute

Wis. 575; *Spafford v. City of Janesville*, 15 Wis. 474.

See *infra*, and the statutes generally. See also *supra*, XIV, B; XIV, C, 2, b.

2. U. S.—*Maury v. Fitzwater*, 88 Fed. 768. Minn.—*Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585. Wash. *Bailey v. Hood*, 38 Wash. 700, 80 Pac. 559.

3. Cal.—*People v. Davis*, 143 Cal. 673, 77 Pac. 651; *People v. Harrison*, 107 Cal. 541, 40 Pac. 956; *People v. Dodge*, 104 Cal. 487, 38 Pac. 203; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448; *Lapham v. Campbell*, 61 Cal. 296; *Stierlen v. Stierlen*, 18 Cal. App. 609, 124 Pac. 226, 228; *George Frank Co. v. Leopold, etc. Co.*, 13 Cal. App. 59, 108 Pac. 878. Colo.—*Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. Fla.—*Lord v. Dowling*, 52 Fla. 313, 42 So. 585; *Einstein v. Davidson*, 35 Fla. 342, 17 So. 563. Idaho.—*Shumake v. Shumake*, 17 Idaho 649, 107 Pac. 42; *Kerns v. Morgan*, 11 Idaho 572, 83 Pac. 954. See also *Richardson v. Ruddy*, 15 Idaho 488, 98 Pac. 842. Kan.—*Dassler's Gen. St.*, 1909, §6193; *National Bank v. Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56. Ky.—*Spencer v. Parsons*, 89 Ky. 577, 13 S. W. 72. N. M.—See *Weaver v. Weaver*, 16 N. M. 98, 113 Pac. 599. Utah.—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 356, 49 Pac. 1027.

[a] In speaking of the court's power in this respect it was said in *People v. Davis*, 143 Cal. 673, 77 Pac. 651, "It derives its jurisdiction to do this, however, solely from the fact that the judgment or order upon the face of the judgment-roll demonstrates to the world its own invalidity."

4. *Becton v. Dunn*, 137 N. C. 559, 50

S. E. 289; *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838; *Monroe v. Whitted*, 79 N. C. 508; *Cowles v. Hayes*, 69 N. C. 406.

5. N. Y. Code Civ. Proc., §129.

[a] Twenty-two Years.—A petition to vacate a probate decree, made twenty-two years after its rendition, but promptly upon the removal of the disability under which the applicant had labored during all that time, will be entertained. *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100.

6. Md.—*Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 691. N. Y.—*Becker v. Bochus*, 5 Redf. Sur. 488. Tenn.—*Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100.

7. See *supra*, XIV, E, 2, a.

8. Ill.—*Ryder v. Twiss*, 4 Ill. 4. N. J. *Walker v. Anderson*, 18 N. J. L. 217. N. C.—*Scott v. Mutual Reserve Life Assn.*, 137 N. C. 515, 50 S. E. 221; *Williamson v. Hartman*, 92 N. C. 236, 240; *Vick v. Pope*, 81 N. C. 22; *Cowles v. Hayes*, 69 N. C. 406. Ore.—*Coast Land Co. v. Oregon Col. Co.*, 44 Ore. 483, 75 Pac. 884. Pa.—*Lytle v. Hoover*, 175 Pa. 408, 34 Atl. 734; *Rehm v. Frank*, 16 Pa. Super. 175. See also *In re Mutual Ben. Co.*, 190 Pa. 355, 42 Atl. 706; *Smith v. Hine*, 179 Pa. 203, 36 Atl. 222; *Richard's Appeal*, 127 Pa. 63, 17 Atl. 756. R. I.—See also *Draper v. Bishop*, 4 R. I. 489. S. D.—*Judd v. Patton*, 13 S. D. 648, 84 N. W. 199. Wis.—*Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265; *Welch v. May*, 14 Wis. 200.

[a] On this principle a member of a benefit association who, with full knowledge of the proceedings, stands passively by and permits a decree of dissolution to be entered against such



has not run.<sup>9</sup> Whether or not the applicant in a given case is chargeable with laches is a fact necessarily determined only from a consideration of all the surrounding circumstances,<sup>10</sup> and laches will not be imputed to him in respect to a judgment of which he had no knowledge.<sup>11</sup> While laches alone will not necessarily defeat an application,<sup>12</sup> it may, under the circumstances of the individual case, justify the court in denying relief,<sup>13</sup> and a very clear and persuasive showing must be made to induce a court in the face of an unreasonable delay, to

association by which its officers are directed to transfer all its assets to another association who in return is to insure the members of the defunct association, will not be permitted to come in a year later, after the assets have been distributed, and have this decree opened. *In re Mutual Benefit Co.*, 190 Pa. 355, 42 Atl. 708.

[b] "The judgment was entered on the 10th of June, 1858. In March, 1859, the defendant obtained an order staying proceedings, and then slumbered until July, 1860. This is not such diligence as the law requires in those who honestly desire to be relieved from a judgment which has been improperly entered against them." *Welch v. May*, 11 Wis. 200.

**Delay May Amount to a Waiver of Otherwise Available Grounds of Relief.** See *infra*, XIV, C, 7.

9. Cal.—See *Eldred v. White*, 102 Cal. 600, 35 Pac. 944. Colo.—*Clark v. Perry*, 17 Colo. 56, 28 Pac. 329. Ind.—*Birch v. Frantz*, 77 Ind. 199. *Contra*, *Bush v. Bush*, 46 Ind. 70. Minn.—*Cutler v. Button*, 51 Minn. 550, 53 N. W. 872; *Gerish v. Johnson*, 5 Minn. 23. N. Y.—*Kahn v. Casper*, 51 App. Div. 540, 64 N. Y. Supp. 838. N. C.—*Currie v. Golconda, etc. Min. Co.*, 157 N. C. 209, 72 S. E. 980. Wash.—*Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042.

[a] "Section 1395 provides that such proceedings must be commenced 'within one year after the rendition of the judgment,' etc. We are of the opinion, however, that the party seeking to have a judgment set aside must nevertheless proceed with diligence within the year allowed. But this question of diligence is addressed to the discretion of the lower court . . ." *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042.

10. *Coast Land Co. v. Oregon Col. Co.*, 44 Ore. 483, 75 Pac. 884.

As to what will amount to laches, see generally the title "Laches."

11. U. S.—*Maury v. Fitzwater*, 88 Fed. 768. Cal.—*Stoutenborough v. San Francisco Bd. of Education*, 104 Cal. 664, 38 Pac. 449. Colo.—*Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. Minn.—*Stocking v. Hanson*, 35 Minn. 207, 28 N. W. 507. Pa.—*Sperry v. Styer*, 23 Pa. Super. 607; *Seranton v. Manley*, 13 Pa. Super. 439.

12. *Patterson v. Hare*, 74 Hun 269, 26 N. Y. Supp. 626; *Droham v. Norton*, 1 Misc. 486, 21 N. Y. Supp. 579.

13. U. S.—*In re Casey*, 195 Fed. 322; *In re First Nat. Bank*, 152 Fed. 64, 81 C. C. A. 260; *Aldrich v. Crump*, 128 Fed. 984. Cal.—*Smith v. Pelton Water Wheel Co.*, 151 Cal. 394, 90 Pac. 934; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *Wolff & Co. v. Canadian Pac. Ry. Co.*, 123 Cal. 535, 56 Pac. 453; *People v. Blake*, 81 Cal. 611, 22 Pac. 1142, 24 Pac. 313; *Garrison v. McGowan*, 48 Cal. 592; *Reese v. Mahoney*, 21 Cal. 305; *California Casket Co. v. McGinn*, 10 Cal. App. 5, 100 Pac. 1077, 1079. Colo.—*Clark v. Perry*, 17 Colo. 56, 28 Pac. 329. Ga.—*Camp v. Phillips*, 88 Ga. 415, 14 S. E. 580. Idaho.—*Council Imp. Co. v. Draper*, 16 Idaho 541, 102 Pac. 7. Ill.—*Delaney v. O'Connor*, 234 Ill. 546, 87 N. E. 226; *Barrett v. Queen City Cycle Co.*, 179 Ill. 68, 53 N. E. 550; *Ryder v. Twiss*, 4 Ill. 4; *Post Falls Lumb. & Mfg. Co. v. Messer Lumber Co.*, 183 Ill. App. 309; *White Oak Coal Co. v. Beck*, 176 Ill. App. 86. Ia.—*Evans v. Church*, 116 N. W. 822. Kan.—*Allison v. Whittaker*, 81 Kan. 706, 106 Pac. 1050; *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998; *Knauber v. Watson*, 50 Kan. 702, 32 Pac. 349. Ky.—*Forrester v. Howard*, 124 Ky. 215, 98 S. W. 984. Md.—*McCormick v. Hogan*, 48 Md. 404; *Montgomery v. Murphy*, 19 Md. 576, 81 Am. Dec. 652. Mich.—*Taber v. Wayne Circuit Judge*, 156 Mich. 652, 121 N. W. 481; *Walsh v. Wayne Circuit Judge*, 76 Mich. 470, 43 N. W. 573.

disturb a final judgment;<sup>14</sup> in such a case it is not enough that the showing made by the applicant casts some doubt, or even a grave suspicion upon the case of the adverse party.<sup>15</sup> Especially is this true

**Minn.**—De Laittre *v.* Chase, 112 Minn. 508, 128 N. W. 670; McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354; Nauer *v.* Benham, 45 Minn. 252, 47 N. W. 796; Altman *v.* Gabriel, 28 Minn. 132, 9 N. W. 633. **Mont.**—Kersten *v.* Coleman, 50 Mont. 82, 144 Pac. 1092. **Neb.**—Wardrobe *v.* Leonard, 78 Neb. 531, 111 N. W. 134. **N. Y.**—Lucas *v.* Second Baptist Church, 4 How. Pr. 353; Nichols *v.* Nichols, 10 Wend. 560; Arents *v.* Long Isl. R. Co., 36 App. Div. 379, 55 N. Y. Supp. 401; Baneroff-Graham *v.* Halley, 80 Misc. 191, 141 N. Y. Supp. 911. **N. C.**—Massie *v.* Hainey, 165 N. C. 174, 81 S. E. 135; Hatcher *v.* Faison, 142 N. C. 364, 55 S. E. 284; Le Duc *v.* Slocumb, 124 N. C. 347, 32 S. E. 726. **N. D.**—Campbell *v.* Coulston, 19 N. D. 645, 124 N. W. 689. **Ore.**—Coast Land Co. *v.* Oregon Colonization Co., 44 Ore. 483, 75 Pac. 884. **Pa.**—Johnson *v.* Frothingham, 214 Pa. 523, 63 Atl. 823; Rehm *v.* Frank, 16 Pa. Super. 175; Hoyt *v.* Clearfield Tract. Co., 10 Pa. Dist. 767. **Wash.**—Eckert *v.* Schmitt, 60 Wash. 23, 110 Pac. 635; Warren *v.* Hershberg, 52 Wash. 38, 100 Pac. 149; Scott *v.* Hanford, 37 Wash. 5, 79 Pac. 481; Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446. **Wis.**—Wheeler & W. Mfg. Co. *v.* Monahan, 63 Wis. 194, 23 N. W. 109; Aetna Life Ins. Co. *v.* McCormick, 20 Wis. 265.

14. **Md.**—Boggs *v.* Inter-Am. Min. & S. Co., 105 Md. 371, 66 Atl. 259; Lawrence Bank *v.* Raney & Co., 77 Md. 321, 26 Atl. 119; Joyne *v.* Scott, 34 Md. 58; Munnikuyson's Admx. *v.* Dorsett's Admx., 2 Har. & G. 374. **Mich.**—People *ex rel.* Hyde *v.* Circuit Court Judges, 1 Doug. 417. **N. J.**—Walker *v.* Andersons, 18 N. J. L. 217. **N. Y.**—Dinsmore *v.* Adams, 49 How. Pr. 238; Wade *v.* De Leyer, 8 Jones & S. 541; Van Arsdale *v.* King, 87 Hun 617, 33 N. Y. Supp. 858; Meyer *v.* Mallon, 85 Hun 450, 32 N. Y. Supp. 889; *In re* Dey Ermand, 24 Hun 1; Abbett *v.* Blohm, 54 App. Div. 422, 66 N. Y. Supp. 838; MacNabb *v.* Porter, etc. Co., 44 App. Div. 102, 60 N. Y. Supp. 694; Conant *v.* American Rubber Tire Co., 37 Misc. 129, 74 N. Y. Supp. 409; Tooker *v.* Booth, 7 Misc. 421, 27 N. Y.

Supp. 974. **N. C.**—Perry *v.* Pearce, 68 N. C. 367. **Ore.**—See also Coast Land Co. *v.* Oregon Col. Co., 44 Ore. 483, 75 Pac. 884. **Pa.**—Harper *v.* Biles, 115 Pa. 594, 8 Atl. 446; McQuillan *v.* Hunter, 1 Phila. 49; Ware *v.* Baldwin, 7 Kulp 278. See also Howe Sewing Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660; Garman *v.* Charlier, 10 Pa. Dist. 38.

[a] "There is no merit in either application. The judgment had been of record for sixteen years before any application was made either to strike off or to open it, and no reason is assigned for the delay." Richards' Appeal, 127 Pa. 63, 17 Atl. 756.

[b] "The law does not absolutely fix any period of time within which a defendant must move to open a judgment, but delay long persisted in after knowledge of all the facts always casts greater or less doubt on the bona fides of the defense set up, and gives weight and probability to the evidence adduced to rebut it." Rehm *v.* Frank, 16 Pa. Super. 175.

[c] A party who is apprised of an execution must not wait until levy and condemnation. "If he does, some good reason should be shown for the delay." McQuillan *v.* Hunter, 1 Phila. (Pa.) 49.

[d] "It would tend to lessen public confidence in the efficacy of judicial proceedings if the judgments of courts, after the lapse of years, are to be disturbed for the want of formal and technical precision in the record of their proceedings and judgments. It is for this manifest reason of public policy, as well as in the interest of substantial justice, which is not always subserved by re-opening and prolonging litigation, that the courts have gone very far in upholding the validity of loose and informal . . . judgments . . . in . . . similar cases." White *v.* Morris, 107 N. C. 92, 12 S. E. 80.

[e] A flagrant neglect of the matter in hand, even though the actual time elapsed be comparatively short, will have a like effect. Lederer *v.* Adler, 51 Misc. 572, 101 N. Y. Supp. 53; Pepper *v.* Clegg, 132 N. C. 312, 43 S. E. 906.

15. Meyer *v.* Mallon, 85 Hun 450, 32

where, in reliance upon the judgment attacked, the parties have changed their position irrevocably or rights of innocent third persons have intervened.<sup>16</sup> The converse of this last proposition is equally true, *i. e.*, where no rights of third parties have intervened the court will lend a more willing ear to the applicant's prayer for relief,<sup>17</sup> and where the application is made so immediately after judgment as that no considerable delay to the adverse party is to be occasioned by permitting a defense on the merits, a court ought to incline to relieve.<sup>18</sup> The foregoing rules are only applicable to such judgments as are voidable and not void, for lapse of time will not, ordinarily, affect the right of a party to have a judgment set aside which is absolutely void.<sup>19</sup>

N. Y. Supp. 889; *Lytle v. Forest*, 16 Pa. Co. Ct. 239.

[a] After a delay of ten years this relief will not be granted where at most the testimony of the defendant only casts a doubt upon the plaintiff's case. *Lytle v. Forest*, 16 Pa. Co. Ct. 239.

16. N. J.—See also *Cawley v. Leonard*, 28 N. J. Eq. 467. N. C.—*Le Due v. Slocomb*, 124 N. C. 347, 32 S. E. 726. See also *Ricaud v. Alderman*, 132 N. C. 62, 43 S. E. 543; *Syme v. Trice*, 96 N. C. 243, 246, 1 S. E. 480. Ohio.—*Miller v. Erdhouse*, 7 Ohio Dec. (Reprint) 294, 2 W. L. Bull. 84. Pa.—*In re Markle's Estate*, 187 Pa. 639, 41 Atl. 304. See also *Cyphert v. McClune*, 22 Pa. 195.

[a] "The delay must be so long that others, relying on the record, have placed themselves in such position that to vacate the entry will operate to defraud them." *Nell v. Dayton*, 47 Minn. 527, 49 N. W. 981.

[b] After a sheriff's sale, the judgment upon which such sale was had will not be opened, where the defendant, with full knowledge of what was going on, stood quietly by and permitted the sale to be made, making no effort to gain relief until after the sheriff's deed had been acknowledged. *Fritz v. Roney*, 9 Pa. Dist. 27.

[c] Where a decree of foreclosure was rendered against the mortgagor and his wife, the purchaser at the sheriff's sale will be protected in his title, when the widow of the mortgagor seeks to have the judgment vacated on the ground that she was never served with process and that her signature was a forgery. *Miller v. Erdhouse*, 7 Ohio Dec. (Reprint) 294, 2 W. L. Bull. 84.

[d] A judgment of divorce may be set aside, as a general rule, without reference to third parties who, by reason of the remarriage of one of the parties, may be made to suffer, and the application need not state that rights of third parties have not intervened. *Rush v. Rush*, 46 Iowa 648, 26 Am. Rep. 179. See also *Whitecomb v. Whitecomb*, 46 Iowa 437.

[e] An admittedly valid defense may, where rights of innocent third parties have intervened, be rejected by the court. *Miller v. Erdhouse*, 7 Ohio Dec. (Reprint) 294, 2 W. L. Bull. 84.

17. American, A. & P. Paint Co. v. Smith, 35 N. Y. Supp. 723. See also *Briscoe v. McCaffery*, 8 Mont. 336, 20 Pac. 691.

18. *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440.

19. U. S.—*Thomas v. American L. & Mtg. Co.*, 47 Fed. 550. Ala.—*Baker v. Barelift*, 76 Ala. 414; *Pettus v. McClannahan*, 52 Ala. 55; *Bruce v. Strickland*, 47 Ala. 192; *Swink's Admr. v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127. Cal.—*People v. Harrison*, 107 Cal. 541, 40 Pac. 956; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; *People v. Pearson*, 76 Cal. 400, 18 Pac. 424; *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727. Ga.—*Crane v. Barry*, 47 Ga. 476. Kan.—*National Bank v. Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56; *Foreman v. Carter*, 9 Kan. 674. Ore.—*Ladd v. Mason*, 10 Ore. 308. Pa.—*Knob Couch v. Hefron*, 15 Pa. Co. Ct. 636. See also *Harper v. Biles*, 115 Pa. 594, 8 Atl. 446. Tex.—*Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312. Utah.—*Bullion B. & C. Min. Co. v. Eureka Hill*



e. *Contents and Formal Requisites of the Application.*—(I.) **Preliminary Statement.**—If, under the rules of practice, a motion is the proper form of remedy, it should be in writing,<sup>20</sup> yet it need not follow any particular form unless required by statute.<sup>21</sup> It is the substance more than the form of the application with which the courts are concerned, and trivial imperfections will not be noticed.<sup>22</sup> Thus, an application which should, by the rules of practice, have been in the form of a motion will not be held defective simply because it is made in the more formal manner of a petition,<sup>23</sup> and vice versa.<sup>24</sup>

(II.) **Particular Requirements.**—The application, after showing the applicant to have such an interest in the judgment attacked as constitutes him a proper party thereto,<sup>25</sup> should state the ground upon which the relief is sought, not in general terms, but with definiteness and particularity.<sup>26</sup> The averment of conclusions should, of course,

Min. Co., 5 Utah 182, 12 Pac. 660. Wis.—See *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 662, where the court says: "The judgment not being void, . . . the motion to set the same aside must be made at the first opportunity."

See also *supra*, XIV, C, 2, b, (VII).

20. *Albany Land Co. v. McElwaine-Richards Co.*, 11 Ind. App. 477, 39 N. E. 297; *Ohio Falls Car Co. v. Sweet*, 7 Ind. App. 163, 34 N. E. 533.

21. Cal.—*People v. Lafarge*, 3 Cal. 130. Kan.—*Morris v. Winderlin*, 92 Kan. 935, 142 Pac. 944. Ky.—*Barbee v. Fox*, 79 Ky. 588. Mont.—*State ex rel. Kolbow v. District Court*, 38 Mont. 415, 100 Pac. 207. N. Y.—*Yudin v. Stoller*, 142 N. Y. Supp. 484.

22. Ariz.—*Porter v. Richard*, 1 Ariz. 87, 25 Pac. 530. Ind.—*Hoag v. Old People's Mut. Benefit Society*, 1 Ind. App. 28, 27 N. E. 438. Kan.—*Boston L. & T. Co. v. Organ*, 53 Kan. 386, 36 Pac. 733. Neb.—*Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069. N. C.—*Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716.

[a] **Surplage** in an application for this relief may be disregarded. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716.

[b] **Form of Motion.**—[Title of Court and Cause.] Comes now the plaintiff (or defendant), the above named A. B., and moves the court to set aside and annul the judgment rendered in this cause in favor of the plaintiff (or defendant) and against the above named defendant (or plaintiff) on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, for the sum of \_\_\_\_\_ dollars (or whatever relief the judgment

awarded) together with attorney's fees, taxed at \_\_\_\_\_ dollars, and costs, and as grounds for such relief shows to the court: (1.) (Here insert in detail the facts showing that the applicant is entitled to this relief). Based upon the form used in *Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778.

23. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. See also *Smith v. Hahn*, 80 N. C. 240; *Foard v. Alexander*, 64 N. C. 69, if it be entitled in the cause and not filed as an independent action.

24. **Motion Treated as Petition.** Where relief was sought by a motion in a case in which a petition was the proper form of application, but the motion contained all the essential averments and was verified, it was treated as a petition although entitled as a motion. *Blain v. Dean*, 160 Iowa 708, 142 N. W. 418.

25. *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. See also *King v. Davis*, 137 Fed. 222.

26. Ark.—*Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782. Cal.—*Shearman v. Jorgensen*, 106 Cal. 483, 39 Pac. 863. Colo.—*Barra v. People*, 18 Colo. App. 16, 69 Pac. 1074. Ga.—*Wade v. Watson*, 133 Ga. 608, 66 S. E. 922; *Manry v. Twitty*, 132 Ga. 478, 64 S. E. 273; *Clements v. Empire Lumber Co.*, 96 Ga. 319, 22 S. E. 987; *Bell v. Hanks*, 55 Ga. 274; *Dobbins v. Dupree*, 36 Ga. 108, 113. Idaho.—*Hall v. Whittier*, 20 Idaho 120, 116 Pac. 1031. Ind.—*Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351; *Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474; *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156; *Hall v. Durham*, 116 Ind. 198, 18 N. E. 181. Ia.—*Oliver v. Riley*,

be avoided.<sup>27</sup> as also, should matter which is only hearsay.<sup>28</sup> Thus, where it is sought to open or vacate a judgment because of fraud in the transaction the particular facts showing such fraud should be averred; an allegation in general terms that the transaction was fraudulent being insufficient,<sup>29</sup> though an application which sets forth facts showing fraud is sufficient without a specific averment of fraud.<sup>30</sup> In some jurisdictions it has been held that the application should contain an averment that subsequent proceedings would not result in the same judgment.<sup>31</sup> Where the proceeding is by petition its form and contents are usually regulated by statutes<sup>32</sup> which require that it shall set forth the judgment or order from which relief is sought,<sup>33</sup> the facts

92 Iowa 23, 60 N. W. 180; *Lafever v. Stone*, 55 Iowa 49, 7 N. W. 400. **Kan.** *Hill v. Williams*, 6 Kan. 17; *George v. Hatton*, 2 Kan. 333. **Ky.**—*McCarthy v. Payne*, 5 Ky. L. Rep. 242. **Neb.** *Roh v. Vitera*, 38 Neb. 333, 56 N. W. 977. **Nev.**—*Brown v. Warren*, 17 Nev. 417, 30 Pac. 1078. **N. M.**—*Lasswell v. Kitt*, 11 N. M. 459, 70 Pac. 561. **N. Y.** *Stone v. Smith*, 31 Misc. 740, 64 N. Y. Supp. 139; *Tallman v. Sprague*, 18 N. Y. Supp. 207. **N. C.**—See *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. **Ohio.**—*Wellman v. Wellman*, 9 Ohio Cir. Ct. 72. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000; *Wyman & Colegrove's Appeal*, 3 Walk. 410 (overpayment of claim sued on, by reason of usurious rate of interest). **S. C.**—*Blair & Co. v. Thomas*, Dudley 288. **Vt.** *Hunt v. Burbank*, 73 Vt. 273, 50 Atl. 1058. **Wis.**—*O'Neill's Estate*, 90 Wis. 480, 63 N. W. 1042.

[a] **Irregularities.**—Where the vacation of the judgment was sought upon the ground that "the judgment was irregularly obtained," the application should point out the irregularities and the bare statement that the judgment was so obtained is insufficient for this purpose. *George v. Hatton*, 2 Kan. 333.

[b] A motion which attacks the "vital" or "active" part of the judgment, is sufficient. *State v. Huston*, 32 Wash. 154, 72 Pac. 1015.

[c] An averment by defendants that they had employed an attorney and had reason to believe that he would attend to the case but that he suffered a default judgment, is insufficient. "Whether they did have reason to so believe was a question to be determined by the district court upon the facts constituting the grounds of belief. These facts should have been stated, so that the discretion of the court

could have been exercised, for it, and not the parties, must determine the existence of the ultimate fact." *Brown v. Warren*, 17 Nev. 417, 30 Pac. 1078.

27. *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156. And see generally the cases hereinafter cited.

28. *Kipp v. Clinger*, 97 Minn. 135, 106 N. W. 108.

29. *Kan.*—*Sanford v. Weeks*, 50 Kan. 339, 31 Pac. 1088; *Hill v. Williams*, 6 Kan. 17. **Ky.**—*McCarthy v. Payne*, 5 Ky. L. Rep. 242. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000.

See generally the title "Fraud."

30. *Oliver v. Riley*, 92 Iowa 23, 60 N. W. 180. See generally the title "Fraud."

31. *Donald v. Bradt*, 15 Colo. App. 414, 62 Pac. 580; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

32. An application which fails to comply with all the statutory requirements is insufficient. *Hill v. Williams*, 6 Kan. 17.

33. **Ark.**—*Kirby's St.*, 1904, §4433. **Kan.**—*Dassler's Gen. St.*, 1909, §6195. **Ky.**—*Civ. Code Proc.*, 1906, §520. **Neb.** *Rev. St.*, 1913, §8208. **Ohio.**—*Bates' Ann. St.*, 5th ed., §5358, cited and construed in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572. **Okl.**—*Provins v. Lovi*, 6 Okla. 94, 50 Pac. 81. **Wash.** *Spokane & I. Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92; *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427, 58 Pac. 576, involving ch. 17, tit. 28, Bal. Code, §5156. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 529, 48 Pac. 197.

[a] As to what will sufficiently identify the judgment attacked, see *Roberts v. Shelton S. W. R. Co.*, 21 Wash. 427, 58 Pac. 576.

[b] In Kansas it is only by stating the judgment in full and in its own

constituting the ground relied upon<sup>35</sup> and that it shall be verified by affidavit.<sup>35</sup> Also, if the petitioner is a defendant these statutes usually require, in addition to the foregoing, that it shall appear from the petition that there exists in the defendant's favor a valid defense to the plaintiff's cause of action.<sup>36</sup> If it appear that injury from which the party asks relief was sustained through his own negligence his application is defective.<sup>37</sup>

(III.) **Supporting Affidavits.**—(A.) **IN GENERAL.**—The proper practice is to support an application to open or vacate a judgment with an affidavit as to the facts constituting the grounds upon which the relief is asked,<sup>38</sup> which should also show the applicant to have been as diligent as, under the circumstances, could be required.<sup>39</sup>

terms and showing when and by what court it was given that this requirement of the code is met. *Hill v. Williams*, 6 Kan. 17.

34. **Kan.**—Dassler's Gen. St., 1909, §6195. **Ky.**—Civ. Code Proc., 1906, §520. **Neb.**—Rev. St., 1913, §8208. **Ohio.**—§5358 Bates' Ann. Ohio St., 5th ed., cited and construed in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572. **Okla.**—Provins v. Lovi, 6 Okla. 94, 50 Pac. 81. **Wash.**—Spokane & I. Lumb. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Roberts v. Shelton S. W. R. Co., 21 Wash. 427, 58 Pac. 576. **Wyo.**—Bank of Chadron v. Anderson, 6 Wyo. 518, 529, 48 Pac. 197.

35. **Ark.**—Kirby's Dig., 1904, §4433. **Kan.**—Dassler's Gen. St., 1909, §6195. **Ky.**—Civ. Code Proc., 1906, §520. **Neb.**—§8208, Rev. St., 1913. **Ohio.**—§5358, Bates' Ann. Ohio St., 5th ed., cited and construed in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572. **Vt.**—Hunt v. Burbank, 73 Vt. 273, 50 Atl. 1058; Woodworth v. Coleman, 57 Vt. 368. **Wash.**—Spokane & I. Lumb. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Roberts v. Shelton S. W. R. Co., 21 Wash. 427, 58 Pac. 576. **Wyo.**—Bank of Chadron v. Anderson, 6 Wyo. 518, 529, 48 Pac. 197.

[a] A petition sworn to by the attorney for the petitioner, who makes oath that the facts therein recited are true "according to his best knowledge, information and belief," it nowhere appearing that he had or could have any personal knowledge or information whatever of the truth of the averments, is insufficient in this regard. *Woodworth v. Coleman*, 57 Vt. 368.

36. **Ark.**—Kirby's Dig., 1904, §4433. **Kan.**—Dassler's Gen. St., 1909, §6195. **Ky.**—Civ. Code Proc., 1906, §520. **Neb.**

Rev. St., 1913, §8208. **Ohio.**—§5358, Bates' Ann. Ohio St., 5th ed., cited and construed in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572. **Okla.**—Provins v. Lovi, 6 Okla. 94, 50 Pac. 81. **Wash.**—Spokane & I. Lumb. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Roberts v. Shelton S. W. R. Co., 21 Wash. 427, 58 Pac. 576. **Wyo.**—Bank of Chadron v. Anderson, 6 Wyo. 518, 529, 48 Pac. 197.

37. *Hunt v. Burbank*, 73 Vt. 273, 50 Atl. 1058.

38. **Cal.**—*In re Van Loan*, 142 Cal. 423, 76 Pac. 37. **Ga.**—*Dugan v. McGlaun*, 64 Ga. 446. **Ill.**—*Domitski v. American Linseed Co.*, 221 Ill. 161, 77 N. E. 428; *Gage v. Chicago*, 211 Ill. 109, 71 N. E. 877. **Ind.**—*Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351; *Frazier v. Williams*, 18 Ind. 416. **Neb.**—*Wunrath v. People's Furniture Co.*, 98 Neb. 342, 152 N. W. 736. **N. Y.**—*Slade v. Delaware & H. Co.*, 122 App. Div. 338, 106 N. Y. Supp. 887. **Okla.**—*Jenkins v. Brown*, 148 Pac. 697; *Crowley-Southerland Com. Co. v. Husband*, 42 Okla. 77, 140 Pac. 1144.

[a] A Notice of the Filing of This Affidavit Should Be Given.—In *Forrest v. Knox*, 21 Cal. App. 363, 131 Pac. 894, the court say: "No notice of the filing of said last mentioned affidavit was given to plaintiff or his attorney until after the granting of the motion, and said affidavit was in no way referred to in the notice of the motion. Under these circumstances the affidavit . . . cannot be considered in support of the motion." *Twigg v. James*, 37 Wash. 434, 79 Pac. 959.

39. **Ill.**—*Hittle v. Zeimer*, 164 Ill. 64, 45 N. E. 419; *Roberts v. Corby*, 86 Ill. 182; *Stetham v. Shoults*, 17 Ill. 99. **Ind.**—*Masten v. Indiana Car, etc. Co.*,



(B.) **AFFIDAVIT OF MERITS.** — Where the applicant is not entitled to relief as a matter of right his application must be supported by an affidavit of merits or a sworn statement which amounts to such an affidavit.<sup>40</sup> This affidavit should show the applicant to have an adequate and meritorious defense to the cause of action, if the applicant be a defendant,<sup>41</sup> or, if the application is made by a plaintiff, that his

25 Ind. App. 175, 57 N. E. 148. **Mo.** Green v. Gbodloe, 7 Mo. 25. **N. C.** Cogdell v. Barfield, 9 N. C. 332. **N. D.** Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. **Tex.** Aldridge v. Mardoff, 32 Tex. 204; Tarrant v. Lively, 25 Tex. Supp. 399; Foster v. Martin, 20 Tex. 118; Milam v. Gordon, 29 Tex. Civ. App. 415, 68 S. W. 1003. **Wash.**—Haynes v. Schwartz Co., 5 Wash. 433, 32 Pac. 220. **W. Va.** Post v. Carr, 42 W. Va. 72, 24 S. E. 583. **Wis.**—Johnson v. Eldred, 13 Wis. 482.

40. See fully the title "**Affidavits of Merits and Defense**," and particularly 1 STANDARD PROC. 655, 659, 688.

41. **Fla.**—Reebuck v. Batten, 64 Fla. 424, 59 So. 942; City of Gainesville v. Johnson, 59 Fla. 459, 51 So. 852. **Ga.** Harralson v. McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; Duggar v. Lackey, 85 Ga. 631, 11 S. E. 1025; Smith v. Sheffield, 83 Ga. 103, 9 S. E. 791; Storey v. Weaver, 66 Ga. 296; Cannon v. Harrold, 61 Ga. 158; Davant v. Carlton, 53 Ga. 491; Jones v. Bullard, 52 Ga. 145, 148; Beall v. Marietta Co., 45 Ga. 28. **Idaho.**—Holzeman & Co. v. Henneberry, 11 Idaho 428, 83 Pac. 497; Holland Bank v. Lieualen, 6 Idaho 127, 53 Pac. 398. **Ill.**—Ettinghausen v. Marx, 86 Ill. 475; Roberts v. Corby, 86 Ill. 182. **Ia.**—Reints v. Engle, 130 Iowa 726, 107 N. W. 947; Tschohl v. Machinery Mut. Ins. Assn., 126 Iowa 211, 101 N. W. 740; Culbertson v. Salinger, 122 Iowa 12, 97 N. W. 99. **Kan.**—Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; Anderson v. Beebe, 22 Kan. 768. **Ky.** Hayman & Co. v. Hallam, 79 Ky. 389; Bagby v. Bagby, 10 Ky. L. Rep. 540; Thomas v. Duncan, 7 Ky. L. Rep. 371. **Mont.**—Vadnais v. East Butte, etc. Min. Co., 42 Mont. 543, 113 Pac. 747; Schaeffer v. Gold Cord Min. Co., 36 Mont. 410, 93 Pac. 344; Donnelly v. Clark, 6 Mont. 135, 9 Pac. 887. **N. M.** Liverpool & L. & G. Ins. Co. v. Perrin & Co., 10 N. M. 90, 61 Pac. 124. **N. Y.** Gold v. Hutchinson, 26 Misc. 1, 55 N. Y. Supp. 575. **N. C.**—Le Duc v. Slo-

comb, 124 N. C. 347, 32 S. E. 726; Jeffries v. Aaron, 120 N. C. 167, 26 S. E. 696; Mauney v. Gidney, 88 N. C. 200; Alston, Young & Co. v. Parish's Heirs, 1 N. C. 309. **Ore.**—Coast Land Co. v. Oregon Col. Co., 44 Ore. 483, 75 Pac. 884; Mayer v. Mayer, 27 Ore. 133, 39 Pac. 1002. **Pa.**—Hipple v. Laird, 189 Pa. 472, 42 Atl. 46. **R. I.**—Spoon-er v. Leland, 5 R. I. 348; Draper v. Bishop, 4 R. I. 489. **S. D.**—Judd v. Patton, 13 S. D. 648, 84 N. W. 199; Pettigrew v. City of Sioux Falls, 5 S. D. 646, 60 N. W. 27. **Tex.**—Contreras v. Haynes, 61 Tex. 103; Aldridge v. Mardoff, 32 Tex. 204; Foster v. Martin, 20 Tex. 118. See also City of Galveston v. Morton, 58 Tex. 409. **Wash.** Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061. **Wis.**—Union Lumb. Co. v. Supvrs. of Chippewa Co., 47 Wis. 245, 2 N. W. 281; Challoner v. Howard, 41 Wis. 355; Bonnell v. Gray, 36 Wis. 574; Holden v. Kirby, 21 Wis. 149; Johnson v. Eldred, 13 Wis. 482.

See 1 STANDARD PROC. 691.

[a] A defense which the party might not have interposed at the trial will not suffice to support an application to open the judgment. Dooley v. Gladiator, etc. Co., 134 Iowa 468, 109 N. W. 864.

As to the necessity and sufficiency of the statement of facts constituting the defense, see 1 STANDARD PROC. 686, 690.

[b] **Construction of Affidavits.**—These supporting affidavits will be construed most strongly against the applicant and will not be sufficient for this purpose unless the facts set forth show a valid defense; it is not enough that, from the contents of the affidavit, such a defense may be inferred. Chicago Fire Proof, Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534; Crossman v. Wohlleben, 90 Ill. 537.

[c] **A mere denial of liability** is not sufficient. Johnson L. & Co. v. Nash-Wright Co., 121 Iowa 173, 96 N. W. 760.

[d] **A counterclaim or set-off** is not such a defense as will justify opening

cause of action is a substantial and just one.<sup>42</sup> If the affidavit of merits is, under the rules of practice, insufficient, this is enough to justify the denial of the desired relief,<sup>43</sup> unless the merits otherwise appear.<sup>44</sup> The defense set up should be founded in equity; the court may well deny the application when asked to let in a strictly legal and inequitable defense.<sup>45</sup> The statute of limitations is, for this purpose, considered a meritorious defense,<sup>46</sup> early cases to the contrary not-

a judgment. *Cresswell v. White*, 3 Ind. App. 306, 29 N. E. 612; *Hawley v. Griffin*, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86.

42. *Phillips v. Equitable L. Assur. Soc.*, 26 N. Y. Supp. 522.

43. **N. Y.**—*Brewster v. Boyle*, 64 Hun 636, 19 N. Y. Supp. 146; *Godson v. Taussig*, 32 Misc. 712, 65 N. Y. Supp. 716. See also *Phillips v. Equitable L. Assur. Soc.*, 26 N. Y. Supp. 522. **Ohio**. *Howard v. Abbey*, 2 Ohio Dec. (Reprint) 64, 1 W. L. Bul. 278. **Pa.** *Hipple v. Laird*, 189 Pa. 472, 42 Atl. 46.

See more fully 1 STANDARD PROC. 655, et seq.

44. See 1 STANDARD PROC. 658, et seq.

45. **Cal.**—*People v. Rains*, 23 Cal. 127. **Nev.**—*Jones v. San Francisco Sulphur Co.*, 14 Nev. 172. **N. J.**—*Corn- ing v. Ludlum*, 28 N. J. Eq. 398; *Vanderveer's Admr. v. Holcomb*, 22 N. J. Eq. 555. **N. Y.**—*Abram French Co. v. Marx*, 8 Misc. 490, 28 N. Y. Supp. 749. But see *Benedict v. Arnoux*, 85 Hun 283, 32 N. Y. Supp. 905. **N. C.**—*Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878. **N. D.**—*Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80. **Ohio**.—*McCulloch v. Tapp*, 2 Ohio Dec. (Reprint) 678, 4 W. L. Bul. 575. **Pa.**—*Welton v. Littlejohn*, 163 Pa. 205, 29 Atl. 871; *Caldwell v. Carter*, 153 Pa. 310, 25 Atl. 831; *Woods v. Irwin*, 141 Pa. 278, 295, 21 Atl. 603, 23 Am. St. Rep. 282; *Huston Twp. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926. See also *Bailey v. Clayton*, 20 Pa. 295; *Wilson v. Hayes*, 18 Pa. 354; *Ekel v. Snevily*, 3 Watts & S. 272. **Tex.**—*Foster v. Martin*, 20 Tex. 118; *Cochrane v. Middleton*, 13 Tex. 275. See also *Aldridge v. Mardoff*, 32 Tex. 204.

[a] "A party has no right to a hearing after judgment, except for causes which touch the honesty and justice of the case." *Huston Twp.*

*Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Bailey v. Clayton*, 20 Pa. 295.

[b] Application was made to open a judgment foreclosing a mechanic's lien on the ground that the claim was for a lump sum with no items of the articles furnished. This being nothing more than a technical defense the court refused to consider it. Where the claim of the plaintiff was for the enforcement of a mere penalty when no injury had, in fact, accrued, the showing of merits required will be correspondingly decreased. *Ellington Roy- ster & Co. v. Wicker*, 87 N. C. 14.

[c] An order granting this relief without qualification or restriction in this respect entitles the applicant to interpose any defense. **Pa.**—*Collins v. Freas*, 77 Pa. 493. **S. C.**—*Hane v. Goodwin*, 1 Brev. 461. **S. D.**—*Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847.

46. **Cal.**—*Lilly-Brackett Co. v. Son- nemann*, 157 Cal. 192, 106 Pac. 715; *San Diego Realty Co. v. McGinn*, 7 Cal. App. 264, 94 Pac. 374. **Miss.**—*Sand- ers v. Robertson*, 23 Miss. 389. **N. Y.** *Bank of Kinderhook v. Gifford*, 40 Barb. 659. **N. C.**—*Compare*, *Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878. **N. D.** *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. **Pa.** *Chandler v. Bennett*, 3 Pa. Co. Ct. 155. *Compare*, *Dutilh v. Miller*, 2 Browne 311. See also *Ellinger's Appeal*, 114 Pa. 505, 7 Atl. 180; *Ekel v. Snevily*, 3 Watts & S. 272, 38 Am. Dec. 758. **S. C.**—*Hane v. Goodwin*, 1 Brev. 461. **S. D.**—*Garvie v. Greene*, 9 S. D. 608, 70 N. W. 847.

[a] The court will not open a judgment to permit a party to plead the statute of limitations where it appeared, without contradiction, at the hearing of the application that a subsequent payment had taken the case out of the operation of the statute. *Rehm v. Frank*, 16 Pa. Super. 175.

[b] In some states this was not formerly true. See *Chandler v. Ben- nett*, 3 Pa. Co. Ct. 155, where this

withstanding, as is also a discharge in bankruptcy,<sup>47</sup> or a former adjudication,<sup>48</sup> or usury<sup>49</sup> and payment, is, of course, a proper defense.<sup>50</sup> In a case, however, where the facts as to a defense upon the merits are in dispute the existence of an unquestioned legal defense will justify the granting of this relief.<sup>51</sup> The defense shown need not be an entire one, but it is sufficient if the applicant shows a partial defense.<sup>52</sup>

**Amending and Supplementing.**—The court may permit the amending<sup>53</sup> or supplementing of an affidavit of merits.<sup>54</sup>

**(IV.) Proposed Answer.**—In many jurisdictions it is proper or necessary to accompany the application with a copy of the pleading which the party desires to file.<sup>55</sup> Such a verified pleading may render un-

situation is reviewed. *Compare*, *Sheets v. Baldwin's Admr.*, 12 Ohio 120; *McCulloch v. Tapp*, 2 Ohio Dec. (Reprint) 675, 4 W. L. Bul. 575.

[c] In *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, this situation was briefly and completely reviewed, the court saying: "It is undeniable, in the light of authority, that the earlier rule, established by the adjudications of the courts of England, as well as those of this country, was that the statute of limitations is not a meritorious plea. . . . But such rule, in our opinion, is not the modern rule. The more recent, and, we think, the better, cases, have abrogated the rule. The modern judicial view is that the statute of limitations is one of repose, and that as a defense the statute is now classed as meritorious, and as much so as other valid defenses."

47. *Wise's Appeal*, 99 Pa. 193; *Chandler v. Bennett*, 3 Pa. Co. Ct. 155 (*overruling Spang v. Deibler*, 1 Pa. Co. Ct. 670); *Com. v. Huber & Co.*, 3 Clärk 383, 5 Pa. L. J. 331.

48. *Audubon v. Excelsior F. Ins. Co.*, 10 Abb. Pr. (N. Y.) 64.

49. *Bank of Kinderhook v. Gifford*, 40 Barb. (N. Y.) 659; *Audubon v. Excelsior F. Ins. Co.*, 10 Abb. Pr. (N. Y.) 64; *Chandler v. Bennett*, 3 Pa. Co. Ct. 155. *Contra*, *Bank of Statesville v. Foote*, 77 N. C. 131.

50. *Chandler v. Bennett*, 3 Pa. Co. Ct. 155.

51. *Ellinger's Appeal*, 114 Pa. 505, 7 Atl. 180.

52. *Kime v. Fenner*, 54 Neb. 476, 74 N. W. 869; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351. See also *Williams v. County Comrs.*, 74 Kan. 693, 88 Pac. 70.

53. *Palmer v. Barclay*, 92 Cal. 199,

28 Pac. 226. See 1 STANDARD PROC. 705.

[a] **Verification May Be Supplied by Amendment.**—*Rush v. Rush*, 46 Iowa 648, 26 Am. Rep. 179.

54. See 1 STANDARD PROC. 705.

[a] Where an order determining an application to set aside a judgment is reversed on appeal and the cause remanded, the hearing is had de novo and the parties may offer supplemental affidavits. *Jones v. Swepson*, 94 N. C. 700.

[b] **Continuance.**—Where the court deems further affidavits necessary a continuance may be ordered to allow their preparation. *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932.

55. **Ariz.**—*Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72. **Cal.**—*Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117; *Bailey v. Taaffe*, 29 Cal. 422. **Fla.**—*Gainesville v. Johnson*, 59 Fla. 459, 51 So. 852. **Ill.**—*Colehour v. Bass*, 143 Ill. App. 530. **Ind.**—*Bryant v. Richardson*, 126 Ind. 145, 25 N. E. 807, it is sufficient if the proposed answer is filed at the same time as the order opening the judgment. **Ia.**—*Worth v. Wetmore*, 87 Iowa 62, 54 N. W. 56; *Brunson v. Nichols*, 72 Iowa 763, 34 N. W. 289; *Thatcher v. Haun*, 12 Iowa 303. **Neb.**—*McBrien v. Riley*, 38 Neb. 561, 57 N. W. 385; *Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411; *Spencer v. Thistle*, 13 Neb. 227, 13 N. W. 214. See also *Fisk v. Thorpe*, 60 Neb. 713, 84 N. W. 79. **N. Y.**—*Schump v. Interurban St. R. Co.*, 81 App. Div. 576, 81 N. Y. Supp. 366; *Meyer v. City of New York*, 80 App. Div. 584, 80 N. Y. Supp. 774; *Allen v. Fowler & Wells Co.*, 45 App. Div. 506, 61 N. Y. Supp. 325; *Richardson v. Sun Printing Pub. Assn.*, 20



necessary an affidavit of merits,<sup>56</sup> or, at least, supply an omission in the affidavit of the facts constituting the defense.<sup>57</sup> And on the other hand an affidavit of merits stating the facts of the defense may be accepted in lieu of a verified answer.<sup>58</sup>

f. *Notice.*—(1.) *When Necessary.*—Unless a statute requires notice of motion in all cases of motions to vacate a judgment,<sup>59</sup> such an application may be made during the term at which the judgment was rendered, without notice to the adverse party,<sup>60</sup> but since the parties

App. Div. 329, 46 N. Y. Supp. 814. See also *Carey v. Browne*, 67 Hun 516, 22 N. Y. Supp. 521. **N. D.**—*Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581. See the concurring opinion in *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151. **Ore.**—*Egan v. North Am. Loan Co.*, 45 Ore. 131, 76 Pac. 774, 77 Pac. 392; *Mayer v. Mayer*, 27 Ore. 133, 39 Pac. 1002; *Bailey v. Williams*, 6 Ore. 71; *White v. Northwest Stage Co.*, 5 Ore. 99. **Wis.**—*Superior Consol. Land Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428; *Milwaukee Mut. L. & Bldg. Soc. v. Jagodzinski*, 84 Wis. 35, 54 N. W. 102.

[a] It is unnecessary to tender an answer until after it has been determined whether the grounds upon which relief is sought are sufficient. *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053.

56. See 1 STANDARD PROC. 658, 688; *Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870. But see *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199; *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80.

57. See 1 STANDARD PROC. 658, 688; *Godson v. Taussig*, 32 Misc. 712, 65 N. Y. Supp. 716.

58. *Carey v. Browne*, 67 Hun 516, 22 N. Y. Supp. 521.

[a] "Where a verified answer is not submitted, the trial court may, at its discretion, accept in lieu of such answer an affidavit setting out a valid defense to plaintiff's cause of action." *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

59. **Ala.**—Civ. Code, 1907, §4142. **Cal.**—*Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91; *Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193. **Colo.**—*Morrell H. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807. **Ill.**—*Major v. Rand*, 72

**Ill.** App. 279. **Kan.**—*Dassler's Gen. St.*, 1909, §6194. And see *National Bank v. Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56. **Neb.**—See *Rev. St.*, 1913, §§7646, 8209. **N. C.**—*Allison v. Whittier*, 101 N. C. 493, 8 S. E. 338. **Ohio.** *Bates' Ann. St.* (5th ed., §5357), cited and construed in *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720; *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337. **Pa.**—See *Harper v. Biles*, 115 Pa. 594, 8 Atl. 446. **R. I.** *Chapdelaine v. Handy*, 18 R. I. 706, 30 Atl. 342.

[a] Such a provision refers to the final disposing of and not to the mere filing or entry of such motion. *Major v. Rand*, 72 Ill. App. 279.

[b] Under the Iowa statute notice is necessary of application to vacate or modify a judgment though made at the same term where made after the time allowed for motion for a new trial. *Ellis v. Remley*, 115 Iowa 381, 88 N. W. 819; *Chicago I. & D. Ry. Co. v. Estes*, 71 Iowa 603, 33 N. W. 124.

[c] But the statute expressly authorizes the court to vacate without notice, a vacation entry of the clerk which was unauthorized, although notice should be given as a matter of fairness. *Carpenter v. Zuver*, 56 Iowa 390, 9 N. W. 304.

60. **Ala.**—*Rich v. Thornton*, 69 Ala. 473; *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Smith v. Robinson*, 11 Ala. 270. **Ind.**—*Brumbaugh v. Stockman*, 83 Ind. 583; *Burnside v. Ennis*, 43 Ind. 411; *Frazier v. Williams*, 18 Ind. 416. **N. C.**—*Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173; *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338. **Wash.** *Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114, where judgment is void. **W. Va.**—*Green & Co. v. P. W. & Ky. R. R. Co.*, 11 W. Va. 685, 692.

[a] Of this litigants and counsel are required to take notice, and nothing is done beyond recall until the ses-

are not chargeable with notice of subsequent proceedings after adjournment of the term, notice is an indispensable prerequisite,<sup>61</sup> unless waived by an appearance or other appropriate manner.<sup>62</sup> Even where notice is required, however, notice of motion is unnecessary if the judgment is absolutely void.<sup>63</sup> In some states the procedure is by

sion ends with the completion of the business. *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338.

[b] In Georgia notice is necessary to motion to set aside judgment. *Exchange Bank v. Elkau*, 72 Ga. 197.

[c] Continuation of notice of motion to vacate made at term at which judgment was rendered is not such an order as requires notice to the parties. *Major v. Rand*, 72 Ill. App. 279.

61. *Cal.*—*Vallejo v. Green*, 16 Cal. 160. *Ill.*—See *Bruen v. Bruen*, 43 Ill. 408; *Smith v. Wilson*, 26 Ill. 186; *Brady v. Washington Ins. Co.*, 67 Ill. App. 159. *Ind.*—*Jenkins v. Corwin*, 55 Ind. 21; *Burnside v. Ennis*, 43 Ind. 411; *Yancy v. Teter*, 39 Ind. 305. *Ia.*

*Des Moines Union R. Co. v. District Court*, 170 Iowa 568, 153 N. W. 217; *Perry v. Kaspar*, 113 Iowa 268, 85 N. W. 22; *Pollock v. Simpson*, 67 Iowa 519, 25 N. W. 758; *Hawkeye Ins. Co. v. Duffie*, 67 Iowa 175, 25 N. W. 117.

*Kan.*—*Trust Co. v. Barrett*, 6 Kan. App. 689, 50 Pac. 465. *La.*—*Florsheim Bros., etc. Co. v. Williams*, 45 La. Ann. 1196, 14 So. 120; *Bajourin v. Ramelli*, 34 La. Ann. 554. *Md.*—*Regester v. Woodward Iron Co.*, 82 Md. 645, 33 Atl. 320.

*Miss.*—*Lane v. Wheless*, 46 Miss. 666. *Mo.*—*Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229. *Neb.*—*Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498; *Tootle v. Jones*, 19 Neb. 588, 27 N. W. 635; *Nuckolls v. Irwin*, 2 Neb. 60. *N. Y.*

*Wheeler v. Emmeluth*, 55 Hun 606, 7 N. Y. Supp. 807; *Cayuga County Bank v. Warfield*, 13 How. Pr. 439; *Barheydt v. Adams*, 1 Wend. 101. *N. C.*—*Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173; *Allison v. Whittier*, 101 N. C. 490, 494, 8 S. E. 338; *Lyon v. McMillan*, 72 N. C. 392; *Sutton v. McMillan*, 72 N. C. 102. *Ohio.*—*Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Hettrick v. Wilson*, 12 Ohio St. 136.

*Okla.*—*Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665. *R. I.*—*Chapdelaine v. Handy*, 18 R. I. 706, 30 Atl. 342. *S. C.* *State v. Parker*, 7 S. C. 235; *Ingram v. Belk*, 2 Rich. L. 111. *Tenn.*—*Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 610; *Warren v. Parquaharson*, 4

*Baxt*, 484. *Tex.*—*Texas Land, etc. Co. v. Winter*, 93 Tex. 560, 57 S. W. 39. *Wash.*—*Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446; *Spokane & I. Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92.

[a] To set aside a decree of foreclosure in favor of nonresidents after adjournment of term without in some proper way acquiring jurisdiction of the parties is erroneous. *Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7.

[b] Notice of filing the application is not ordinarily necessary but a notice of the hearing of such application should be given. *Bruen v. Bruen*, 43 Ill. 408.

[c] Notice filed on last day of term but not served until a subsequent term is considered as a motion made at the subsequent term. *Morrell H. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807.

[d] The record must be made to show that this provision has been complied with, since there can be no presumption of notice. *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337.

62. *Ala.*—*Jennings v. Pearce*, 101 Ala. 538, 14 So. 319; *Moore v. Easley*, 18 Ala. 619. *Cal.*—*Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193. *Ia.*—*Chicago I. & D. Ry. Co. v. Estes*, 71 Iowa 603, 33 N. W. 124.

[a] An appearance to vacate the order setting aside the previous order for insufficiency of the facts stated in the application to set aside the decree is a waiver of lack of notice. The court then has jurisdiction of the parties. *Ellis v. Remley*, 115 Iowa 331, 88 N. W. 809.

63. *Cal.*—*People v. Thomas*, 101 Cal. 571, 36 Pac. 9. *Idaho.*—*Kerns v. Morgan*, 11 Idaho 572, 83 Pac. 954. *Mont.* *State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098. *Wash.*—*Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114.

[a] "The power of a court to vacate a judgment or order void upon its face is not extinguished by lapse of

petition in some cases, in which a summons is required to be issued and served as in an original action.<sup>64</sup>

**Withdrawal of Motion.** — A motion of this character may be withdrawn without notice.<sup>65</sup>

**(II.) Form and Contents.** — The form of the notice may be prescribed by statute or rules of court.<sup>66</sup> It is usually required to be in writing,<sup>67</sup> and in such form as will inform the adverse party as to the nature of the proceeding and the time of the hearing.<sup>68</sup> The notice should specify all the relief for which the applicant will ask since, if the adverse party defaults at the hearing, the applicant will be limited thereby;<sup>69</sup> but should the parties appear and a hearing be had upon the merits, the court may make such an order as is required from the facts disclosed, at least to the extent of including provisions incidental to the relief demanded.<sup>70</sup> The notice should also inform the adverse party as to the grounds upon which the motion will be made.<sup>71</sup>

**(III.) To Whom Given.** — The statutes generally provide for notice

time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action is entirely appropriate, *neither motion nor notice to an adverse party is essential.*" *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

64. Ia.—Code, 1897, §4095. **Neb.** Rev. St., 1913, §8208. **Ohio.**—*Bates' Ann. St.* (5th ed.), §5358. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 529, 48 Pac. 197.

65. *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592.

66. *Major v. Rand*, 72 Ill. App. 279; *N. Y. Code Civ. Proc.*, §1289. See also *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337, and the title "Notice."

67. **Ala.**—*Civ. Code*, 1907, §4142. **Ill.**—*Major v. Rand*, 72 Ill. App. 279. **N. Y.**—*Parson's Code Civ. Proc.*, 1915, §1289. **N. C.**—*Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173. **Ohio.**—*Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337.

68. **Form of Notice of Motion.** [Title of court and cause.] To the above named plaintiff (or defendant) and (if adverse party is represented by counsel) to A. B., his attorney: Please take notice that the undersigned, as attorney for the defendant (or plaintiff), will on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, at \_\_\_\_\_ o'clock —. m. of said day, or as soon thereafter as counsel may be heard, move the above named court to vacate the judgment rendered in said cause on the

\_\_\_\_\_ day of \_\_\_\_\_, 19—, on the ground (here insert the ground upon which the motion is to be made as that the said court was without jurisdiction to render such judgment); for the following reasons, to-wit: 1. Because (here set forth the facts as that the defendant was not served personally with the summons, etc.) Based upon *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937.

For another form of notice of motion see *Peoples v. Ulmer*, 64 S. C. 496, 42 S. E. 429.

69. *Headdings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017.

70. In *Headdings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017, defaulting defendant served notice that he would ask that "the judgment herein be vacated, and the findings on which it was entered set aside, and that the attorney for the defendant be allowed to serve his notice of retainer." The order of the court further provided for leave to file an answer. The parties being before the court and a hearing having been had this was held to be proper.

71. *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; *Perkins v. Mead*, 22 How. Pr. (N. Y.) 476; *Selover v. Forbes*, 22 How. Pr. (N. Y.) 477.

[a] A notice of motion for irregularity should specify wherein the irregularity consists. *Selover v. Forbes*, 22 How. Pr. (N. Y.) 477; *Whitehead v. Smith*, 9 How. Pr. (N. Y.) 35.



to the adverse party.<sup>72</sup> This notice should be given to the parties of record who have an interest in maintaining the judgment which the applicant seeks to have opened or set aside.<sup>73</sup>

(IV.) **Service.**—(A.) **IN GENERAL.**—The manner or mode of service of the notice is determined largely by statute.<sup>74</sup>

(B.) **UPON WHOM.**—While there is authority which requires the service of the notice upon the adverse party himself,<sup>75</sup> generally service may be made upon the attorney of record of the adverse party.<sup>76</sup>

(C.) **REQUIREMENTS AS TO TIME.**—Statutes providing for notice vary as to the length of notice required.<sup>77</sup> Some statutes provide for reasonable notice only.<sup>78</sup> If the proceeding is instituted by petition it is

72. *Morrell H. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807.

73. *People v. Miller*, 195 Ill. 621, 63 N. E. 504. See *N. Y. Code Civ. Proc.*, §1286.

[a] Where disbarment proceedings were instituted in one state, based upon a foreign judgment of disbarment, the parties upon whose relation the second proceeding was instituted are not entitled to notice of an application to vacate the foreign judgment since they were not parties to that action. *People v. Miller*, 195 Ill. 621, 63 N. E. 504.

[b] If notice has been given to all persons interested in maintaining the judgment it is an immaterial irregularity that the party who is nominally the adverse party was not notified. *Fitzgerald v. Cross*, 30 Ohio St. 444.

74. See *Ala.*—*Civ. Code*, 1907, §4142. *N. Y.*—*Code Civ. Proc.*, §1289. *Ohio.* *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337.

See generally the title "Service of Process and Papers."

[a] Where the application is made by petition and summons, served as in the commencement of an action, notice may be given by publication. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468.

[b] In Indiana where the remedy is by "motion or complaint" (§405, *Burns' Ann. Stats.*, 1914) notice may not be given by publication. *Beck v. Koester*, 79 Ind. 135.

75. *Perry v. Kasper*, 113 Iowa 209, 85 N. W. 22, holding service upon adverse party necessary.

[a] Service upon legal representatives after death of the party, see *Ala. Civ. Code*, 1907, §4142, and *Grier v. Jones*, 31 Ga. 181.

76. *Dak.*—*Beach v. Beach*, 6 Dak. 371, 43 N. W. 701. *Ga.*—*Jordan v. Tar-*

*ver.* 92 Ga. 379, 17 S. E. 351. *Ill.* *Major v. Rand*, 72 Ill. App. 279, 283; *Pick v. Glickman*, 54 Ill. App. 646. *Kan.*—*National Bank v. Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56. *Minn.* *Phelps v. Heaton*, 79 Minn. 476, 82 N. W. 990. *Neb.*—*Merriam v. Gordon*, 17 Neb. 325, 22 N. W. 563. *N. C.*—*Branch v. Walker*, 92 N. C. 87. *N. D.*—*Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095. *Ohio.*—See *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337. *Wash.*—*Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446; *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858.

[a] Under proceedings instituted by petition, if the statute declares, as it does in some states, that "on such petition summons shall be issued and served as in the commencement of an action," the service may only be made upon the party and not upon his attorney. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468.

77. See *Ala. Civ. Code*, 1907, §4142; *Spokane & I. Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92 (overruling *Chehalis v. Ellingson*, 21 Wash. 638, 59 Pac. 485); *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103.

78. *Bates' Ann. Ohio St.* (5th ed.), §5357; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Hill v. Bowyer*, 18 Gratt. (59 Va.) 364.

[a] **What Is Reasonable Notice.** Under such a statute where the notice was served on the day set for hearing but the hearing was continued for nearly a month, thus affording the adverse party ample time to prepare for contesting the application, the error, if any, in the shortness of the notice was cured. "A reasonable notice of the hearing of a motion is such notice as is meet and fair, in view of the cir-

frequently required that the party shall be brought into court on the same notice as to time as in an original action.<sup>79</sup>

(V.) Waiver. — By appearing and contesting the application for this relief the adverse party waives his right to a notice.<sup>80</sup>

g. *Demurrer, Answer or Counter-Affidavits.* — While neither a demurrer<sup>81</sup> nor answer may be filed by the opposing party upon a motion to open or vacate a judgment,<sup>82</sup> in those jurisdictions where the application is by petition the opposing party must answer,<sup>83</sup> otherwise the petition may be granted pro confesso,<sup>84</sup> unless, as in some states the statute provides that the allegations of the petition are deemed denied without answer.<sup>85</sup> The adverse party has a right to offer counter-affidavits as to the grounds upon which it is sought to open or vacate the judgment,<sup>86</sup> thus he may controvert the facts offered as an excuse for the failure to make defense at the proper time.<sup>87</sup> Generally, however, the affidavit of the applicant as to the merits of his defense may not be controverted in this manner.<sup>88</sup>

cumstances and conditions existent at the time in the matter to be presented." *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498.

79. Ohio.—*Bates' Ann. St.* (5th ed.), §5358; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337. Wash.—*Roberts v. Shelton, etc. R. R. Co.*, 21 Wash. 427, 58 Pac. 576. Wyo.—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

80. Ala.—*Jennings v. Pearce*, 101 Ala. 538, 14 So. 319; *Moore v. Easley*, 18 Ala. 619. Cal.—*Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70. Ga.—*Jordan v. Tarver*, 92 Ga. 379, 17 S. E. 351. Compare, *Shotwell v. Rowell*, 30 Ga. 557. Ind.—*Hill v. Crump*, 24 Ind. 291. Ia.—*Worth v. Wetmore*, 87 Iowa 62, 54 N. W. 56. Mont.—*Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592. Ohio.—*Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930.

81. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468.

82. *Whitehead v. Post*, 2 Ohio Dec. (Reprint) 468.

83. *Yost v. Mensch*, 141 Pa. 73, 21 Atl. 507, 27 W. N. C. 562.

[a] Such answer should be direct and specific in its denials. *Yost v. Mensch*, 141 Pa. 73, 83, 21 Atl. 507, 27 W. N. C. 562.

As to answers generally, see the titles "Answers;" "Denials."

84. *Daly v. Thompson*, 5 Pa. Dist. 749. See also *Bonner v. Martin*, 51 Ga. 195.

85. Iowa Code, 1897, §4095; *Roberts v. Shelton, etc. R. R. Co.*, 21 Wash. 427, 58 Pac. 576.

86. *Reed v. Curry*, 35 Ill. 536.

87. Cal.—*In re Van Loan*, 143 Cal. 423, 76 Pac. 37; *Security Loan & T. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257; *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247. Ill. *Gilchrist Transp. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558; *Hefling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424; *Matzenbaugh v. Doyle*, 156 Ill. 331, 40 N. E. 935. Ind.—*Williams v. Grooms*, 122 Ind. 391, 24 N. E. 158; *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880; *Morris v. Buckeye Engine Co.*, 78 Ind. 86; *Bristor v. Galvin*, 62 Ind. 352; *Lake v. Jones*, 49 Ind. 297; *Masten v. Indiana Car Co.*, 25 Ind. App. 175, 57 N. E. 148. Minn.—*Bausman v. Tilley*, 46 Minn. 66, 48 N. W. 459. Mont.—*Butte Butch. Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303. Neb.—*Stover v. Hough*, 47 Neb. 789, 66 N. W. 825. N. Y.—*Provost v. Provost*, 18 N. Y. Supp. 896. N. D.—*Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581.

[a] The facts in opposition may only be stated. Inferences and arguments or matters of belief, have no place in such an affidavit. *Powell v. Kane*, 5 Paige (N. Y.) 265.

[b] By Attorney.—An affidavit controverting the allegations in the affidavits supporting the application may be made by the attorney for his client. *Marx v. Epstein*, 1 Tex. Civ. Cas., §1317.

88. Ala.—*Pratt v. Keils*, 28 Ala. 390. Cal.—*Douglass v. Todd*, 96 Cal. 655, 31

*h. Hearing and Determination.*—(I.) Procedure at Hearing. — The procedure generally adopted on the hearing is to first hear and determine the grounds upon which the application is made.<sup>89</sup> Good cause appearing for granting the desired relief, the rules of practice generally require that the court shall then consider the validity of the proposed defense, and shall refuse to disturb the judgment attacked unless it appears that there is a valid defense to the action,<sup>90</sup> or, if the application be by a plaintiff, that he has a good cause of

Pae. 622, 31 Am. St. Rep. 247; *Reynolds v. Dist. v. Coghill*, 56 Cal. 697; *Quach v. Wicks*, 45 Cal. 52; *Francis v. Cox*, 75 Cal. 395. Ill.—*Gleicher v. Transp. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 258; *Mumford v. Kimball*, 55 Ill. 582. Ind.—*Holmes v. 70th City Bank*, 142 Ind. 99, 41 N. E. 323; *Williams v. Grooms*, 122 Ind. 391, 24 N. E. 158; *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880; *Douglass v. Keehn*, 78 Ind. 199; *State v. Howe*, 64 Ind. 18; *Bristor v. Galvin*, 62 Ind. 352; *Hunter v. Francis*, 56 Ind. 460; *Hill v. Crump*, 24 Ind. 291; *Davis v. Steuben Tp.*, 19 Ind. App. 694, 50 N. E. 1. Ia.—*Worth v. Wetmore*, 87 Iowa 62, 54 N. W. 56. Mont.—*Butte Butch. Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303. N. Y.—*Benedict v. Arnoux*, 85 Hun 283, 32 N. Y. Supp. 905; *Hanford v. McNair*, 2 Wend. 286; *Catlin v. Larson*, 4 Abb. Pr. 216, 14 How. Pr. 511; *Johnson v. Lynch*, 15 How. Pr. 199. N. D.—*Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581. S. D.—*Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87; *Congdon Hdw. Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022.

See 1 STANDARD PROC. 708.

[a] Where the records and files affirmatively show that the proposed defense is not available the motion may be resisted on this ground. *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87.

89. Ark.—*Kirby's Dig.*, 1904, §4435. Ia.—*Code*, 1897, §4097; *Worth v. Wetmore*, 87 Iowa 62, 54 N. W. 56. Kan.—*Dassler's Gen. St.*, 1909, §6196. Ky.—*Civ. Code Proc.*, 1906, §522. Neb.—*Rev. St.*, 1913, §§8210-11; *Western Assur. Co. v. Klein*, 48 Neb. 904, 67 N. W. 873; *Bond v. Wycoff*, 42 Neb. 244, 60 N. W. 104; *Thompson v. Johnson*, 17 Neb. 286, 22 N. W. 100. N. C.—*Turner v. J. I. Case Thresh. Mach. Co.*, 133 N. C. 381, 45 S. E. 781, involving §513, Rev., 1905. Ohio.—*Bates' Ann. St.*, 1906, cited and

*Case Thresh. Mach. Co.*, 133 N. C. 381, 45 S. E. 781. Ohio.—*Bates' Ann. St.* (5th ed.), §5359; *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572; *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Watson v. Paine*, 25 Ohio St. 340; *Smead Foundry Co. v. Iron Co.*, 18 Ohio Cir. Ct. 783; *Wellman v. Wellman*, 9 Ohio Cir. Ct. 72; *Fox v. Bank*, 11 Ohio Dec. (Reprint) 127; *Kolkhoff v. Busse*, 6 Ohio Dec. 28. Pa.—See *Ives v. Snyder*, 7 Kulp 393. S. D.—*Congdon Hdw. Co. v. Con. Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022.

[a] A statute requiring the court to try and decide upon the grounds for setting aside the judgment before trying and deciding upon the validity of the defense, means not the sufficiency of the averments of the grounds but the existence of the facts alleged. *Kolkhoff v. Busse*, 6 Ohio Dec. 28.

[b] Only the grounds stated in the application will be considered. *Chaliss v. Headley*, 9 Kan. 684.

90. Ark.—*Kirby's Dig.*, 1904, §4434. Ia.—*Code*, 1897, §1496. And see, involving this section, the following cases: *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Coleman v. Case*, 66 Iowa 534, 24 N. W. 31; *State Ins. Co. v. Granger*, 62 Iowa 272, 17 N. W. 504; *Miracle v. Lancaster*, 46 Iowa 179; *Brewer v. Holhom*, 34 Iowa 473. This section, it has been held, contemplates a trial as to whether there is a valid defense. *Morton v. Coffin*, 29 Iowa 235. Kan.—*Dassler's Gen. St.*, 1909, §6197. Ky.—*Civ. Code Proc.*, 1906, §521. Neb.—*Rev. St.*, 1913, §8211 ("a judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered"); *Western Assur. Co. v. Klein*, 48 Neb. 904, 67 N. W. 873. N. C.—*Turner v. J. I. Case Thresh. Machine Co.*, 133 N. C. 381, 45 S. E. 781, involving §513, Rev., 1905. Ohio.—*Bates' Ann. St.*, 1906, cited and



action.<sup>91</sup> The court, however, will not inquire into the merits further than to discover whether or not the applicant has, *prima facie*, a good defense or cause of action.<sup>92</sup> It is for the court to determine, upon

construed in *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572; *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720; *Ralston v. Wells*, 49 Ohio St. 298, 30 N. E. 784; *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Watson v. Paine*, 25 Ohio St. 340; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Smead Foundry Co. v. Andrews & Hitchcock Iron Co.*, 18 Ohio Cir. Ct. 783; *Wellman v. Wellman*, 9 Ohio Cir. Ct. 72; *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127; *Kolkhoff v. Busse*, 6 Ohio Dec. 28. See also *Hildebrand v. Windisch & Co.*, 6 Ohio Dec. (Reprint) 784, 4 W. L. Bal. 289. **Okla.** *Provins v. Lovi*, 6 Okla. 94, 50 Pac. 81. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 529, 48 Pac. 197.

[a] In Ohio, (1) after the court has decided that there is good ground to vacate, the judgment to vacate should be suspended until after the cause is tried; and if, on such trial, the defense is established, then judgment of vacation should be entered; or, if the defense fails, the judgment is to be affirmed. *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Frazier v. Williams*, 24 Ohio St. 625. (2) It seems that the provisions of the statute are intended for the protection of the party resisting the application and may be waived by his subsequent appearance without objection. Where the judgment is set aside without first determining that there is a valid defense to the action, the order thus made is not void but voidable only, and hence immune from collateral attack. *Newman v. Desnoyers*, 64 Ohio St. 447, 60 N. E. 572.

[b] If the proceeding was by motion the defendant should file his proposed answer and a trial be had in the regular manner; if by petition where the defense is set out in issuable form it would be sufficient to take issue thereon by reply or demurrer. When the issue is thus made up, it should be tried as in any other case. *Watson v. Paine*, 25 Ohio St. 340.

91. **Ark.**—*Kirby's Dig.*, 1904, §4434. **Kan.**—*Dassler's Gen. St.*, 1909, §6197. **Ky.**—*Civ. Code Proc.*, 1906, §521. **Neb.**

*Rev. St.*, 1913, §8211. **Ohio.**—*Bates' Ann. St.* (5th ed.), §5360; *Wellman v. Wellman*, 9 Ohio Cir. Ct. 72; *Bowser v. Toledo*, 6 Ohio Cir. Dec. 83, 9 Ohio Cir. Ct. 294.

92. **Ia.**—*Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760. **N. Y.**—*Benedict v. Arnoux*, 85 Hun 283, 32 N. Y. Supp. 905, 66 N. Y. St. Rep. 298; *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053. See also *Dinsmore v. Adams*, 49 How. Pr. 238. **N. C.**—See also *Le Due v. Slocomb*, 124 N. C. 347, 32 S. E. 726. **Pa.** See *Hunter v. Forsyth*, 205 Pa. 466, 55 Atl. 26. **R. I.**—*Alverson v. Alverson*, 2 R. I. 27. **S. D.**—*Congdon Hdw. Co. v. Consolidated Apex Min. Co.*, 11 S. D. 376, 77 N. W. 1022. See also *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29. **Vt.**—*Fairfield v. King*, 41 Vt. 611.

See *supra*, XIV, E, 2, g.

[a] "As the truth of the defenses are not finally tried in the proceedings to vacate the judgment, enough evidence to make a *prima facie* showing of the truth or existence of the defenses would be sufficient to authorize the court to vacate the judgment." *Knights of Maccabees v. Gordon*, 83 Ark. 17, 21, 102 S. W. 711.

[b] "It is not necessary to show that the defense is valid, and the court will not go into the evidence except so far as to satisfy themselves that the petitioner has *prima facie* good grounds for a trial." *Alverson v. Alverson*, 2 R. I. 27.

[c] "The hearing of evidence is confined to the question whether the judgment has been taken through the inadvertence, mistake, surprise, or excusable neglect of the defendant. The applicant is not required to make more than such a *prima facie* showing of merits as arises from his own affidavits." *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053, 1054, *quoting* from *Freeman on Judgments*, §109.

[d] In Pennsylvania the court has said that where an affidavit of defense is not filed in time "and comes before the court only on a rule to open a judgment regularly entered, the court is entitled to examine the averments critically and to require further evi-

the facts, whether the judgment should be opened or vacated.<sup>92</sup> And a motion to open or vacate a judgment may be disposed of in a summary manner.<sup>93</sup> It is not necessary, simply because there is a conflict in the evidence, to submit the matter to a jury,<sup>94</sup> though the court may, if the nature of the controversy be such as to make it advisable, direct an issue to be tried by a jury, and grant the relief sought in accordance with the verdict of the jury.<sup>95</sup> If the court is not satisfied from the affidavits and papers presented as to what the real facts are, it may refer the matter for the purpose of taking further evidence,<sup>96</sup> and may require the parties to submit to an oral examination and cross-examination.<sup>97</sup> The laches of the applicant may be considered in determining whether to grant him relief.<sup>98</sup> Relief may also be denied where it appears that it would result in no substantial benefit to the applicant.<sup>1</sup> In some jurisdictions it is the duty of the court to make findings on the facts, which should be specific and not

done as to the facts, as in other cases of application to open judgments." *Hunter v. Perreth*, 105 Pa. 400, 45 Atl. 26.

92. *Kolkhoff v. Busse*, 6 Ohio Dec. 28; *Cloud v. Markle*, 186 Pa. 614, 40 Atl. 811; *Fisher v. Hestonville M. & F. Pass. Ry. Co.*, 185 Pa. 602, 40 Atl. 97; *Wernet's Appeal*, 91 Pa. 319; *Earley's Appeal*, 90 Pa. 321; *Gottlieb v. Middleberg*, 23 Pa. Super. 525; *Ives v. Snyder*, 7 Kulp 393. See also *Reichenbach v. Hartlep*, 15 Pa. Super. 23.

[a] On such a motion a court has all the powers which formerly appertained to a chancellor. *Vilas v. Plattsburgh & M. Railroad Co.*, 123 N. Y. 440, 25 N. E. 941.

[b] Upon a Preponderance of the Evidence.—*Cloud v. Markle*, 186 Pa. 614, 40 Atl. 811. But see *Merchants Ad Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619, 61 Pac. 277; *Kolkhoff v. Busse*, 6 Ohio Dec. 28.

Discretion of Court.—See *infra*, XIV, E, 2, h, (II).

Review on Appeal.—See *infra*, XIV, H.

94. *Wright v. Baltimore*, 3 Ind. 10, 99 Am. Dec. 330.

95. *Earley's Appeal*, 90 Pa. 321; *Gottlieb v. Middleberg*, 23 Pa. Super. 525; *Zartman v. Spangler*, 21 Pa. Super. 647; *Ives v. Snyder*, 7 Kulp (Pa.) 393. See *Kolkhoff v. Busse*, 6 Ohio Dec. 28.

96. Ill.—*Rasmussen v. Smith*, 82 Ill. App. 334. Miss.—*Meyer v. Whitehead*, 62 Miss. 187. Pa.—*Martin v. Kling*, 157 Pa. 473, 27 Atl. 753; *McCutcheon v. Allen*, 96 Pa. 319; *Ives v. Snyder*, 7

Kulp 393. Wis.—*Cooley v. Gregory*, 16 Wis. 303.

See generally the title "Issues in Pleading and Practice."

97. *Vilas v. Plattsburgh & M. Railroad Co.*, 123 N. Y. 440, 25 N. E. 941.

98. *Vilas v. Plattsburgh & M. Railroad Co.*, 123 N. Y. 440, 25 N. E. 941.

99. *Jones v. Jones*, 24 N. Y. Supp. 1031. See *supra*, XIV, E, 2, d, (II).

[a] If upon the hearing of the application it should develop that the applicant was guilty of such laches as must bar his application it becomes unnecessary for the court to consider the character of his proposed defense. *Turner v. J. I. Case Thresh. Mach. Co.*, 136 N. C. 381, 45 S. E. 781; *Osborn v. Leach*, 133 N. C. 427, 45 S. E. 783.

1. *Harrell v. Peebles*, 79 N. C. 26; *Bradford v. Coit*, 77 N. C. 72; *Salsberg v. Mack*, 6 Kulp (Pa.) 337.

2. *Obbink v. Smith*, 80 N. C. 16; *Jones v. Swenson*, 79 N. C. 510; *Uteley v. Peters*, 72 N. C. 525; *Clegg v. New York White Soap Stone Co.*, 66 N. C. 391; *Powell v. Weith*, 66 N. C. 423. Compare, *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892.

See generally the title "Findings and Conclusions."

[a] "It is the duty of the judge: first, to find the facts, as they would be set out in a special verdict." This requirement is not met by simply stating the evidence. That is often conflicting and the appellate court is not a competent tribunal to try the facts. *Clegg v. New York White Soap Stone Co.*, 66 N. C. 391.

general.<sup>8</sup> And, it has been held, a party to such a motion may properly demand of the trial court that it specify the ground upon which its decision therein is made, and a refusal so to do is error.<sup>4</sup>

(II.) Discretion of Court. — It is a well established general rule that in granting or withholding this relief,<sup>5</sup> as well as in the disposition of

3. *Winborne v. Johnson*, 93 N. C. 46; *Oldham v. Sneed*, 80 N. C. 15; *Smith v. Hahn*, 80 N. C. 240; *Powell v. Weith*, 66 N. C. 423. See also *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338.

[a] A general finding "that the defendants did not fail to employ counsel in their action in consequence of any fraud practiced on them by the plaintiff," was, in *Smith v. Hahn*, 80 N. C. 240, held defective, the court there assigning as the reason that "it does not ascertain and separately set forth the facts which, as a matter of law, amount to fraud on the part of the plaintiff."

[b] A finding that an "action was transferred within the time prescribed by law" is insufficient in this regard. *Powell v. Weith*, 66 N. C. 423.

[c] In the absence of a request for special findings a general finding is sufficient. *Anthony v. Karbach*, 64 Neb. 509, 90 N. W. 243, 97 Am. St. Rep. 662.

4. *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892. See *infra*, XIV, F.

5. U. S.—*Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439. See also *Miocene Ditch Co. v. Moore*, 150 Fed. 483, 80 C. C. A. 301. Ala.—*Ex parte Parker*, 172 Ala. 136, 54 So. 572; *Ewing v. Peck*, 17 Ala. 339; *Bagby v. Chandler*, 8 Ala. 230; *Wilson v. Torbert*, 3 Stew. 296, 21 Am. Dec. 632. Ariz.—*Beebe v. Farish*, 14 Ariz. 231, 127 Pac. 715; *Arizona Min. & Trad. Co. v. Benton*, 12 Ariz. 373, 100 Pac. 952. Cal.—*Lang v. Lilley, etc. Co.*, 164 Cal. 294, 128 Pac. 1026; *Boland v. Persons*, 160 Cal. 486, 117 Pac. 547; *Webster v. Somer*, 159 Cal. 459, 114 Pac. 575; *Cass v. Hutton*, 155 Cal. 103, 99 Pac. 493; *Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878; *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425, 34 Pac. 76; *Clarke v. Vitram*, 99 Cal. 50, 33 Pac. 798; *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762; *Malone v. Big Flat Gravel Min. Co.*, 93 Cal. 384, 28 Pac. 1063; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962; *Gar-*

*ner v. Erlanger*, 86 Cal. 60, 24 Pac. 805; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089; *Bailey v. Taaffe*, 29 Cal. 423; *Consolidated, etc. Min. Co. v. Howe*, 29 Cal. 72; *Woodward v. Backus*, 20 Cal. 137; *Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823; *Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370; *Staley v. O'Day*, 22 Cal. App. 149, 133 Pac. 620; *Bond v. Karma-Ajax Con. Min. Co.*, 15 Cal. App. 469, 115 Pac. 965; *Ritter v. Braash*, 11 Cal. App. 258, 104 Pac. 592; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554; *Klokke v. Raphael*, 8 Cal. App. 1, 96 Pac. 392; *Doherty v. California Nav. Co.*, 6 Cal. App. 131, 91 Pac. 419; *Pelegrielli v. McCloud River Lumb. Co.*, 1 Cal. App. 593, 82 Pac. 695; *Murphy v. Stelling*, 1 Cal. App. 95, 81 Pac. 730; *Link v. Jarvis*, 5 Cal. Unrep. 750, 33 Pac. 206. See also *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691. Colo.—*County Court v. People*, 55 Colo. 258, 133 Pac. 752; *Burlington Ditch, etc. Co. v. Ft. Morgan Irr. Co.*, 59 Colo. 571, 151 Pac. 432; *Thompson v. Crescent Mill, etc. Co.*, 47 Colo. 4, 105 Pac. 880; *Bannerot v. McClure*, 39 Colo. 472, 90 Pac. 70; *Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Hollingsworth v. Ring*, 26 Colo. App. 121, 141 Pac. 139; *McConnell v. Schultz*, 23 Colo. App. 194, 128 Pac. 876; *Morrell Hdw. Co. v. Princess Gold Min. Co.*, 16 Colo. App. 54, 63 Pac. 807; *Union Brewing Co. v. Cooper*, 15 Colo. App. 65, 60 Pac. 946. D. C.—*Dante v. Bagby*, 39 App. Cas. 516; *Hallowell v. Darling*, 32 App. Cas. 405. Fla.—*Loring v. Wittich*, 16 Fla. 617. Ga.—*Moore v. Moore*, 139 Ga. 597, 77 S. E. 820; *Murray v. Willoughby*, 133 Ga. 514, 66 S. E. 267; *Roberts v. Kuhrt*, 119 Ga. 704, 46 S. E. 856; *Bowen v. Wyeth*, 119 Ga. 687, 46 S. E. 823; *Deering Harvester Co. v. Thompson*, 116 Ga. 418, 42 S. E. 772; *Tower v. Ellsworth*, 112 Ga. 460, 37 S. E. 736; *Mitchell v. Williams*, 110 Ga. 280, 34 S. E. 848; *Bridges v. Blake-man*, 108 Ga. 801, 34 S. E. 122; *Whaley v. Cooper*, 82 Ga. 72, 8 S. E. 870; *Aiken v. Wolfe*, 76 Ga. 816; *Morris v. Morris*, 76 Ga. 734; *Storey v. Weaver*,



66 Ga. 296; *Harris v. Breed*, 38 Ga. 299; *Hall v. Holman*, 15 Ga. App. 659, 84 S. E. 174; *Bowman v. Winn*, 16 Ga. App. 546, 85 S. E. 787; *Southland Lumber Co. v. Bales*, 7 Ga. App. 227, 66 S. E. 548. **Haw.**—*Kapiolani Est. v. Grinbaum*, 14 Hawaii 548; *Tibbets v. Pali*, 14 Hawaii 517; *MacFarlane v. McCandless*, 8 Hawaii 118; *Bishop & Co. v. Pacific Nav. Co.*, 7 Hawaii 276; *Ashford v. Titecomb*, 5 Hawaii 489. **Idaho.**—*Richards v. Richards*, 24 Idaho 87, 132 Pac. 576; *Brooks v. Orchard Land Co.*, 21 Idaho 212, 121 Pac. 101; *Humphreys v. Idaho Gold Min. Dev. Co.*, 21 Idaho 126, 120 Pac. 823; *Green v. Kandle*, 20 Idaho 190, 118 Pac. 90; *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho 83, 113 Pac. 89; *Culver v. Mountain Home Electric Co.*, 17 Idaho 669, 107 Pac. 65; *Western Loan Co. v. Smith*, 12 Idaho 94, 85 Pac. 1084; *Pease v. Kootenai*, 7 Idaho 731, 65 Pac. 432; *Baker v. Knott*, 3 Idaho 700, 35 Pac. 172. **Ill.**—*Culver v. Brinkerhoff*, 180 Ill. 548, 54 N. E. 585; *Barrett v. Queen City Cycle Co.*, 179 Ill. 68, 53 N. E. 550; *Baldwin v. McClelland*, 152 Ill. 42, 48, 38 N. E. 143; *Fergus v. Garden City, etc. Co.*, 71 Ill. 51; *Mason v. McNamara*, 57 Ill. 274; *Blayne v. Cotton*, 189 Ill. App. 205; *Staat v. Coughenour*, 187 Ill. App. 36; *Brown v. Royal Casualty Co.*, 183 Ill. App. 540; *Kloepfer v. Osborne*, 177 Ill. App. 384; *Flora v. Fields*, 156 Ill. App. 341; *Mutual Ins. Co. v. Carnahan*, 122 Ill. App. 540; *Major v. Rand*, 72 Ill. App. 279; *Board of Education v. Hoag*, 21 Ill. App. 588. **Ind.**—*Cavanaugh v. Toledo W. & W. Ry. Co.*, 49 Ind. 149; *Carlisle v. Wilkinson*, 12 Ind. 91; *Houser v. Laughlin*, 55 Ind. App. 563, 104 N. E. 309; *Neat v. Topp*, 49 Ind. App. 512, 97 N. E. 578; *Milbourn v. Baugher*, 43 Ind. App. 35, 86 N. E. 874; *Mutual Reserve L. Ins. Co. v. Ross*, 42 Ind. App. 621, 86 N. E. 506; *Masten v. Indiana Car Co.*, 25 Ind. App. 175, 57 N. E. 148. **Ia.**—*Malley v. Roberts*, 167 Iowa 523, 149 N. W. 630; *Rock Island Plow Co. v. Bixby*, 166 Iowa 559, 147 N. W. 880; *Evans v. Church*, 146 N. W. 822; *Fox v. Nolan*, 165 Iowa 302, 145 N. W. 491; *Ronayne v. Commercial Men's Assn.*, 162 Iowa 615, 144 N. W. 319; *Norman v. Iowa Cent. R. Co.*, 149 Iowa 246, 128 N. W. 349; *Logan v. Southall*, 137 Iowa 372, 115 N. W. 19; *Iowa Sav. & L. Assn. v. Kent*, 134 Iowa 444, 109 N. W. 773; *Tschohl v. Machinery Mut. Ins. Assn.*, 126 Iowa 511, 101 N. W. 749; *McQuade v. Chicago, R. I. & P. R. Co.*, 78 Iowa 688, 42 N. W. 520, 43 N. W. 615. **Kan.**—*Hopkins v. Hopkins*, 47 Kan. 103, 27 Pac. 822. **Ky.**—*Green v. Com.*, 152 Ky. 239, 153 S. W. 242; *Elliston v. Bank*, 3 Dana 99; *Pennsylvania Fire Ins. Co. v. Young*, 25 Ky. L. Rep. 1350, 78 S. W. 127. **Mich.**—*Carton v. Day*, 157 Mich. 43, 121 N. W. 295; *Alspaugh v. Ionia Circuit Judge*, 126 Mich. 67, 35 N. W. 244; *Low v. Mills*, 61 Mich. 35, 27 N. W. 877; *City of Detroit v. Jackson*, 1 Doug. 106. **Minn.**—*Schultz v. Wallin*, 130 Minn. 45, 152 N. W. 865; *Fitzgerald v. Fitzgerald*, 129 Minn. 414, 152 N. W. 772; *Rodgers v. United States & D. Life Ins. Co.*, 127 Minn. 435, 149 N. W. 671; *Northwest Thresher Co. v. Herding*, 126 Minn. 184, 148 N. W. 57; *Slimmer v. State Bank*, 122 Minn. 187, 142 N. W. 144; *Zinn v. Huhn*, 120 Minn. 491, 139 N. W. 952; *Clifford v. Great Northern R. Co.*, 118 Minn. 22, 136 N. W. 260; *Dennis v. Firth*, 113 Minn. 235, 129 N. W. 387; *Pasich v. Polga*, 112 Minn. 510, 128 N. W. 669; *Perkins v. Gibbs*, 108 Minn. 151, 121 N. W. 605; *Waller v. Waller*, 102 Minn. 405, 113 N. W. 1013; *Fishstrom v. Bankers' Mut. Ins. Co.*, 102 Minn. 228, 113 N. W. 267; *W. R. Lynn Shoe Co. v. Schunk*, 101 Minn. 22, 111 N. W. 729; *White v. Gurney*, 92 Minn. 271, 99 N. W. 889; *Osman v. Winsted*, 78 Minn. 295, 80 N. W. 1127; *Hull v. Chapel*, 77 Minn. 159, 79 N. W. 669, 77 Am. St. Rep. 666; *Milwaukee Harvester Co. v. Schroeder*, 72 Minn. 393, 75 N. W. 606; *Pine Mountain Iron & Coal Co. v. Tabour*, 55 Minn. 287, 56 N. W. 895; *Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 689; *Merritt v. Putnam*, 7 Minn. 493. **Mo.**—*Citizens' Bank v. Martin*, 171 Mo. App. 194, 156 S. W. 488; *Parks v. Coyne*, 156 Mo. App. 379, 137 S. W. 335; *Dazey v. Laurence*, 153 Mo. App. 435, 134 S. W. 85; *Knupp v. Miller*, 133 Mo. App. 256, 113 S. W. 725; *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090; *Hoffman v. Loudon*, 96 Mo. App. 184, 70 S. W. 162; *Cabbanne v. Macadaras*, 91 Mo. App. 70; *McLaran v. Wilhelm*, 50 Mo. App. 658; *Carr v. School Dist.*, 42 Mo. App. 154. **Mont.**—*Kersten v. Coleman*, 50 Mont. 82, 144 Pac. 1092; *Swilling v. Cottonwood Land Co.*, 44 Mont. 339, 119 Pac. 1102; *Storer v. Graham*, 43 Mont. 344, 116 Pac. 1011; *Donlan v. Thompson Falls Cop. Mill. Co.*, 42 Mont. 257, 112

- Pac. 445; *Brown v. Weinstein*, 40 Mont. 202, 105 Pac. 730; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 310; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635.
- Neb.**—*Prudential Real Est. Co. v. Hall*, 79 Neb. 805, 113 N. W. 243; *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069; *Lichtenberger v. Worm*, 41 Neb. 856, 60 N. W. 93; *Vindquist v. Perky*, 16 Neb. 284, 20 N. W. 301.
- Nev.**—*Horton v. New Pass G. & S. Min. Co.*, 21 Nev. 184, 27 Pac. 376.
- N. H.**—*Claggett v. Simes*, 31 N. H. 56.
- N. J.**—*Smith v. Livesey*, 67 N. J. L. 269, 51 Atl. 453; *Cowley v. Leonard*, 28 N. J. Eq. 467.
- N. M.**—*Lasswell v. Kitt*, 11 N. M. 459, 70 Pac. 561; *Rio Grande, etc. Co. v. Gildersleeve*, 9 N. M. 12, 48 Pac. 309; *Territory v. Las Vegas Grant*, 6 N. M. 87, 27 Pac. 414; *Metzger v. Waddell*, 1 N. M. 400.
- N. Y.**—*Mayor v. Smith*, 138 N. Y. 676, 34 N. E. 400; *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842; *Leighton v. Wood*, 17 Abb. Pr. 177; *Outwater v. New York*, 18 How. Pr. (N. Y.) 572; *Prager v. Beardsley*, 133 App. Div. 592, 118 N. Y. Supp. 232; *Dudley v. Broadway Ins. Co.*, 42 App. Div. 555, 59 N. Y. Supp. 668; *Donnelly v. McArdle*, 14 App. Div. 217, 43 N. Y. Supp. 560; *Spektorsky v. American, etc. Co.*, 5 App. Div. 621, 39 N. Y. Supp. 73; *Seiffert v. Caverly*, 64 Hun 638, 19 N. Y. Supp. 520; *Abram French Co. v. Marx*, 10 Misc. 384, 31 N. Y. Supp. 122; *Felix v. Josephthal*, 134 N. Y. Supp. 923; *Cunningham v. Hatch*, 18 N. Y. Supp. 458, 45 N. Y. St. Rep. 685; *Drummond v. Matthews*, 17 N. Y. Supp. 726, 42 N. Y. St. Rep. 117; *Traitteur v. Livingston*, 13 N. Y. Supp. 603.
- N. C.**—*Cowan v. Cunningham*, 146 N. C. 453, 59 S. E. 992; *Morris v. Liverpool, L. & G. Ins. Co.*, 131 N. C. 212, 42 S. E. 577; *Clement v. Ireland*, 129 N. C. 220, 39 S. E. 838; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840; *Manning v. Roanoke & T. R. Co.*, 122 N. C. 824, 28 S. E. 963; *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022; *Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878; *Winborne v. Johnson*, 95 N. C. 46; *Kerchner v. Baker*, 82 N. C. 169; *Hudgins v. White*, 65 N. C. 393.
- N. D.**—*Westbrook v. Rice*, 28 N. D. 324, 148 N. W. 827; *Chamberlain v. Akers*, 26 N. D. 395, 144 N. W. 715; *Johannes v. Coghlan*, 23 N. D. 588, 137 N. W. 822; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75; *Wheeler v. Castor*, 11 N. D. 317, 92 N. W. 381; *City of Fargo v. Keency*, 11 N. D. 484, 92 N. W. 836; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581; *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672.
- Ohio.**—*Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735; *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St. 445; *Fowble v. Walker*, 4 Ohio 64; *Manguno, etc. Co. v. Clymonts*, 10 Ohio Cir. Dec. 427; *Jordan v. Russell*, 8 Ohio Cir. Dec. 467. See also *Manguno & T. Co. v. Clymonts*, 19 Ohio Cir. Ct. 237.
- Okla.**—*Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890; *McAdams v. Latham*, 21 Okla. 511, 96 Pac. 584; *Hagar v. Wikoff*, 2 Okla. 580, 39 Pac. 281; *Jaffray v. Wolfe*, 1 Okla. 312, 33 Pac. 945.
- Ore.**—*Anderson v. McClellan*, 54 Ore. 206, 102 Pac. 1015; *Schneider v. Hutchinson*, 35 Ore. 253, 57 Pac. 324, 76 Am. St. Rep. 474; *Coos Bay Nav. Co. v. Endicott*, 34 Ore. 573, 57 Pac. 61; *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440, 67 Am. St. Rep. 518; *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. Rep. 818; *Askren v. Squire*, 29 Ore. 228, 45 Pac. 779; *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025; *Lovejoy v. Willamette Locks Co.*, 24 Ore. 569, 34 Pac. 660; *Mitchell & Lewis Co. v. Downing*, 23 Ore. 448, 32 Pac. 394; *Hicklin v. McClellan*, 19 Ore. 508, 24 Pac. 992; *Bailey v. Williams*, 6 Ore. 71; *White v. Northwest Stage Co.*, 5 Ore. 99.
- Pa.**—*Schnebel v. Nelson*, 238 Pa. 341, 86 Atl. 265; *Miller v. Miller*, 209 Pa. 511, 58 Atl. 886; *Gaz-zam v. Reading*, 202 Pa. 231, 51 Atl. 1000; *Com. v. Mellet*, 196 Pa. 243, 46 Atl. 434; *Walter v. Fees*, 155 Pa. 55, 25 Atl. 829; *Hunter v. Mahoney*, 148 Pa. 232, 23 Atl. 1004; *Huston Twp. Mut. F. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Wise's Appeal*, 99 Pa. 193; *Earley's Appeal*, 90 Pa. 321; *McClelland v. Pomeroy*, 75 Pa. 410; *Eldred v. Hazlett's Admr.*, 38 Pa. 16; *Skidmore v. Bradford*, 4 Pa. 296; *Robinson v. Gover*, 52 Pa. Super. 537; *Harvester Co. v. Miller*, 51 Pa. Super. 324; *Ammonia Works v. Ellk*, 47 Pa. Super. 294; *Olyus v. Buch*, 34 Pa. Super. 43; *Loeb v. Allen*, 32 Pa. Super. 133; *Blake Tobacco Co. v. Posluszy*, 31 Pa. Super. 602; *Zartman v. Spangler*, 21 Pa. Super. 647; *Kellett Freeman*, 19 Pa. Super. 155; *Leader v. Dunlap*, 6 Pa. Super. 243; *Chandler v. Bennett*, 3 Pa. Co. Ct. 155; *Shortz v. Quigley*, 1 Bin. 222; *Putney v. Collins*, 3 Grant Cas. 72. See also *Burley v. Filby*, 193 Pa. 374,

such incidental questions as the diligence of the applicant,<sup>6</sup> the sufficiency of his showing,<sup>7</sup> and the imposition of terms<sup>8</sup> and costs,<sup>9</sup> the court exercises a wide discretion. Statutes in some states expressly

- 44 Atl. 453; *McCutcheon v. Allen*, 95 Pa. 319; *Gottlieb v. Middleberg*, 23 Pa. Super. 525; *Bazile v. Trumbull*, 22 Pa. Super. 187; *Rehm v. Frank*, 16 Pa. Super. 175; *Reichentach v. Harlep*, 15 Pa. Super. 23; *O'Brien v. Sylvester*, 12 Pa. Super. 408. **R. I.**—*Alverson v. Alverson*, 2 R. I. 27. **S. C.**—*Farmers Bank v. Talbert*, 97 S. C. 74, 81 S. E. 305; *Gibson v. Bethea*, 95 S. C. 343, 78 S. E. 1025; *Cannady v. Martin*, 72 S. C. 131, 51 S. E. 549; *Bugg's Est.*, 71 S. C. 439, 444, 51 S. E. 263; *Farmers, etc. Man. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226; *Bryson v. Whidden*, 55 S. C. 465, 33 S. E. 558; *Higgins v. Wait*, 28 S. C. 606, 5 S. E. 363; *Le Conte v. Irwin*, 19 S. C. 554. See also *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937. **S. D.**—*Smith v. United Commercial Travelers*, 29 S. D. 622, 137 N. W. 598; *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87; *Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167; *Evans v. Fall River*, 4 S. D. 119, 55 N. W. 862. See also *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027. **Tex.**—*Janes v. Langham*, 33 Tex. 604; *Aldridge v. Mardoff*, 32 Tex. 204; *Gillaspie v. Huntsville* (Tex. Civ. App.), 151 S. W. 1114; *Pecos & N. T. Ry. Co. v. Pearce* (Tex. Civ. App.), 117 S. W. 911; *Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258; *Scottish Union Ins. Co. v. Tomkies & Co.*, 28 Tex. Civ. App. 157, 66 S. W. 1109; *Fitzgerald v. Compton*, 28 Tex. Civ. App. 202, 67 S. W. 131. **Utah.**—*Salt Lake Hardware Co. v. Neilson Land, etc. Co.*, 43 Utah 406, 134 Pac. 911; *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731; *Jolly v. Haycock*, 32 Utah 366, 90 Pac. 901; *Cutler v. Haycock*, 32 Utah 354, 90 Pac. 897; *Peterson v. Crosier*, 29 Utah 235, 81 Pac. 860; *Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033; *Thomas v. Morris*, 8 Utah 284, 31 Pac. 446. **Vt.**—*Mutual Life Ins. Co. v. Foster*, 88 Vt. 503, 93 Atl. 258; *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590; *Amazon Ins. Co. v. Partridge*, 49 Vt. 121. **Wash.**—*Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690; *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573; *Walton v. Hartman*, 38 Wash. 34, 80 Pac. 196; *McBride v. McGinley*, 21 Wash. 573, 72 Pac. 105; *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *Sanborn Vail & Co. v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; *Haynes v. B. F. Schwartz Co.*, 5 Wash. 433, 32 Pac. 220; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33. See also *Dalgardno v. Trumbull*, 25 Wash. 362, 65 Pac. 528. **Wis.**—*Schoenmann v. Hood*, 145 Wis. 241, 130 N. W. 101; *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50; *Reeves v. Kroll*, 133 Wis. 196, 113 N. W. 440; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910; *Falkenberg v. Gorman*, 71 Wis. 8, 36 N. W. 599; *Wheratt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164; *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907; *Jefferson Co. Bank v. Robbins*, 67 Wis. 68, 29 N. W. 209; *Ray v. Worthrup*, 55 Wis. 396, 13 N. W. 239; *Union Lumb. Co. v. Supervisors*, 47 Wis. 245, 2 N. W. 281; *Seymour v. Supervisors*, 40 Wis. 62; *McLaren v. Kehlor*, 22 Wis. 297. **Can.**—*McCauley v. Christie*, 15 Manitoba 358.
- [a] Where, under statute, a commissioner has power to grant this relief, an order of the court reviewing his action is discretionary. *Superior Consol. Land Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428.
- Review on appeal**, see *infra*, XIV, H.
- [b] Statutes making orders which refuse this relief appealable do not affect this discretion in any manner. *Com. ex rel. Shenandoah v. Mellett*, 196 Pa. 243, 46 Atl. 434; *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335; *Earley's Appeal*, 90 Pa. 321; *Leader v. Dunlap*, 6 Pa. Super. 243. See also *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511.
6. *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042.
7. *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042. See also *Lee v. Sallada*, 7 Pa. Super. 98.
8. See *infra*, XIV, F, 2.
9. *Irwin's Appeal*, 9 Sad. 479, 12 Atl. 840. See *infra*, XIV, I.



declare that the granting of relief sought on the ground of surprise, excusable neglect, etc., shall be discretionary with the court.<sup>11</sup> On the other hand, there are cases where relief is demandable as a matter of right. For example, it is the imperative duty of a court to set aside such of its judgments as are void;<sup>12</sup> and, under some statutes, judgments procured upon constructive service of process must be vacated where application is made within the time provided for by the statute.<sup>12</sup> Also, under statutes providing that, in designated cases, the court "shall" open or set aside its judgment, this relief has been held to be a matter of right.<sup>13</sup> The discretion of the court, however, is undoubtedly a legal one, to be exercised on sound legal principles, and not an absolute discretion which may be employed according to the whim or caprice of the court.<sup>14</sup> The rule is well settled, however,

10. N. Y. Code Civ. Proc., §724; N. D. Comp. Laws, 1910, §151.

11. Cal.—Waller v. Weston, 125 Cal. 201, 57 Pac. 892, no service of summons. Colo.—Stubbs v. McGillis, 44 Colo. 138, 96 Pac. 1005 (no service of summons); Millage v. Richards, 52 Colo. 512, 122 Pac. 788 (the analogous case of a judgment based on constructive service where the affidavit on which the order therefrom was based is defective). Minn.—Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 56 N. W. 576 (defective service of jurisdictional process); Swift v. Fletcher, 6 Minn. 550 (premature entry of default). N. Y.—Phonoharp Co. v. Stobbe, 20 Misc. 698, 46 N. Y. Supp. 678; Seifert v. Caverly, 18 N. Y. Supp. 327 (no notice of trial and consequent default). N. D.—Stewart v. Parsons, 5 N. D. 273, 65 N. W. 672 (no service of summons); Nicholls v. Nicholls, 5 N. D. 125, 64 N. W. 73. S. C.—Wren v. Johnson, 62 S. C. 533, 544, 40 S. E. 937; Roberts v. Pawley, 50 S. C. 491, 501, 27 S. E. 913 (no service of summons).

See *infra*, XIV, F, 3, a.

[a] Where the record shows the service of process was manifestly defective, and the judgment entered in response thereto accordingly irregular upon its face, an application to open such a judgment is not addressed "to the discretion of the court, invoking its equitable powers; . . . it was an assertion of a strict legal right to have the judgment set aside." *Seranton v. Manley*, 13 Pa. Super. 439.

12. Cal.—Holiness Church v. Metropolitan Church Assn., 12 Cal. App. 445, 107 Pac. 633. Ill.—Lyon v. Robbins,

46 Ill. 276. Kan.—Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614. Minn.—Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714; Fink v. Woods, 102 Minn. 374, 113 N. W. 909; Fifield v. Norton, 79 Minn. 264, 82 N. W. 581; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Nye v. Swan, 42 Minn. 243, 44 N. W. 9. Neb.—Brown v. Conger, 10 Neb. 236, 4 N. W. 1009. N. Y.—New York Board Comrs. v. Hollister, 2 Hilt. 588; Seifert v. Caverly, 18 N. Y. Supp. 327. Ohio.—Roberts v. Price, 2 Ohio Dec. (Reprint) 681. Ore.—Felts v. Boyer, 73 Ore. 83, 144 Pac. 420; Osburn v. Maata, 66 Ore. 558, 135 Pac. 165.

13. Gibson v. Manly, 15 Ill. 140; Cavanaugh v. Toledo, W. & W. Ry. Co., 49 Ind. 149; Phelps v. Osgood, 34 Ind. 150; Macy v. Lindley, 54 Ind. App. 157, 99 N. E. 790; Ziegler v. Funkhouser, 42 Ind. App. 428, 85 N. E. 984.

14. Cal.—Bailey v. Taaffe, 29 Cal. 422. D. C.—Hallowell v. Darling, 32 App. Cas. 405. Ga.—Butler & Co. v. Strickland-Tillman Hard. Co., 15 Ga. App. 193, 82 S. E. 815. Ill.—Dunlap v. Gregory, 14 Ill. App. 601. See also *City of Chicago v. Wolf*, 86 Ill. App. 286. Mo.—Cabanne v. Macadaras, 91 Mo. App. 70. Nev.—Horton v. New Pass G. & S. Min. Co., 21 Nev. 184, 27 Pac. 376. N. Y.—Davis v. Solomon, 25 Misc. 695, 56 N. Y. Supp. 80. N. C.—Marsh v. Griffin, 123 N. C. 660, 31 S. E. 840; Weaver v. Jones, 82 N. C. 440. See also *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338. N. D.—Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581. Ohio.—Fowble v. Walker, 4 Ohio 64. Ore.—Coos Bay Nav. Co. v. Endicott, 34 Ore. 573,

that all doubts as to the efficacy or propriety of granting the application will be resolved in favor of the application.<sup>15</sup>

In the exercise of its discretion the court will be guided by a consideration of the purpose of this remedy which is, primarily, to afford relief to a litigant who, through no fault of his own, has been prevented from properly presenting his cause of action or defense, or, as is said, has not had his day in court.<sup>16</sup> Therefore, a court will hesitate to disturb a final judgment at the instance of a party who has, either designedly or negligently, omitted to present his case for the con-

57 Pac. 61; *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440; *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467. **Pa.**—*Chandler v. Bennett*, 3 Pa. Co. Ct. 155. See also *Com. ex rel. Henderson v. Masonic Home*, 7 Pa. Dist. 103. **S. C.**—*Le Conte v. Irwin*, 19 S. C. 554. **S. D.**—See also *Weber v. Tschetter*, 1 S. D. 205, 216, 46 N. W. 201. **Tex.**—*James v. Langham*, 33 Tex. 604. **Utah.**—*Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033; *Thomas v. Morris*, 8 Utah 284, 31 Pac. 446. **Wash.** *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Sanborn, Vail & Co. v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466. **Wis.**—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910; *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164; *Cleveland v. Hopkins*, 55 Wis. 387, 13 N. W. 225; *Johnson v. Eldred*, 13 Wis. 482.

[a] "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." *Bailey v. Taaffe*, 29 Cal. 422.

[b] "The discretion of the courts in opening judgments must rest upon a foundation of competent evidence. . . ." *Com. ex rel. Henderson v. Masonic Home*, 7 Pa. Dist. 103.

[c] In *North Dakota* it has been said (*Minnesota Thresher Mfg. Co. v.*

*Holz*, 10 N. D. 16, 84 N. W. 581), that it must appear to the court of review that the trial court "based its ruling on . . . matter which, under the law, came within the proper purview of judicial discretion."

15. **Ariz.**—*Dowdy v. Calvi*, 14 Ariz. 148, 125 Pac. 873. **Cal.**—*Jergins v. Schenck*, 162 Cal. 747, 124 Pac. 426; *Petition of Tracey*, 136 Cal. 385, 69 Pac. 20; *Merchants Ad Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619, 61 Pac. 277; *Wolff & Co. v. Canadian Pac. R. Co.*, 123 Cal. 535, 56 Pac. 453; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 938; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Wolff & Co. v. Canadian Pac. Ry.*, 89 Cal. 332, 26 Pac. 825. **Idaho.**—*Humphreys v. Idaho Gold M. Development Co.*, 21 Idaho 126, 120 Pac. 823. **Ill.**—*Moline v. Chicago, B. & Q. R. Co.*, 262 Ill. 52, 104 N. E. 204. **Ia.**—*Mally v. Roberts*, 167 Iowa 523, 149 N. W. 630; *Westphal v. Clark*, 46 Iowa 262. **Mont.**—*Nash v. Treat*, 45 Mont. 250, 122 Pac. 745. **N. D.**—*Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228. **Utah.**—*Cutler v. Haycock*, 32 Utah 354, 90 Pac. 897; *Jolly v. Haycock*, 32 Utah 366, 90 Pac. 901.

16. **Ia.**—*Mally v. Roberts*, 167 Iowa 523, 149 N. W. 630. **Neb.**—"It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney." *Clutz v. Carter*, 12 Neb. 113, 10 N. W. 541, quoted with approval in *Haggerty v. Walker*, 21 Neb. 596, 33 N. W. 244. **N. Y.**—See also *Lawson v. Adams*, 89 App. Div. 303, 85 N. Y. Supp. 863. **N. C.**—*Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581. See also *Pepper v. Clegg*, 132 N. C. 312, 316, 43 S. E. 906; *Wyche v. Ross*, 119 N. C. 174, 178, 25 S. E. 878. **Ohio.**—*Fowble v. Walker*,

sideration of the court when afforded an opportunity to do so,<sup>17</sup> and clearly a court should refuse to grant this relief, equitable in its nature, where the application shows that but for the party's own turpitude or malfeasance he would not be in need of assistance.<sup>18</sup> And while a party may be relieved from the results of his neglect under proper circumstances, he must first show a sufficient excuse therefor.<sup>19</sup>

The natural or intrinsic equities of the individual case will, to a considerable extent, control its ultimate determination;<sup>20</sup> that is to say, where it appears from the whole case that justice requires the judgment to be opened or set aside, the court will exercise its discretion, and grant the necessary relief,<sup>21</sup> and, conversely, where there

4 Ohio 64. **S. C.**—*Peeples v. Ulmer*, 64 S. C. 496, 42 S. E. 429. **S. D.**—*Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

[a] "The constant purpose of the courts must be to dispense justice between litigants, and to this end no one should be deprived, except by facts for which he ought to be held responsible, of an opportunity to present his grievance or defense for the examination and judgment of the court." *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

17. **N. J.**—*Barlow v. Burns*, 70 N. J. L. 631, 57 Atl. 262. **N. Y.**—*Sutter v. New York*, 106 App. Div. 129, 94 N. Y. Supp. 515; *Merrifield v. Bell*, 14 N. Y. Supp. 322. See also *Kitson v. Blake*, 60 Hun 579, 14 N. Y. Supp. 446. **N. C.**—*Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581. **Va.**—*Turnbull v. Thompson*, 27 Gratt. (68 Va.) 306.

See *supra*, XIV, E, 2, d, (II).

[a] "The plaintiff has had his day in court. He had full opportunity to defeat a recovery upon the very grounds he now urges to set aside the judgment. . . . He says he purposely kept silent, . . . and permitted the judgment by default to be taken. The courts cannot thus be trifled with." *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581.

[b] On this principle where a party through counsel chose not to avail himself of the right to be heard and no other reason was presented, a judgment against him as on default will not be disturbed. *Sutter v. New York*, 106 App. Div. 129, 94 N. Y. Supp. 515.

18. **Mo.**—*Robyn v. Chronicle Pub. Co.*, 127 Mo. 385, 30 S. W. 130. **N. J.**—*Leonard v. New York Bay Co.*, 28 N. J. Eq. 192. **N. M.**—*Metzger v. Waddell*, 1 N. M. 400. **N. Y.**—*Eyring v. Her-*

*cules Land Co.*, 9 App. Div. 306, 41 N. Y. Supp. 191; *Lederer v. Adler*, 51 Misc. 572, 101 N. Y. Supp. 53; *Mullane v. Roberge*, 21 Misc. 342, 47 N. Y. Supp. 155; *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053. See also *Dudley v. Broadway Ins. Co.*, 42 App. Div. 555, 59 N. Y. Supp. 668. **Pa.**—*Kunkle's Appeals*, 107 Pa. 368; *Blystone v. Blystone*, 51 Pa. 373. See also *O'Brien v. Sylvester*, 12 Pa. Super. 408. **Tex.**—*Milam v. Gordan*, 29 Tex. Civ. App. 415, 68 S. W. 1003.

[a] A judgment fraudulently obtained for the purpose of delaying creditors will not be relieved against. *Blystone v. Blystone*, 51 Pa. 373.

[b] A default entered against a party after numerous continuances at his instance will be opened only upon a clear and strong showing to that end. *Ellery v. Bendet*, 31 Misc. 771, 64 N. Y. Supp. 346.

[c] Failure to record a deed, as a consequence of which the grantee thereunder was not made a party to a subsequent suit involving the premises therein conveyed is such negligence as is contemplated by this rule. *Leonard v. New York Bay Co.*, 28 N. J. Eq. 192.

[d] Where the defendant fled the country to avoid arrest a judgment rendered against him will not be set aside because he has not had his day in court. *Magee v. Phelps*, 4 Ky. L. Rep. 615.

19. *Leighton v. Wood*, 17 Abb. Pr. (N. Y.) 177; *Fowble v. Walker*, 4 Ohio 64. See *supra*, XIV, B, 9.

20. *Williamson v. Haitman*, 92 N. C. 236; *Cosgrove v. Butler*, 1 S. C. 241.

21. **N. Y.**—*Swan v. Mutual Reserve Assn.*, 22 Misc. 256, 50 N. Y. Supp. 46; *Rabinowitz v. Haimowitz*, 91 N. Y. Supp. 11. **Okla.**—See also *Jaffray v.*



appears to be no equitable reason for interfering the court will not do so.<sup>22</sup> The ground urged must be a substantiated one rather than a mere technicality.<sup>23</sup> And where the opening of a judgment would be barren of results, as where the relief provided by the judgment is only such as the plaintiff is admittedly entitled to, the court will refuse relief.<sup>24</sup>

F. THE RELIEF OBTAINED.—1. Generally.—To open a judgment is but to allow a defendant a hearing on the merits,<sup>25</sup> which is quite

Wolfe, 1 Okla. 312, 33 Pac. 945. **Pa.** See also *Lawrence v. Price*, 24 Pa. Co. Ct. 521. **S. D.**—*Beckett v. Deffenbach*, 6 S. D. 21, 60 N. W. 167. See also *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29.

[a] Defective Pleadings.—A judgment obtained upon pleadings which do not show any liability for the amount claimed will be set aside. *Mason v. Kansas City C. Ry. Co.*, 58 Kan. 817, 51 Pac. 284.

[b] Where no hypothesis presented by the pleadings or evidence will justify the judgment thereupon predicated, it should be set aside. *Hammers v. Merrick*, 42 Kan. 32, 31 Pac. 783.

22. **Ky.**—*Taylor v. Young's Admr.*, 2 Bush 428. **Md.**—*Bond v. Citizens' Nat. Bank*, 65 Md. 498, 4 Atl. 893. **Mich.**—*Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694. **Mont.**—*Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887. **N. J.** *Allaire v. Day*, 30 N. J. Eq. 231. **N. Y.** *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; *Cohen v. Levy*, 49 App. Div. 638, 62 N. Y. Supp. 1060; *Jospe v. Lighte*, 22 Misc. 146, 48 N. Y. Supp. 645; *Van Arsdale v. King*, 33 N. Y. Supp. 858; *Caro v. Metropolitan, etc. Co.*, 16 Jones & S. 545, 64 How. Pr. 225. **Pa.**—*Fishblate v. McCullough*, 7 Pa. Dist. 364. See also *Ford v. Tighe*, 8 Kulp 428.

[a] A judgment regularly entered will not be vacated or opened where it appears that it is neither unjust nor oppressive. *Northern Pac., etc. R. Co. v. Black*, 3 Wash. 327, 28 Pac. 538.

[b] Thus, where the defendant did not deny the justness of the debt to evidence which the note sued upon was signed, but asked that the judgment be opened because, as he alleged, he was "insanely drunk" at the time of the execution thereof, this relief was denied, the court saying, that the "defendant has not been unjustly or inequitably treated." *Ford v. Tighe*, 8 Kulp (Pa.) 428.

[c] In *Audit Co., etc. v. McNaught*, 87 N. Y. Supp. 542, the cause had been peremptorily set for trial at instance of plaintiff, and when it was reached the plaintiff was not ready to proceed. The cause was dismissed and judgment rendered for defendant. On a subsequent application to open, plaintiff's counsel could not state when he would be able to proceed and the application was properly denied.

[d] A decree directing a tax sale will not be set aside where it does not appear that the tax although admittedly irregular, was unjust or prejudicial. *Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694.

23. *Sullivan v. Sweeney*, 189 Pa. 474, 42 Atl. 45; *Woelfel v. Hammer*, 159 Pa. 448, 28 Atl. 147. See also *Maneval v. Jackson Tp.*, 141 Pa. 426, 21 Atl. 672; *Baker v. Lukens*, 35 Pa. 146, and *supra*, XIV, B, 7.

[a] As was said in *Knarr v. Elgren*, 7 Sad. (Pa.) 172, 181, 9 Atl. 875, "In either form of procedure (bill in equity or summary proceeding in same action) the relief demanded is in equity; and the application or complaint must make a case which would justify a chancellor in entering the decree."

24. **Mich.**—*Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694. **N. J.**—*Allaire v. Day*, 30 N. J. Eq. 231. See also *Brown v. Easton*, 30 N. J. Eq. 725. **N. Y.**—*Runnell v. Griffin*, 8 Abb. Pr. 39; *Devlin v. Boyd*, 69 Hun 328, 23 N. Y. Supp. 523. **N. C.**—*Scott v. Mutual R. F. Life Assn.*, 137 N. C. 515, 526, 50 S. E. 221. **Pa.**—*Colwell v. Wehrly*, 150 Pa. 523, 24 Atl. 737.

25. *Farmers Loan & Trust Co. v. Killgore*, 36 Neb. 677, 681, 65 N. W. 790; *Huston Twp. Mut. F. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Savage v. Kelley*, 11 Phila. (Pa.) 525; *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. (Pa.) 128; *Gallup v. Reynolds*, 8 Watts (Pa.) 424; *Carson v. Coulter*, 2 Grant's Cas. (Pa.) 121.

a different matter from vacating it or setting it aside altogether.<sup>26</sup> Upon the judgment being opened without condition the judgment itself is not thereby destroyed; it remains as security for whatever relief may ultimately be awarded to the adverse party.<sup>27</sup> And it is proper for the court to direct that the judgment relieved against shall stand as security for the plaintiff's demands.<sup>28</sup> But where a judgment is vacated the lien of the judgment is thereafter without support,<sup>29</sup> unless otherwise provided by statute.<sup>30</sup> The relief awarded may include a provision setting aside an execution previously issued on the judgment from which relief is granted.<sup>31</sup>

**2. Judgment Opened or Vacated in Whole or in Part.**—The rule generally obtains that a judgment may properly be opened or set aside in whole or in part.<sup>32</sup> As regards the parties thereto, however, the rule generally followed is that a joint judgment may not be set aside

[a] "To open a judgment, however, is not to set it aside; for when it is closed again by the finding of a sum due, an execution issues on it as if it had not been disturbed." *Gallup v. Reynolds*, 8 Watts (Pa.) 424, quoted with approval in *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. (Pa.) 128.

[b] "A judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such, of which the order of the court has not deprived it." *Steinbridge's Appeal*, 1 Pen. & W. (Pa.) 481.

26. *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027.

[a] "There can be no doubt, therefore, that the county court could either have set the judgment aside upon the motion absolutely, or have opened it upon condition, as that it should stand as security to abide the final result." *Second Ward Bank v. Upman*, 14 Wis. 596.

27. *West v. Irwin*, 74 Pa. 258; *Dennison v. Leech*, 9 Pa. 164; *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. (Pa.) 128; *Gallup v. Reynolds*, 8 Watts (Pa.) 424.

[a] Opening a judgment which is a lien upon real property does not destroy or in any way impair such lien. *Adams v. James L. Leeds Co.*, 189 Pa. 544, 42 Atl. 195; *Van Cott v. Webb-Miller*, 25 Pa. Super. 51; *Savage v. Kelley*, 11 Phila. (Pa.) 525; *Carson v. Coulter*, 2 Grant's Cas. (Pa.) 121. See also *Keyes v. Moorhead*, 11 Pa. Co. Ct. 43; *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. 128.

[b] Execution Not Stayed.—Open-

ing a judgment will not, of itself, have the effect of staying the execution of such judgment. To accomplish this special provision therefore must be made in the order granting this relief. *Savage v. Kelley*, 11 Phila. (Pa.) 525. See also *McAnulty v. Nat. Life Assn.*, 6 Lack. Leg. N. (Pa.) 128.

28. Ind.—*Pierson v. Holman*, 5 Blackf. 482. N. J.—*Boyd v. Williams*, 70 N. J. L. 185, 56 Atl. 135; *McTague v. Pennsylvania, etc. R. R. Co.*, 44 N. J. L. 62; *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111. N. Y. *Flagg v. Cooper*, 22 Jones & S. 50; *Ellsworth v. Campbell*, 31 Barb. 134; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237; *Fenton v. Garlick*, 6 Johns. 287; *Ketcham v. Elliott*, 66 Hun 627, 20 N. Y. Supp. 745; *Long Branch Pier Co. v. Crossley*, 40 Misc. 249, 81 N. Y. Supp. 905; *Pomares v. Duncan*, 11 N. Y. Supp. 380, 25 Abb. N. C. 58; *Brickel v. Train*, 86 N. Y. Supp. 292. Pa. *Ash v. Conyers*, 2 Miles 94; *Van Cott v. Webb-Miller*, 25 Pa. Super. 51. S. D.—*Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027.

29. *Adams v. James L. Leeds Co.*, 189 Pa. 544, 42 Atl. 195.

30. *Bates' Ann. Ohio St.* (5th ed.), §5360.

31. *Stephens v. Stephens*, 1 Phila. (Pa.) 108.

32. Ga.—See *Jackson v. Miles*, 98 Ga. 512, 25 S. E. 569. Ill.—*Lyon v. Boilvin*, 7 Ill. 629. Kan.—*Weaver v. Leach*, 26 Kan. 179. N. C.—*Geer v. Reams*, 88 N. C. 197. Tex.—*Erwin v. Archenhold Co.*, 34 Tex. Civ. App. 55, 77 S. W. 823. W. Va.—*Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

as to any number less than all,<sup>33</sup> and especially is this true where the judgment under consideration is, in its very nature, inseparable.<sup>34</sup> But there are cases in which it is manifestly proper so to do,<sup>35</sup> as, for example, in an action against several defendants who are entitled to sever in the defense a motion may be allowed vacating the judgment as to one or more of them and leaving the judgment unaffected as to the remaining defendants.<sup>36</sup>

3. Upon Terms.—a. *Generally*.—In granting this relief the court, in its discretion may,<sup>37</sup> or may not impose upon the applicant

Wyo.—Laramie Nat. Bank v. Steinhoff, 11 Wyo. 290, 71 Pac. 992, 73 Pac. 209.

[a] Where a complaint states two causes of action, improperly united in a single count, and the judgment was properly entered as to one count only, it may be vacated in part and sustained in part. *Weaver v. Leach*, 26 Kan. 179.

33. Ill.—*Claffin v. Dunne*, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; *Gould v. Sternburg*, 69 Ill. 531. Ia. *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62 Iowa 218, 17 N. W. 489. Ky.—*Bitzer v. O'Bryan*, 107 Ky. 590, 54 S. W. 951. Mich.—*Van Renselaer v. Whiting*, 12 Mich. 449. Mo.—*Smith v. Rollins*, 25 Mo. 408. Neb.—*Boyd v. Munson*, 56 Neb. 269, 76 N. W. 552. Nev.—*Stevenson & Son v. Mann*, 13 Nev. 268. N. C. *Ellington v. Wicker*, 87 N. C. 14; *Ramsour v. Raper*, 29 N. C. 346. Ohio. *Frazier v. Williams*, 24 Ohio St. 625; *Jordan v. Russell*, 8 Ohio Dec. 467. Vt.—*Downer v. Dana*, 22 Vt. 22. W. Va. *Midkiff v. Lusher*, 27 W. Va. 439.

34. *Jordan v. Russell*, 8 Ohio Dec. 467.

[a] Where by consent, a judgment was entered admitting to probate a contested will, and, as to one of the contestants grounds existed for setting this judgment aside, it must, in the nature of things, be set aside as to all. *Jordan v. Russell*, 8 Ohio Dec. 467.

35. Ga.—*Powell v. Perry*, 63 Ga. 417. Ind.—*Wright v. Churchman*, 135 Ind. 683, 35 N. E. 835; *Pattison v. Norris*, 29 Ind. 165. Mo.—*Neenan v. St. Joseph*, 126 Mo. 89, 28 S. W. 963. N. Y.—*Droham v. Norton*, 1 Misc. 486, 21 N. Y. Supp. 579. N. D.—*Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672.

[a] Should the grounds upon which one of several joint applicants seeks relief be sufficient and independent of the grounds upon which the application is urged as to the remaining ap-

plicants, the court may, in the furtherance of justice, open a judgment only as to the applicant just mentioned. *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672.

[b] In *Barlow v. Burns*, 70 N. J. L. 631, 57 Atl. 262, one of two defendants in an action for libel employed counsel who did not file a plea but went before a sheriff's jury to have damages assessed. The other defendant employed no counsel, her mother undertaking to attend to the entire matter for her. There was a probability that this last mentioned defendant had a defense. It was held that the judgment was properly opened as to the latter defendant although this relief was denied the former. *Barlow v. Burns*, 70 N. J. L. 631, 57 Atl. 262.

36. *Boone v. Hulsey*, 71 Tex. 176, 9 S. W. 531. See *supra*, XI, K, 2, d; XI, K, 3.

37. Ill.—*Chicago v. English*, 198 Ill. 211, 64 N. E. 976; *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1083; *Freibroth v. Mann*, 70 Ill. 523; *Mason v. McNamara*, 57 Ill. 274; *Lyon v. Boilvin*, 7 Ill. 629. Kan.—*Missouri Pac. R. Co. v. Linson*, 39 Kan. 416, 18 Pac. 498; *Ames v. Brinsden*, 25 Kan. 746; *Spratley v. Putnam Ins. Co.*, 5 Kan. 155. Md. *Tyrrell v. Hilton*, 92 Md. 176, 48 Atl. 55; *Coulbourn v. Fleming*, 73 Md. 210, 27 Atl. 1041. Mo.—*Miners' Bank v. Kingston*, 204 Mo. 687, 103 S. W. 27; *Young v. Bircher*, 31 Mo. 136, 77 Am. Dec. 638. Nev.—*Howe v. Coldren*, 4 Nev. 171. N. Y.—*Lewy v. Fox*, 22 Jones & S. 397; *Flagg v. Cooper*, 22 Jones & S. 50; *McCarty v. Altonwood Stock Farm*, 68 Hun 551, 22 N. Y. Supp. 1091. N. C. *Alston Young, etc. Co. v. Parish's Heirs*, 1 N. C. 221. Ohio.—*French Wax Figure Co. v. Jupp, etc. Co.*, 21 Ohio Cir. Ct. 764; *Fowble v. Walker*, 4 Ohio 64. Ore.—*Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190. Pa.—*Huston Twp.*



such terms as may be just,<sup>35</sup> except in those cases where this relief is demandable as a matter of strict legal right, and not as a matter of

*Mut. F. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926; *Gilliland v. Bredin*, 63 Pa. 393; *McMurray's Heirs v. City of Erie*, 59 Pa. 223; *Bailey v. Clayton*, 20 Pa. 295; *Dennison v. Leech*, 9 Pa. 164; *Savage v. Kelley*, 11 Phila. 525; *Carson v. Coulter*, 2 Grant's Cas. 121; *Ekel v. Snavely*, 3 Watts & S. 272. See also *Kunes v. McCloskey*, 10 Pa. Co. Ct. 542; *Peters & Son v. McDonald*, 7 Kulp 308. **E. I.**—See also *Miller v. McCormick*, 60 Atl. 48. **S. D.**—*Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778. See also *Evans v. Fall River County*, 4 S. D. 119, 55 N. W. 862. **Vt.**—See also *Burnham & Mayo v. Brewster*, 1 Vt. 87. **Va.**—*Powers v. Carter Coal & Iron Co.*, 100 Va. 450, 456, 41 S. E. 867. **Wash.**—See *Walton v. Hartman*, 38 Wash. 34, 80 Pac. 196. **Wis.**—*Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559; *Meiners v. Frederick Miller Brew. Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; *Magoon v. Callahan*, 39 Wis. 141; *Stoppelfeldt v. Milwaukee M. & G. B. Ry. Co.*, 29 Wis. 688; *Weber v. Zeimet*, 27 Wis. 685.

[a] In the exercise of this authority, however, the court may not require the defendant to bring into court the amount due under the judgment which it is sought to vacate. *Page v. Wallace*, 87 Ill. 84.

[b] Such terms may be imposed as will, as near as may be "place the plaintiff in as favorable a position as he would have been in had the relief been denied." But it is an abuse of discretion to impose terms which will place the plaintiff in a better position. *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314; *Union Nat. Bank v. Benjamin*, 61 Wis. 514, 21 N. W. 523.

[c] "What will be in the 'furtherance of justice,' and what 'terms' are to be regarded as 'just' must depend upon the facts of each particular case." *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314.

[d] The court may require the applicant to go to trial at a certain time as a condition to granting this relief. *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910.

[e] Where a motion for this relief is granted on the condition that the applicant pay the actual costs of the adverse party "to be assessed by the

clerk," the adverse party must establish such expenses before the applicant can pay them. *Brown v. Brown*, 27 S. C. 153, 3 S. E. 69.

[f] The court may (1) open the judgment on condition that the issue framed be a special one (*McMurray's Heirs v. Erie*, 59 Pa. 223. See also *Walker v. Saldada*, 17 Pa. Co. Ct. 371; *Peters & Son v. McDonald*, 7 Kulp [Pa.] 308), (2) or that the defense to be interposed be other than a technical one (*Bailey v. Clayton*, 20 Pa. 295). (3) Likewise, the court may, it has been held, open its judgment upon condition that the defendant shall not object to the jurisdiction of the court. *Putney v. Collins*, 3 Grant's Cas. (Pa.) 72.

[g] **Execution May Issue.**—On granting this relief the court may, as a condition thereto, order that execution of the judgment proceed. But this term or condition can only be imposed by special order or provision. *Savage v. Kelley*, 11 Phila. (Pa.) 525.

[h] In the exercise of this power the court may require the applicant, in a proper case, to pay the accrued costs of the adverse party. *Cooper v. Borough of Kingston*, 6 Kulp (Pa.) 344.

[i] **Failure To Comply With Terms.** In Texas it has been held that where the court set aside a judgment on condition that the applicant pay the costs, his failure to pay such costs did not entitle the adverse party to a new judgment for the court might yet modify its order in this respect and do away with this condition entirely. *Marx v. Epstein*, 1 Tex. Civ. Cas., §1317.

[j] **A change of venue** may be denied as a condition to granting this relief. *Dennison v. Chapman*, 102 Cal. 618, 36 Pac. 943.

[k] **A postponement** may be denied in granting this relief. *Chicago v. English*, 198 Ill. 211, 64 N. E. 976.

38. **Pa.**—*Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 32 Atl. 335. See also *Carson v. Coulter*, 2 Grant's Cas. 121. **S. D.**—See also *Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778. **Va.**—*Powers v. Carter Coal & Iron Co.*, 100 Va. 450, 41 S. E. 867. **Wash.** *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272.

[a] "No terms were imposed by

favor, in which the imposition of any terms is error.<sup>39</sup> And this discretionary power is usually provided for in statutes regulating the opening or vacating of judgments.<sup>40</sup> If the dictates of justice require, the court may open a judgment on the condition that the defense to be interposed shall be a meritorious one, as distinguished from a technical one.<sup>41</sup>

In imposing terms the adverse party must be considered, and the terms must afford him such protection as, in view of all the surround-

the court below, but that was a matter peculiarly in the discretion of the court, and it would require a very strong case, much stronger than this, to move us to interfere." *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 23 Atl. 335.

39. *Cal.*—*Waller v. Weston*, 125 Cal. 201, 57 Pac. 892. *N. Y.*—*Yates v. Guthrie*, 119 N. Y. 420, 23 N. E. 741; *Seifert v. Caverly*, 63 Hun 604, 18 N. Y. Supp. 327; *Phonoharp Co. v. Stobbe*, 20 Misc. 698, 46 N. Y. Supp. 678; *Cohen v. Meryash*, 93 N. Y. Supp. 529. *N. D.*—*Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296. *Ore.*—*Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190. *S. C.*—*Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937.

See *supra*, XIV, E, 2, h, (II).

[a] Where defendant had interposed a motion to strike out the plaintiff's complaint and, before the determination of that motion, a judgment on default was entered against him, the action of the court in opening such judgment only on condition that the defendant should not plead the statute of limitations was reversible error; the relief in such a case should be unconditional. *Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190.

[b] The verification of plaintiff's complaint was defective. The defendant served an unverified answer. This the plaintiff returned and entered a default. The default was opened upon terms. This was held to be error, inasmuch as it was the defendant's right to file an unverified answer under the circumstances. *Phonoharp Co. v. Stobbe*, 20 Misc. 698, 46 N. Y. Supp. 678.

40. *Ill.*—*Burns' Ann. St.*, Rev. 1914, §405. *Me.*—*Rev. St.*, 1903, §12, c. 85, p. 761, concerning justice's courts. *Mont.*—*Rev. Codes*, 1907, §6589. *N. J.* *Comp. St.*, 1910, §112, p. 4087, providing for relief on terms from neglect of attorney. *N. Y.*—*Code Civ. Proc.*,

§§724, 1292. *N. C.*—*Rev.* 1905, §§513, 449. *N. D.*—*Rev. Codes*, 1905, §§6884, 6846.

[a] In New York, the power of the municipal courts in this regard is restricted by statute (*Laws*, 1896, ch. 748) to compelling the applicant to pay costs, not to exceed ten dollars, or to put up an undertaking to secure the judgment. See, involving this point, *Ludwin v. Siano*, 36 Misc. 537, 73 N. Y. Supp. 940; *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 507.

See generally the statutes.

41. *Cal.*—*Dennison v. Chapman*, 102 Cal. 618, 36 Pac. 943. *N. Y.*—*Allen v. Mapes*, 20 Wend. 633. See also *Pape v. Schofield*, 77 Hun 236, 28 N. Y. Supp. 340. *Pa.*—*Bailey v. Clayton*, 20 Pa. 295. *Tex.*—*Erwin v. Archenhold Co.*, 34 Tex. Civ. App. 55, 77 S. W. 823.

*Compare, supra*, XIV, E, 2, e, (III), (B).

[a] *Examples.*—Such defenses as usury (*Audubon v. Excelsior F. Ins. Co.*, 10 Abb. Pr. [N. Y.] 64; *Lord v. Vandemburgh*, 15 How. Pr. [N. Y.] 363. But see *Kinderhook Bank v. Gifford*, 40 Barb. [N. Y.] 659), the statute of limitations (*Ala.*—*Sawyer v. Patterson*, 12 Ala. 295. *Mont.*—*Anaconda Min. Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472. *N. Y.*—*Audubon v. Excelsior F. Ins. Co.*, 10 Abb. Pr. 64; *Fox v. Baker*, 2 Wend. 244. *Wis.*—*Meiners v. Miller Brew. Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586. *Contra, Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190), have been held technical defenses which may be required to be waived as a condition to such relief, but *res adjudicata* (*Audubon v. Excelsior F. Ins. Co.*, 10 Abb. Pr. [N. Y.] 64), is not such a defense as may be required to be waived.

[b] *Venue.*—That the court has no jurisdiction over the particular case, but has jurisdiction over the subject-matter in general may be required to

ing circumstances, he is equitably entitled to.<sup>42</sup> Occasionally this power has been spoken of as an "unlimited" one,<sup>43</sup> but, extensive though it undoubtedly is, it is not without limitations and restrictions.<sup>44</sup> And where, in a given case, the court has exercised this discretion in a manner not warranted by the equities, its action therein will be modified on appeal.<sup>45</sup> Furthermore, statutes frequently impose certain limitations on the exercise of this discretion.<sup>46</sup> Where the order of the court is one granting to the applicant the relief desired it is erroneous to impose terms upon the adverse party.<sup>47</sup>

*h. Payment of Costs and Expenses.*—Where it is discretionary with the court to open or vacate a judgment, the court will, ordinarily, in the exercise of a like discretion, require, as a condition thereto, that the applicant pay the accrued costs of the adverse party.<sup>48</sup> Sometimes

be waived as a condition to opening the case. *Putney v. Collins*, 3 Grant's Cas. (Pa.) 72.

42. *Siegel v. Frankel*, 93 N. Y. Supp. 533; *O'Meara v. Interurban St. Ry. Co.*, 87 N. Y. Supp. 405.

43. *Ensly v. Wright*, 3 Pa. 501.

44. "The law has wisely vested those courts with very large discretionary powers in such matters; but it is a judicial discretion, not to be capriciously or oppressively exercised. It is a power to be used in furtherance of justice, and not for the purpose of gagging and binding one of the parties to a suit, and then turning him over, in this helpless and defenseless condition, to the tender mercies of his adversary." *Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190.

[a] A condition is improper which requires the applicant to waive a meritorious defense. *Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190.

45. See *infra*, XIV, H.

46. In New York the municipal courts may not impose, as a condition to this relief, costs to exceed ten dollars. *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 505, involving c. 748, Laws 1896. And see *Schwartz v. Schendel*, 24 Misc. 701, 53 N. Y. Supp. 773.

47. *Berg v. Pohl*, 24 Misc. 740, 53 N. Y. Supp. 799; *Port Huron, etc. Co. v. Clements*, 113 Wis. 249, 89 N. W. 160.

[a] In New York the court may, upon granting this relief, "direct and enforce restitution, in like manner, with like effect, and subject to the same conditions, as where a judgment is reversed upon appeal." Code Civ. Proc., §1292. And see *Parker v. Lythgoe*, 60 Hun 578, 14 N. Y. Supp. 528.

[b] Where a judgment as on default was taken dismissing plaintiff's complaint, it was error for the court, on a subsequent application of plaintiff to vacate the same to require of the defendant that she file and serve an answer to the complaint. She not being in fault should have been allowed to demur or plead thereto in whatever manner she saw fit. *Berg v. Pohl*, 24 Misc. 740, 53 N. Y. Supp. 799.

48. Cal.—See *Hartman v. Olvera*, 49 Cal. 101. Ga.—*Johnson, etc. Co. v. Durham, etc. Co.*, 31 Ga. 335; *Williams v. Dawson*, 13 Ga. 44. See also *Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88. Ill.—*Yost v. Minneapolis Harvester Works*, 41 Ill. App. 556. Ind.—*Norris v. Dodge's Admr.*, 23 Ind. 190. Kan.—*Stewart v. Scully*, 46 Kan. 491, 26 Pac. 957. Ky.—*Williams v. Taylor*, 11 Bush 375. Mich.—*People ex rel. Miller v. Wayne Cir. Judge*, 39 Mich. 375. Minn.—*Ueland v. Johnson*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698. Neb.—*Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824; *Haggerty v. Walker*, 21 Neb. 596, 33 N. W. 244; *Kepley v. Irwin*, 14 Neb. 300, 15 N. W. 719. N. J.—*Oram v. Dennison*, 13 N. J. Eq. 438. See *Den ex dem. Lee v. Eval*, 1 N. J. L. 233. N. Y.—*Kane v. Van Nostrand*, 13 How. Pr. 465; *Morrell v. Gibson*, 1 How. Pr. 208; *Burnham v. Smith*, 1 How. Pr. 46; *Leighton v. Wood*, 17 Abb. Pr. 177; *McCarty v. Altonwood Stock Farm*, 68 Hun 551, 22 N. Y. Supp. 1091; *Muller v. Rost*, 58 Hun 604, 11 N. Y. Supp. 615; *Marcus v. Pomeranz*, 98 App. Div. 619, 90 N. Y. Supp. 139; *Kahn v. Casper*, 51 App. Div. 540, 64 N. Y. Supp. 838; *Goodness v. Metropolitan St. Ry. Co.*, 49 App.



the imposition of such a condition is made imperative by statute.<sup>49</sup> In the absence of such a statute, however, the court may, if the equities of the case require, refuse to impose such terms.<sup>50</sup> Where, however, relief is demandable not as a matter of favor, but as a matter of strict legal right, no such condition may be imposed.<sup>51</sup> The amount is usually such sum as will substantially reimburse the adverse party the reasonable and necessary expenses incurred in obtaining the judgment which is to be relieved against,<sup>52</sup> although the court may, in its

Div. 76, 63 N. Y. Supp. 470; *Hyman v. London Assur. Corp.*, 43 App. Div. 622, 60 N. Y. Supp. 355; *De Marco v. Mass.*, 31 Misc. 827, 64 N. Y. Supp. 768; *Szerlip v. Baier*, 22 Misc. 351, 49 N. Y. Supp. 300; *Callender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645; *Ketcham v. Elliott*, 20 N. Y. Supp. 745. See also *Schwartz v. Schendel*, 24 Misc. 701, 53 N. Y. Supp. 773. **N. C.**—See *Dell School v. Peirce*, 163 N. C. 424, 79 S. E. 687. **Ohio**.—*Messick & Co. v. Roxbury*, 12 Ohio Dec. 95. **Fa.**—*Cooper v. Borough of Kingston*, 6 Kulp 344. **S. D.**—*Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778. **Wis.**—*Reeves & Co. v. Kroll*, 133 Wis. 196, 113 N. W. 440; *Port Huron Engine, etc. Co. v. Clements*, 113 Wis. 249, 89 N. W. 160; *Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559.

[a] **Cost Bond.**—Under a statute providing that in actions for the recovery of land the defendant must before he answer, plead or demur, file a cost bond, it is necessarily a condition to be imposed upon setting aside a default judgment that the defendant file such a bond. *Dell School v. Peirce*, 163 N. C. 424, 79 S. E. 687.

49. **Cal.**—*Robinson v. Merrill*, 80 Cal. 415, 22 Pac. 260; *Heermann v. Sawyer*, 48 Cal. 562; *Leet v. Grants*, 36 Cal. 288; *Howe v. The Independence Con. G. & S. Min. Co.*, 29 Cal. 72; *People v. O'Connell*, 23 Cal. 281; *Roland v. Kreyenhagen*, 18 Cal. 455. **Ga.**—*Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88. **Neb.**—*Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824; *Kepley v. Irwin*, 14 Neb. 300, 15 N. W. 719. **Wis.**—*Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910.

[a] Where opposite party does not insist upon such a statutory provision being followed, it is not reversible error to fail to impose such a condition. *Butler v. Richmond & D. R. Co.*, 88 Ga. 594, 15 S. E. 668.

50. *Kane v. Van Nostrand*, 13 How. Pr. (N. Y.) 465; *Gillespie v. Satterlee*, 18 Misc. 606, 42 N. Y. Supp. 463; *Reeves & Co. v. Kroll*, 133 Wis. 196, 113 N. W. 440; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910.

[a] Under statutes providing that this relief shall be upon such terms as are just, it is not an abuse of discretion to refuse to impose costs upon the successful applicant. *Reeves & Co. v. Kroll*, 133 Wis. 196, 113 N. W. 440.

51. **Cal.**—*Waller v. Weston*, 125 Cal. 201, 57 Pac. 892. **Nev.**—*Stanton-Thompson Co. v. Crane*, 24 Nev. 171, 51 Pac. 116, no personal service of jurisdictional process. **S. D.**—*Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778, opinion upon hypothesis that judgment was void.

As to when this relief is demandable as of rights see *supra*, XIV, E, 2, h, (II).

[a] **Upon Opening a Judgment Void for Want of Jurisdiction.**—*Waller v. Weston*, 125 Cal. 201, 57 Pac. 892.

[b] In Wisconsin, costs may be imposed in relieving against a void judgment. "Although void the court would not be bound to set the judgment aside unless it appeared to be inequitable. Hence an application to set it aside in a measure always appeals to the equitable power and discretion of the court." When this discretion exists terms may or may not be imposed. *Reeves & Co. v. Kroll*, 133 Wis. 196, 113 N. W. 440.

52. **N. Y.**—*Kressh v. Novick*, 162 App. Div. 891, 148 N. Y. Supp. 55; *Kahn v. Casper*, 51 App. Div. 540, 64 N. Y. Supp. 838; *Callender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645; *Siegel v. Frankel*, 93 N. Y. Supp. 533; *Ketcham v. Elliott*, 20 N. Y. Supp. 745. **Fa.**—*Cooper v. Borough of Kingston*, 6 Kulp 344. **Wis.**—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559.

[a] These expenses must be reason-

discretion, require the payment of only a portion thereof.<sup>53</sup> The successful party may be required to reimburse the adverse party his attorney's fees,<sup>54</sup> expenses incurred in paying off tax liens upon premises involved in the litigation,<sup>55</sup> moneys paid to the sheriff,<sup>56</sup> and personal expenses incurred.<sup>57</sup>

c. *Security*.<sup>58</sup>—An undertaking to secure the payment of whatever judgment may be recovered upon a claim for unliquidated damages may not, as a general rule, be required as a condition to the granting of this relief,<sup>59</sup> though exceptional circumstances may justify such a requirement,<sup>60</sup> and where the demand is on a liquidated sum an undertaking of this nature may be required.<sup>61</sup> Such a condition, however, on account of its severity, should only be imposed where the facts furnish a clear justification therefor.<sup>62</sup> The court may also require of

able and necessary, otherwise they should not be imposed as costs, even though actually incurred. For example, the successful party should not be required to pay his adversary's attorney's fees unless reasonable, although actually paid by the adverse party. *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559.

[b] **The Expense Must Have Been Actually Incurred.**—Expenses for entering up a judgment which has never in fact been entered up will not be imposed. *Morrell v. Gibson*, 1 How. Pr. (N. Y.) 208.

[c] **The municipal court's power in this regard is limited to imposing costs not exceeding ten dollars.** *Schwartz v. Schendel*, 24 Misc. 701, 53 N. Y. Supp. 773.

[d] **Ten Per Cent. of the Judgment.** In *Ueland v. Johnson*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698, the court, in speaking of the costs imposed, say: "The amount is ten per cent. of the judgment, and under ordinary circumstances would be excessive." But this amount may be justified where the applicant's neglect and delay are "great and unexcused."

53. *Ryan v. Mooney*, 49 Cal. 33.

54. **N. Y.**—*McCarty v. Altonwood Stock Farm*, 68 Hun 551, 22 N. Y. Supp. 1091; *Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459. **S. D.** *Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778. **Wis.**—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870.

55. *Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870.

56. *Callender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645.

57. *McCarty v. Altonwood Stock Farm*, 68 Hun 551, 22 N. Y. Supp.

1091; *Behl v. Schuette*, 95 Wis. 441, 70 N. W. 559.

58. **Judgment as Security.**—See *supra*, XIV, F, 1.

59. *Glickman v. Leow*, 29 App. Div. 479, 51 N. Y. Supp. 1078; *Brickel v. Train*, 86 N. Y. Supp. 292.

[a] In such a case, it has been held, the amount claimed has no relation to the amount the plaintiff will ultimately recover, if anything, and even in face of a showing that the defendant is financially irresponsible, the plaintiff will obtain all the security to which he is entitled by allowing the judgment previously rendered to stand as security for whatever judgment the plaintiff may recover, and he should not be required to put up an undertaking to secure any judgment that the plaintiff may obtain against him. *Brickel v. Train*, 86 N. Y. Supp. 292.

60. As where there are subsequent judgments against an applicant which would become prior liens if the adverse party's judgment were set aside. *Fuchs & Lange Mfg. Co. v. Springer, etc. Co.*, 15 Misc. 443, 37 N. Y. Supp. 24.

61. **N. Y.**—*Jellinghaus v. New York Ins. Co.*, 5 Bosw. 678; *Caponigri v. Cooper*, 70 App. Div. 124, 74 N. Y. Supp. 1116; *Hornthall v. Finelite*, 9 Misc. 724, 29 N. Y. Supp. 686; *Dudley v. Brinck*, 8 Misc. 76, 28 N. Y. Supp. 527. **Wash.**—*Halter v. Spokane Soap Wks.*, 12 Wash. 662, 42 Pac. 126. **Wis.** *Whereatt v. Ellis*, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

62. **Minn.**—*Brown v. Brown*, 37 Minn. 128, 33 N. W. 546. **N. Y.** *Glickman v. Leow*, 29 App. Div. 479, 51 N. Y. Supp. 1078; *Brickel v. Train*, 86 N. Y. Supp. 292. **Wis.**—*Union Nat.*

an applicant that he give an undertaking that he will not, in the event relief is denied him, hinder the collection of the judgment by encumbering or conveying his property;<sup>63</sup> or, should the circumstances of the case warrant it, the court may even require the applicant to deposit in custodia legis the amount of the judgment.<sup>64</sup>

d. *Payment of Amount Admitted.*—Upon an application to be relieved from a judgment for a sum of money, liability for a part of which sum the applicant admits, the court may require as a condition thereto that the applicant pay to the adverse party the sum admitted to be due.<sup>65</sup>

e. *Compliance With Terms.*—An order opening or vacating a judgment on terms does not become operative until the terms or conditions imposed have been fully complied with.<sup>66</sup> or, where the terms imposed are of a nature which cannot be performed in advance, they must be executed at the proper time,<sup>67</sup> unless the judgment was one which should have been relieved against unconditionally, in which event an order reinstating the judgment for a non-compliance with the terms erroneously imposed, will be reversed.<sup>68</sup> Compliance with conditions thus imposed may be waived by the adverse party.<sup>69</sup>

G. THE ORDER DETERMINING THE APPLICATION.—1. Generally. The language of this order should observe the distinction between

*Bank v. Benjamin*, 61 Wis. 512, 21 N. W. 523.

63. *Schwartz v. Schendel*, 24 Misc. 701, 53 N. Y. Supp. 773.

64. *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 507; *Fuchs & Lange Mfg. Co. v. Springer, etc. Co.*, 15 Misc. 443, 27 N. Y. Supp. 24.

65. *Youngman v. Tonner*, 82 Cal. 611, 23 Pac. 120; *Pier v. Amory*, 42 Wis. 474; *Magoon v. Callahan*, 39 Wis. 141.

[a] *Payment of more than the amount admitted* should not be required. *Pier v. Amory*, 42 Wis. 171.

[b] *In case there are several defendants* the court may require each defendant to pay his pro rata share and may order a referee to determine what such share will be. *Weber v. Zeimet*, 27 Wis. 107.

[c] *Upon a proposed plea of usury* the court may require the payment of the principal and a legal rate of interest. *Weber v. Zeimet*, 27 Wis. 685; *Jones v. Walker*, 22 Wis. 220; *Dole v. Northrop*, 19 Wis. 249.

66. *U. S.*—*Howe v. McDermott*, 4 Cranch 711, 12 Fed. Cas. No. 6,768. *Ala.*—*Willis & Co. v. The Planters' & Mechs. Bank of Mobile*, 19 Ala. 141. See also *Stephenson v. Mamony*, 4 Ala.

317. *Cal.*—*Wolff & Co. v. Canadian Pac. Ry.*, 89 Cal. 332, 26 Pac. 825; *Hartman v. Olvera*, 49 Cal. 101; *Gregory v. Haynes*, 21 Cal. 443. *Md.*—*Walters v. Munroe*, 17 Md. 501. *N. Y.* *Mitchell v. Menkle*, 1 Hilt. 142; *Delehanty v. Hoffman*, 1 How. Pr. 9; *Sabin v. Johnson*, 7 Cow. 421; *Van Ingen v. Hilton*, 91 Hun 373, 36 N. Y. Supp. 752. See also *Furman v. Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629. *S. C.*—*Brown v. Brown*, 27 S. C. 153, 3 S. E. 69.

[a] *Time of compliance with direction to pay costs*, in the absence of a special provision therefor in the order, depends on the statutory provision for the time for payment of costs generally. *Van Ingen v. Hilton*, 91 Hun 373, 36 N. Y. Supp. 752.

67. *Waterson v. Sent*, 10 Fla. 326, where a judgment was opened on condition that the applicant permit certain depositions to be read at the trial.

68. *Wolfe v. Murray*, 96 Md. 727, 54 Atl. 876.

69. *U. S.*—*Ransom v. New York*, 4 Blatchf. 157, 20 Fed. Cas. No. 11,572. *Ia.*—*Walker v. Cameron*, 78 Iowa 315, 43 N. W. 199. *N. Y.*—*Keifer v. Grand Trunk Ry. Co.*, 59 Hun 627, 13 N. Y. Supp. 860.



opening a judgment and vacating or annulling it;<sup>70</sup> however, it is the plain import of the language used, rather than the technical terms employed, which will control the effect of the order.<sup>71</sup> When the application to vacate is made after the issuance of an execution it is not necessary that the order should expressly direct that the execution be quashed.<sup>72</sup> An order granting relief should specify the grounds upon which it is made,<sup>73</sup> and a failure to comply with this requirement renders the order fatally defective.<sup>74</sup>

If the judgment relieved against is one taken on a default the de-

70. *King v. Brooks*, 72 Pa. 363.

[a] Where a judgment has been opened, and, upon a subsequent trial on the merits, the defendant gets a verdict, there ought, in strict practice, to be another order formally vacating the judgment previously opened. *McAnulty, Admr. v. Nat. Life Assn.*, 6 Lack. Leg. N. (Pa.) 128.

As to this distinction between opening and vacating see *supra*, XIV, F, 1.

71. When the order of the court is to strike off or vacate, if it is apparent on the face of the record that it was in fact for the purpose of rehearing or retrial, it is in substance an order to open,—though it is much better in all cases to employ the proper term. *King v. Brooks*, 72 Pa. 363.

[a] **Permission To File Answer.**—In *Merchants Ad-Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619, 61 Pac. 277, it was held that it was not necessary for an order setting aside a judgment on default to expressly extend to the defendant the right to file an answer, especially where the notice of motion stated that the motion would be made “upon the affidavits and verified answer” and the order setting aside the judgment directed, *inter alia* that the cause be reopened “and the parties thereto permitted to take such further proceedings in said cause as they may see fit and proper.”

72. *Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235.

[a] **Form of Order Opening Judgment To Admit Defense on the Merits.** [Title of court and cause.] On this \_\_\_\_\_ day of \_\_\_\_\_, 19—, came on to be heard the motion of the defendants herein to set aside the judgment by default rendered against them herein on the \_\_\_\_\_ day of May, 1903, and (here insert ground upon which motion was granted) because the defendants allege that they have made

payments to the plaintiff not shown in the account sued on, it is ordered by the court that the case be opened for the purpose of hearing such matters of the defense as go to the merits of the defendant's answer, and that the cause be tried upon its merits upon the \_\_\_\_\_ day of \_\_\_\_\_, 19—. Based upon the form used in *Erwin v. Archenhold Co.*, 34 Tex. Civ. App. 55, 77 S. W. 823.

73. *Strassner v. Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546; *Lerner v. Wagner*, 36 Misc. 833, 74 N. Y. Supp. 851; *Spina v. Maroselli*, 34 Misc. 204, 68 N. Y. Supp. 862; *Cahill v. Lilienthal*, 30 Misc. 429, 62 N. Y. Supp. 524; *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 505; *Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575; *Thornall v. Turner*, 23 Misc. 363, 51 N. Y. Supp. 214; *Colwell v. Devlin*, 20 Misc. 355, 45 N. Y. Supp. 850; *Smith v. Holmes Bros.*, 148 N. C. 210, 61 S. E. 631; *Turner v. Case Thresh. Machine Co.*, 133 N. C. 381, 45 S. E. 781; *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508; *Jones v. Swepson*, 79 N. C. 510. See also *Branch v. Walker*, 92 N. C. 87.

[a] An order reciting that the grounds upon which it is made is “that the defendants have a trial and a day in court,” is insufficient in this regard. *Lerner v. Wagner*, 36 Misc. 833, 74 N. Y. Supp. 851.

[b] A memorandum attached to a decree, reciting that such decree is set aside is inoperative for this purpose. *Barton v. Bryant*, 2 Ind. 189.

74. *Strassner v. Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546; *Spina v. Maroselli*, 34 Misc. 204, 68 N. Y. Supp. 862; *Stivers v. Ritt*, 29 Misc. 341, 60 N. Y. Supp. 507; *Gormully & Jeffery Manufacturing Co. v. Catharine*, 25 Misc. 338, 55 N. Y. Supp. 475; *Popkin v. Friedlander*, 23 Misc. 475, 51 N. Y. Supp. 398; *Thornall v. Turner*, 23 Misc. 363,

fendant should be required to answer within a reasonable time,<sup>75</sup> or if an issue has been reached, a day should be fixed for a trial on the merits.<sup>76</sup>

**2. Vacating the Order.**—An order vacating or setting aside a judgment may be vacated by the court which made it where such order was irregularly made,<sup>77</sup> or is invalid,<sup>78</sup> or erroneous,<sup>79</sup> or procured by fraud,<sup>80</sup> or where the applicant has not complied with the condition imposed upon the granting of such order,<sup>81</sup> or, generally, in any case where to permit such order to stand would be inequitable.<sup>82</sup> In vacating such an order, however, the court should make adequate provision for such rights of third parties as may have intervened.<sup>83</sup> When such an order is vacated the original judgment is at once reinstated.<sup>84</sup>

**II. APPEAL AND REVIEW.**—An order granting or refusing this relief is usually considered final and appealable,<sup>85</sup> although in some

51 N. Y. Supp. 214; *Colwell v. Devlin*, 20 Misc. 355, 45 N. Y. Supp. 850.

75. *Ill.*—*Parcell v. Henry*, 67 Ill. App. 256. *Minn.*—*Jones v. Swain*, 57 Minn. 251, 59 N. W. 297. *N. Y.*—*Headings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017; *Gormully & Jeffery Mfg. Co. v. Catharine*, 25 Misc. 338, 55 N. Y. Supp. 475. *Ohio.*—*Kolkhoff v. Busse*, 6 Ohio Dec. 28. *Tex.*—*Fowler v. Morrill*, 8 Tex. 153.

76. *West v. Burks*, 90 Ark. 156, 118 S. W. 397; *Beck v. Juckett*, 111 Iowa 339, 82 N. W. 762.

[a] An order which fails to set the case down for pleading, hearing or trial, is invalid as depriving the adverse party of a trial on the merits. *Gormully & Jeffery Mfg. Co. v. Catharine*, 25 Misc. 338, 55 N. Y. Supp. 475.

77. *Foster v. Potter*, 24 Ind. 363.

78. *Prescott v. Bennett*, 50 Ga. 266, where the order vacating the judgment was void for want of jurisdiction.

79. *Reed Bros. v. Nicholson*, 93 Mo. App. 29.

[a] In California such an order may not be vacated on this ground. *Hanson v. Hanson*, 78 Cal. xix, 20 Pac. 736.

80. *Hanson v. Hanson*, 78 Cal. xix, 20 Pac. 736 (where the court say that such an order made "where the court was imposed upon by some trick or artifice" may be vacated); *Keating v. Hayes*, 78 Hun 599, 29 N. Y. Supp. 475.

81. *Gregory v. Haynes*, 21 Cal. 443.

82. *Robinson v. Chicago, Rock Island & Pac. Ry. Co.*, 71 Iowa 102, 32 N. W. 193; *Waterman v. Jones*, 1 How.

Pr. (N. Y.) 12 (a case where the order was vacated for the gross laches of the party in notifying the adverse party of the vacation of the judgment).

83. *Keogh v. Delany*, 40 N. J. L. 97.

84. *Kirby v. Gates*, 71 Iowa 100, 32 N. W. 191; *Gloninger v. Hazard*, 4 Phila. (Pa.) 354.

[a] In Colorado the contrary has been held (*Owen v. Going*, 7 Colo. 85, 1 Pac. 229), the court saying, that "however erroneous the action of the district court may have been in setting aside the judgment, the order effectively accomplished its purpose. When the court subsequently set aside this order, its action in so doing did not have the effect to revive or reinstate the judgment."

85. *Neb.*—*Morse v. Engle*, 26 Neb. 247, 41 N. W. 1098. *N. D.*—*Garr v. Spaulding*, 2 N. D. 414, 51 N. W. 867. *Ohio.*—*Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Myres v. Myres*, 6 Ohio St. 221. *S. C.*—*Thew v. Porcelain Mfg. Co.*, 8 S. C. 286. *Utah.*—*Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[a] This, it has been said is true because, a motion to vacate or set aside a judgment is in effect the same as a bill for the same purpose; the judgment on the bill is final and appealable and the order denying the motion, having the same effect upon the rights of the parties as the judgment on the bill, is also final in its nature. *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

states an appeal will only lie from orders refusing such relief.<sup>86</sup> Under a statute restricting the right of appeal to such final orders as affect a substantial right, it has been held that an appeal will not lie from an order determining an application for this relief,<sup>87</sup> though there is authority to the contrary.<sup>88</sup>

Since the court may not, on a motion to vacate its judgment, consider or correct errors in law, in judicial reasoning,<sup>89</sup> the appellate court, on an appeal from an order denying such a motion, may not inquire into the correctness of the judgment below, but only into the propriety of the order determining the application to vacate such judgment.<sup>90</sup> The findings of the court below, upon conflicting evidence,

[b] In Pennsylvania (1) prior to the passage of the Act of May 20, 1891, P. L. 101, no appeal would lie to the order of the court opening a judgment. *Kelber v. Pittsburgh N. Plow Co.*, 146 Pa. 485, 32 Atl. 335. (2) It was only from an order refusing to open a judgment that an appeal might theretofore be had. *Richards' Appeal*, 127 Pa. 63, 17 Atl. 756; *Lamb's Appeal*, 89 Pa. 407. (3) No appeal might then be had from an order determining an application to strike off or set aside a judgment. *Sweesey v. Ketchum*, 80 Pa. 160. (4) "The first section of that act provides" for an appeal from a "decision of the court opening, vacating or striking off, or the refusal to" do so. "The act in question, with the prior Act of April 4, 1877, P. L. 53, have made a radical change, so far as the right of appeal is concerned. What was formerly an absolute discretion in the court below is now reviewable here." *Kelber v. Pittsburgh N. Plow Co.*, 146 Pa. 485, 23 Atl. 335.

[c] An appeal from an inferior court to a court of general jurisdiction will lie where the former court has improperly granted or denied an application for this relief. *Whitehurst v. Merchants' & Farmers' Transp. Co.*, 109 N. C. 342, 13 S. E. 937. See also *Finlayson v. American Accident Co.*, 109 N. C. 196, 13 S. E. 739.

86. *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Northern Pac.*, etc. R. R. Co. v. *Black*, 3 Wash. 327, 28 Pac. 538, *overruling* in this regard, *Hancock v. Stewart*, 1 Wash. Ter. 323. See also *Stocking v. Hanson*, 22 Minn. 542.

87. *Foote v. Lathrop*, 41 N. Y. 358. But see *Mayor, etc. of New York v. Smith*, 138 N. Y. 676, 34 N. E. 400, where the court say the determination by the trial court of such an applica-

tion is "absolute and beyond a review by this court, unless it appears that there was an abuse of discretion."

[a] Appeals From Municipal Courts. (1) Under N. Y. Code Civ. Proc., §1342, providing for an appeal from municipal to superior courts on orders "affecting a substantial right" an order determining an application of this sort was held appealable in *Kubie v. Miller Bros. & Co.*, 31 Misc. 460, 64 N. Y. Supp. 448. *Compare, Keller v. Feldmann*, 2 Misc. 179, 21 N. Y. Supp. 581. (2) In the following cases, although not turning on this point appeals were permitted from a municipal to a supreme court under the municipal court Act, §257 (Laws 1902, p. 1563, c. 580); *Johnson v. Manning*, 80 App. Div. 368, 80 N. Y. Supp. 738; *Long Branch Pier Co. v. Crossley*, 40 Misc. 249, 81 N. Y. Supp. 905; *Dept. of Health v. Babcock*, 84 N. Y. Supp. 604. And a similar ruling was made under §1347, Code Civ. Proc., in *Fassett v. Tallmadge*, 15 Abb. Pr. (N. Y.) 265.

88. *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930. See also *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Myres v. Myres*, 6 Ohio St. 221; *Wohlgemuth v. Taylor*, 25 Ohio Cir. Ct. 271; *Blyth & Fargo Co. v. Swenson*, 15 Utah 345, 49 Pac. 1027.

[a] In South Carolina such orders have been considered as within the purview of a statute which provided for an appeal from a final order "involving the merits." *Thew v. Porcelain Mfg. Co.*, 8 S. C. 286.

89. See *supra*, XIV, B, 7.

90. *Eaten v. Youngs*, 36 Wis. 171; *Landon v. Burke*, 33 Wis. 452. See also *Quaw v. Lameraux*, 36 Wis. 626.

[a] The correctness of the judgment of the trial court may only be inquired into by an appeal directly



as to the facts with respect to the alleged grounds for relief, will not be disturbed on appeal<sup>91</sup> if there was any competent evidence introduced to sustain them,<sup>92</sup> and unless there was a failure or an omission to find the material facts.<sup>93</sup> But whether the facts found show a case of excusable neglect is a conclusion of law which is reviewable on appeal.<sup>94</sup> The court's discretion, however, in granting or refusing relief, will not be disturbed unless it has been abused;<sup>95</sup> especially is

from it. *Eaton v. Youngs*, 36 Wis. 171.

91. N. Y.—*Clegg v. New York White Soap Stone Co.*, 66 N. C. 391. N. C. *Osborn v. Leach*, 133 N. C. 427, 45 S. E. 783 (affidavits of the parties will not be considered since the findings below are conclusive, and should not be included in the record); *Ricaud v. Alderman*, 132 N. C. 62, 43 S. E. 543; *Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Morris v. Liverpool, L. & G. Ins. Co.*, 131 N. C. 212, 42 S. E. 577; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Marsh v. Griffin*, 123 N. C. 660, 669, 31 S. E. 840; *Sikes v. Weatherly*, 110 N. C. 131, 14 S. E. 511; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892; *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530; *Weil v. Woodward*, 104 N. C. 94, 10 S. E. 129; *Winborne v. Johnson*, 95 N. C. 46; *Branch v. Walker*, 92 N. C. 87. See also *Finlayson v. American Acc. Co.*, 109 N. C. 196, 13 S. E. 739; *Beck v. Bellamy*, 93 N. C. 129. S. C.—*Odum v. Burch*, 52 S. C. 305, 29 S. E. 726.

[a] But the findings of a justice made on an application for this relief are reviewable on an appeal to a court of general jurisdiction. *Finlayson v. American Accident Co.*, 109 N. C. 196, 13 S. E. 739.

[b] Additional evidence will not be heard here. If further findings of fact should be deemed necessary, this court should remand the cause to the end that the same may be made. *Sharp v. Danville M. & S. W. R. Co.*, 106 N. C. 308, 11 S. E. 530.

92. *Ricaud v. Alderman*, 132 N. C. 62, 43 S. E. 543; *Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Morris v. Liverpool, L. & G. Ins. Co.*, 131 N. C. 212, 42 S. E. 577; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269.

93. *Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840.

94. *Morris v. Liverpool, L. & G. Ins. Co.*, 131 N. C. 212, 42 S. E. 577;

*Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840; *Albertson v. Terry*, 108 N. C. 75, 12 S. E. 892; *Weil v. Woodward*, 104 N. C. 94, 10 S. E. 129; *Winborne v. Johnson*, 95 N. C. 46; *Beck v. Bellamy*, 93 N. C. 129; *Clegg v. New York White Soap Stone Co.*, 66 N. C. 391; *Hudgins v. White*, 65 N. C. 393.

95. Cal.—*Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878; *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165. Colo.—*Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *McConnell v. Schultz*, 23 Colo. App. 194, 128 Pac. 876. Ga.—*Estes v. Ivey*, 53 Ga. 52; *Harris v. Breed*, 38 Ga. 297. Haw.—*Kekaula v. Kaaukai*, 9 Hawaii 473. Idaho.—*Western Loan Co. v. Smith*, 12 Idaho 54, 85 Pac. 1084; *Pease v. Kootenai*, 7 Idaho 731, 65 Pac. 432; *Baker v. Knott*, 3 Idaho 700, 35 Pac. 172. Ill.—*Treutler v. Halligan*, 86 Ill. 39; *Stenzel v. Sims*, 25 Ill. App. 538. See also *Hovey v. Middleton*, 56 Ill. 468. Ia.—*Hueston v. Preferred Acc. Ins. Co.*, 161 Iowa 521, 143 N. W. 566; *Bradshaw v. Des Moines Ins. Co.*, 154 Iowa 101, 134 N. W. 628; *Tschohl v. Machinery Mut. Ins. Assn.*, 126 Iowa 211, 101 N. W. 740. Minn.—*Hendricks v. Conner*, 104 Minn. 399, 116 N. W. 751; *Fishstrom v. Bankers Mut. Cas. Ins. Co.*, 102 Minn. 228, 113 N. W. 267. Mo.—*Robyn v. Chronicle Pub. Co.*, 127 Mo. 385, 30 S. W. 130; *Judah v. Hogan*, 67 Mo. 252; *Griffin v. Veil*, 56 Mo. 310; *Jacob v. McLean*, 24 Mo. 40; *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090; *Hoffman v. Loudon*, 96 Mo. App. 184, 70 S. W. 162; *Cabanne v. Macadaras*, 91 Mo. App. 70; *Hesse v. Seyp*, 88 Mo. App. 66. N. Y.—*Mayor v. Smith*, 138 N. Y. 676, 34 N. E. 400; *Brown v. Huber*, 103 App. Div. 134, 92 N. Y. Supp. 940; *Dudley v. Broadway Ins. Co.*, 42 App. Div. 555, 59 N. Y. Supp. 668; *Cunningham v. Hatch*, 18 N. Y. Supp. 453, 45 N. Y. St. 685;

Drummond v. Matthews, 17 N. Y. Supp. 726, 42 N. Y. St. 117; *Traiteur v. Livingston*, 13 N. Y. Supp. 603. **N. C.** *Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Morris v. Liverpool, L. & G. Ins. Co.*, 131 N. C. 212, 42 S. E. 577; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878; *Bank of Statesville v. Foote*, 77 N. C. 131. See also *Kerchner v. Baker*, 82 N. C. 169. **N. D.** *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381; *City of Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836; *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672. **Okla.**—*Hagar v. Wikoff*, 2 Okla. 580, 39 Pac. 281; *Jaffray v. Wolfe*, 1 Okla. 312, 33 Pac. 945. **Ore.**—*Schneider v. Hutchinson*, 35 Ore. 253, 57 Pac. 324, 76 Am. St. Rep. 474; *Coos Bay Nav. Co. v. Endicott*, 34 Ore. 573, 57 Pac. 61; *Askren v. Squire*, 29 Ore. 228, 45 Pac. 779; *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025; *Lovejoy v. Willamette Transp. & Locks Co.*, 24 Ore. 569, 34 Pac. 660; *Mitchell & Lewis Co. v. Downing*, 23 Ore. 448, 32 Pac. 394; *Hicklin v. McClear*, 19 Ore. 508, 24 Pac. 992; *Bailey v. Williams*, 6 Va. 71; *White v. Northwest Stage Co.*, 5 Ore. 99. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000; *Cloud v. Markle*, 186 Pa. 614, 40 Atl. 811; *Walter v. Fees*, 155 Pa. 55, 25 Atl. 829; *Hunter v. Mahoney*, 148 Pa. 232, 23 Atl. 1004; *McCutcheon v. Allen*, 96 Pa. 319; *Wernet's Appeal*, 91 Pa. 319; *Zartman v. Spangler*, 21 Pa. Super. 647; *O'Brien v. Sylvester*, 12 Pa. Super. 408; *Leader v. Dunlap*, 6 Pa. Super. 243; *Renwick Bros. & Co. v. Richardson*, 5 Pa. Super. 202. See also *Burley v. Filby*, 193 Pa. 374, 44 Atl. 453; *Philadelphia v. Weaver*, 155 Pa. 74, 25 Atl. 876; *Hatch v. Stitt*, 66 Pa. 264; *Gilliland v. Bredin*, 63 Pa. 393; *Van Cott v. Webb-Miller*, 25 Pa. Super. 51; *Gottlieb v. Middleberg*, 23 Pa. Super. 525; *Batzle v. Trumbower*, 22 Pa. Super. 487; *Rehm v. Frank*, 16 Pa. Super. 175; *Crawford v. Rath*, 4 Pa. Super. 612; *Schoenhut's Appeal*, 1 Sad. 530, 5 Atl. 619. **Compare**, *Huston Twp. Mut. F. Ins. Co. v. Beale*, 110 Pa. 321, 1 Atl. 926. **S. C.** *Bugg's Estate*, 71 S. C. 439, 444, 51 S. E. 263; *Bryson v. Whilden*, 55 S. C. 465, 33 S. E. 558; *Odum v. Burch*, 52 S. C. 305, 29 S. E. 726; *Higgins v. Wait*, 28 S. C. 606, 5 S. E. 363; *Le Conte v. Irwin*, 19 S. C. 554. **S. D.** *Brettell v. Deffebach*, 6 S. D. 21, 60 N. W. 167; *Evans v. Fall River*, 4 S. D.

119, 55 N. W. 862; *Ormsby v. Conrad*, 4 S. D. 599, 57 N. W. 778. See also *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027. **Tex.**—*Janes v. Langham*, 33 Tex. 604; *Aldridge v. Mardoff*, 32 Tex. 204; *Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258; *Fitzgerald v. Compton*, 28 Tex. Civ. App. 202, 67 S. W. 131. **Utah.**—*Thomas v. Morris*, 8 Utah 284, 31 Pac. 446. **Vt.**—See *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590. **Wash.**—*Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *Sanborn, Vail & Co. v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466. **W. Va.**—*Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744. **Wis.**—*Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Wheeler & W. Mfg. Co. v. Monahan*, 63 Wis. 198, 23 N. W. 127; *Ray v. Northrup*, 55 Wis. 396, 13 N. W. 239; *Cleveland v. Hopkins*, 55 Wis. 387, 13 N. W. 225; *Smith v. Smith*, 51 Wis. 665, 8 N. W. 868; *Seymour v. Supervisors*, 40 Wis. 62; *Johnson v. Eldred*, 13 Wis. 482.

[a] On an appeal of this character the appellate court will only determine whether or not this discretion has been properly exercised. *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 32 Atl. 335.

[b] The discretion vested in the New York supreme court may be exercised not only at special term but by all the justices in the appellate division. *Lawson v. Adams*, 89 App. Div. 303, 85 N. Y. Supp. 863.

[c] What Will Warrant Reversal. It is not sufficient for the appellate court to find as a matter of fact that the showing made below was sufficient to have justified the setting aside of the judgment. It must further find that the showing was such that there was no room for the exercise of discretion by the lower court before it can rightfully interfere. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

[d] Where the allegations in the application for this relief are, if true, sufficient, and there is no denial of them the appellate court will properly refuse to disturb the action of the trial court in opening the judgment. *Hunter v. Mahoney*, 148 Pa. 232, 23 Atl. 1004.

[e] "Where the moving papers, including the proposed answer, show that the party has a good defense, and that judgment has been suffered through mistake, inadvertence, surprise, or excusable neglect, it is an abuse of dis-

this true where a successful defense was made after the judgment was opened.<sup>96</sup> But where such discretion has been arbitrarily or unfairly exercised the action of the trial court may be reviewed and reversed.<sup>97</sup> And, it has been held, that it is not necessary that this abuse be actual

cretion to refuse the relief authorized by this section." *Bloor v. Smith*, 112 Wis. 340, 87 N. W. 870; *Boutin v. Catlin*, 101 Wis. 545, 77 N. W. 910; *Cleveland v. Hopkins*, 55 Wis. 387, 390, 13 N. W. 225.

[f] The mere fact that the appellate court does not entirely agree with the court of original jurisdiction in its rulings does not suffice to show a case of abuse of this discretion within the meaning of the authorities. *City of Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836.

[g] Where the evidence upon which the court acted is not set out in the record, an appellate court will presume that the evidence adduced below was legally sufficient to warrant the setting aside of the judgment. *Breckinridge v. Breckinridge*, 78 Ark. 598, 94 S. W. 715.

[h] Technical questions of practice will not justify a reversal of the action of the trial court, especially where they are without any "substantial merit." *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272.

As to the nature and extent of this discretion, see *supra*, XIV, E, 2, h, (II).

96. *Coos Bay Nav. Co. v. Endicott*, 34 Ore. 573, 57 Pac. 61.

[a] The courts are not disposed to deny a litigant the right to be heard where he has not lost or forfeited this right by his own negligence; for this reason a clearer abuse of discretion is required to reverse an order setting aside a default than where such order is refused. *Mally v. Roberts*, 167 Iowa 523, 149 N. W. 630. And see, to the same effect, *Norman v. Iowa Cent. R. Co.*, 149 Iowa 246, 128 N. W. 349; *Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878; *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165.

97. *Idaho*.—*Holzeman & Co. v. Henneberry*, 11 Idaho 428, 83 Pac. 497. *Mo.*—*Judah v. Hogan*, 67 Mo. 252; *State v. Heinrich*, 14 Mo. App. 146. *Mont.*—*Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Chambers v. City of Butte*, 16 Mont. 90, 40 Pac. 71. *N. Y.* *Weston v. Citizens' Nat. Bank*, 88 App.

Div. 330, 84 N. Y. Supp. 743; *Ross v. Belden*, 72 App. Div. 628, 76 N. Y. Supp. 88; *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80. *N. C.*—*Pepper v. Clegg*, 132 N. C. 312, 43 S. E. 906; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840. *Ore.*—*Coos Bay Nav. Co. v. Endicott*, 34 Ore. 573, 57 Pac. 61; *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440, 67 Am. St. Rep. 518; *Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. Rep. 818. *S. C.*—See also *Le Conte v. Irwin*, 19 S. C. 554. *S. D.*—*Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87; *Evans v. Fall River County*, 4 S. D. 119, 55 N. W. 862. *Tex.*—*City of Galveston v. Morton*, 58 Tex. 409; *James v. Langham*, 33 Tex. 604, 607; *Scottish Union Ins. Co. v. Tomkies & Co.*, 28 Tex. Civ. App. 157, 66 S. W. 1109. *Utah.*—See also *Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033. *Wash.*—*Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537. *Wis.*—*Dunlop v. Schubert*, 97 Wis. 135, 72 N. W. 350; *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164; *Johnson v. Eldred*, 13 Wis. 482.

[a] The action of the court in refusing this relief was reversed where it appeared that the defendant, who was the applicant on the motion to vacate, was absent from the state during all the proceedings leading up to the entry of the judgment complained of; that at the earliest moment he engaged competent counsel to care for his interest in the pending litigation; that because of his temporary absence from the address to which his mail was delivered he did not receive a communication forwarded to him by said counsel; that counsel withdrew from the case without notice to defendant who, upon discovering such withdrawal, immediately telegraphed to another attorney, retaining him to proceed to obtain the opening of the judgment by default which had been entered against him and to obtain leave to file an answer and defend the action, the refusal of the trial court to vacate the judgment under such circumstances being considered an abuse of the court's



or intentional, in the ordinary acceptance of the term; a failure to exercise such legal discretion from a mistake of law or any other cause, is equally reviewable.<sup>98</sup>

When an application should have been granted, not as an equitable favor, but as a strict legal right,<sup>99</sup> the refusal so to do is reversible on appeal.<sup>1</sup> Where the action of the court was wholly without authority, it will be reversed.<sup>2</sup> On the other hand, where the ruling of the trial court was correct, although predicated upon wrong principles or reasons, its ruling will, nevertheless, be sustained on appeal.<sup>3</sup> In the event of a reversal, the appellate court will remand the case so that the court below may dispose of it in accordance with the law as determined on the appeal.<sup>4</sup> The appellate court may provide that its judgment shall be without prejudice to a timely renewal of the application upon proper and sufficient papers.<sup>5</sup>

**Questions Not Raised Below.**—In accordance with the general rule, questions which were not raised in the trial court may not be raised for the first time on appeal.<sup>6</sup>

discretion. *Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033.

[b] "The discretion of courts to open judgments is very extensive, but it must rest on a foundation of competent evidence." So, where some of the allegations of the petition to open the judgment were denied and proof demanded by the answer thereto, and it appeared that no evidence was introduced on the points denied, the action of the court in opening the judgment was erroneous and was reversed. *Woods v. Irwin*, 141 Pa. 278, 293, 21 Atl. 603.

98. *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840.

[a] A distinction in this regard exists between a case in which the court below exercises its discretionary power on such an application and one in which it decides that it may not legally do so. Thus it was said in *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590, "Had the county court exercised its discretionary power, and granted the relief prayed for, or dismissed the petition, its decision would not be reversible here. . . . But, as we construe the exceptions, that court held, as matter of law, upon the facts alleged, that the petitioner was not entitled to have the case brought forward. In this there was error. The court might legally have granted the relief." See also *Fairfield v. King*, 41 Vt. 611.

99. See *supra*, XIV, E, 2, h, (II).

1. *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672.

2. *Hill v. Egan*, 2 Pa. Super. 596, by reason of lapse of time.

3. *Scott v. Mut. Reserve Life Assn.*, 137 N. C. 515, 50 S. E. 221; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

4. *Weil v. Woodward*, 104 N. C. 94, 10 S. E. 129, the appellate court cannot usurp the discretionary powers of the court below and grant the desired relief.

5. *Early v. Bard*, 93 App. Div. 476, 87 N. Y. Supp. 650.

6. **N. C.**—*Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793. **Pa.**—See *Lauer Brewing Co. v. Chmielewski*, 206 Pa. 90, 55 Atl. 841. **S. C.**—*Claussen v. Johnson*, 32 S. C. 86, 11 S. E. 209. **S. D.**—See *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29. **Utah.**—See *Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033. **Wash.**—*Washington Mill Co. v. Marks*, 27 Wash. 170, 67 Pac. 565; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042; *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997.

[a] That the applicant's affidavit of merits was defective. *State v. C. V. & C. M. Co.*, 13 Nev. 194; *Headings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017.

[b] That the proceedings in which the order appealed from was made were barred by a prior application for the same relief. *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997.

[c] **Objections as to sufficiency of notice of motion may not be raised on**

**Imposition of Terms.**—The question of the imposition of terms, being generally a matter discretionary with the trial court,<sup>7</sup> it will require an exceptionally strong showing to induce the appellate court to interfere on that score.<sup>8</sup> But should the terms imposed be, under the attendant circumstances, inadequate,<sup>9</sup> or unnecessarily severe,<sup>10</sup> or, for any reason, improper,<sup>11</sup> the appellate court will modify the order of the trial court in that respect.

**I. Costs.**—The allowance of costs in proceedings to open or vacate a judgment,<sup>12</sup> as in proceedings at law generally,<sup>13</sup> is a matter of statutory regulation. Generally the costs in such proceedings should be taxed against the unsuccessful party,<sup>14</sup> though they may be imposed upon the successful party under some circumstances as a condition precedent to opening or vacating a default judgment against him.<sup>15</sup>

appeal when not made in the court below. *Utah Commercial & Sav. Bank v. Trumbo*, 17 Utah 198, 53 Pac. 1033.

[d] The objection that the attorneys presenting the motion for relief are not the same as those who represented the party in the original cause and that there is no substitution of record must be made in the trial court and may not be urged for the first time on appeal, especially where it appears that they were recognized as properly appearing for the applicant by both the court and opposing counsel. *Searles v. Christensen*, 5 S. D. 650, 69 W. N. 29.

7. See *supra*, XIV, F, 3.

8. *Homthal v. Finelite*, 9 Misc. 724, 29 N. Y. Supp. 686; *Kelber v. Pittsburgh Nat. Plow Co.*, 146 Pa. 485, 32 Atl. 335. See also *Lewy v. Fox*, 22 Jones & S. (N. Y.) 397.

9. *Siegel v. Frankel*, 93 N. Y. Supp. 523.

10. *N. Y.*—*Sweet v. Metropolitan St. R. Co.*, 18 Misc. 355, 41 N. Y. Supp. 549. *Ore.*—*Mitchell v. Campbell*, 14 Ore. 454, 13 Pac. 190. *Wis.*—*Behl v. Schuetz*, 25 Wis. 441, 70 S. W. 530; *Union Nat. Bank v. Benjamin*, 61 Wis. 512, 21 N. W. 523.

[a] **In a Divorce Action.**—A default judgment was entered against a wife. The cause of action was adultery. She moved to open the judgment on the ground that she was never served with process. Motion granted on condition that she pay all costs incurred by plaintiff to date of motion. This was held to be an improper use of the court's discretion, requiring of her, as it did, that before she might defend

her honor, she must make a payment which she, being lawfully dependent on the plaintiff, was unable to make. *Fox v. Fox*, 143 App. Div. 483, 127 N. Y. Supp. 989.

11. *Fuchs & Lange Mfg. Co. v. Springer, etc. Co.*, 15 Misc. 443, 37 N. Y. Supp. 24.

[a] On appeal an order of the trial court requiring the applicant to stipulate, as a condition to the granting of this relief, that he will not appeal from the ultimate judgment of the court upon the merits, will be modified in this respect. *Fuchs & Lange Mfg. Co. v. Springer, etc. Co.*, 15 Misc. 443, 37 N. Y. Supp. 24.

12. In *Alabama* (§4144, Civ. Code, 1907), the costs are borne, in an uncontested motion, by the applicant; in a contested motion, by the unsuccessful party.

[a] **Costs on appeal**, under the New York statute are limited to ten dollars. *Strassner v. Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546.

13. See the title "Costs."

14. *Irwin's Appeal*, 9 Sad. (Pa.) 479, 12 Atl. 840, where relief was denied the applicant except that the judgment was modified to eliminate an allowance of usurious interest. It was held that the applicant being successful to that extent, the costs should go against the other party.

15. See *supra*, XIV, F, 3, b, and *Hyman v. London Assur. Corp.*, 43 App. Div. 622, 60 N. Y. Supp. 355, taxing the costs of the motion as well as the costs of the previous proceedings, in which the judgment was rendered, as a condition to opening the default. *Conte*

**J. SECOND APPLICATION.—PURSUIT OF CONCURRENT REMEDIES.** Ordinarily the denial of an application to open or vacate a judgment will operate as a bar to a future application for the same relief,<sup>16</sup> at least when sought upon the same grounds as those upon which the first motion was made,<sup>17</sup> unless the order denying the first application recites that it is made without prejudice to a new motion,<sup>18</sup> or, in the absence of such a recital, leave of court is subsequently obtained to present a second application.<sup>19</sup> This rule does not apply in case of a

*pare*, *Gillespie v. Satterlee*, 18 Misc. 606, 42 N. Y. Supp. 463.

16. Ga.—*Grier v. Jones*, 54 Ga. 154. See also *Walker v. Bivins*, 57 Ga. 322. Minn.—*Weller v. Hammer*, 43 Minn. 195, 45 N. W. 427; *Swanstrom v. Marvin*, 38 Minn. 359, 37 N. W. 455. N. Y. *Dwight v. St. John*, 25 N. Y. 203; *Smith v. Van Patten*, 2 How. Pr. 235. N. C.—*Mabry v. Henry*, 83 N. C. 298. S. D.—See also *Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638. Tex. *Metzger v. Wendler*, 35 Tex. 378. Wash. *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748. See also *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997. Wis.—*Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Day v. Mertlock*, 87 Wis. 577, 58 N. W. 1037; *Webster v. Board of Supervisors*, 47 Wis. 225, 2 N. W. 335; *Robbins v. Kountz*, 44 Wis. 558; *Branger v. Buttrick*, 28 Wis. 450; *Kabe v. The Vessel "Eagle,"* 25 Wis. 108.

[a] The unsuccessful applicant for this relief by motion may not thereafter seek the same relief by writ of error coram nobis. *Second Ward Bank v. Upman*, 14 Wis. 596.

[b] An order made on a second application which directs the vacation of the judgment will not be reversed on appeal where it appears that this relief should have been granted in the first instance. *Clein v. Wand Schneider*, 14 Wash. 257, 44 Pac. 272.

[c] A timely objection must be made on this ground or the objection is waived. *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997.

[d] Bill in Equity a Bar.—Where relief of this sort has been denied on proceedings in equity the party may not seek relief by motion. *Mellerio v. Freeman*, 211 Pa. 202, 60 Atl. 735.

[e] A Judgment Previously Opened. **Second Application to the Same End.** An application to open a judgment was made and granted, a defense interposed and a trial had which resulted in a

verdict for plaintiff. Before the rendition of judgment another application was made to open the judgment but on a different ground than the first. The court said: "This application was to open a judgment which was open, and as to which an issue had been framed and a verdict rendered. A motion for a reargument or to rescind the order discharging the rule for a new trial and to enlarge the issue would have opened the way for an application for the relief sought." *Smith v. Hine*, 179 Pa. 203, 260, 36 Atl. 222.

17. *Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Robbins v. Kountz*, 44 Wis. 558; *Branger v. Buttrick*, 28 Wis. 450.

[a] An application for this relief on the ground of irregularity determined adversely to the applicant, will operate as a bar to a future application setting forth practically the same facts although described as making a case of fraud. *Mabry v. Henry*, 83 N. C. 298.

18. *Wolff & Co. v. Canadian Pac. Ry.*, 89 Cal. 332, 26 Pac. 825; *Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029; *Webster v. Board of Supervisors*, 47 Wis. 225, 2 N. W. 335; *Robbins v. Kountz*, 44 Wis. 558; *Branger v. Buttrick*, 28 Wis. 450; *Kabe v. The Vessel "Eagle,"* 25 Wis. 108.

19. Cal.—*Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721. Minn.—*Carlson v. Carlson*, 49 Minn. 555, 52 N. W. 214. Mont.—*Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592. N. Y.—*Bush v. O'Brien*, 47 App. Div. 581, 62 N. Y. Supp. 685. Pa.—*Silberman v. Shuklansky*, 172 Pa. 77, 33 Atl. 272. Wash. *Clein v. Wand Schneider*, 14 Wash. 257, 44 Pac. 272. Wis.—*Robbins v. Kountz*, 44 Wis. 558; *Branger v. Buttrick*, 28 Wis. 450; *Kabe v. The Vessel "Eagle,"* 25 Wis. 108.

[a] Inasmuch as the rule requiring leave to be obtained before an applica-



voluntary dismissal of the application,<sup>20</sup> or where it was disposed of on grounds not going to the merits of the application.<sup>21</sup> And it is held that an application made on entirely new grounds which were previously unknown to the applicant will not be barred by the denial of a prior application.<sup>22</sup> Thus, a motion made on grounds which, if found to be true, constitute an absolute right to this relief, as where the motion is made on the ground that the defendant was never served with process,<sup>23</sup> is no impediment to a second application by the party made upon grounds which go only to the discretion of the court, as upon the ground of excusable neglect.<sup>24</sup> In jurisdictions where the party may, at his option, pursue one of a number of remedies, he may not, after failing in one, resort to another.<sup>25</sup> Nor may the party, while pursuing one form of remedy, resort to another looking towards the same relief.<sup>26</sup>

**XV. EQUITABLE RELIEF. — A. IN GENERAL. —** This subdivision of the article treats of independent proceedings in equity by original bill to obtain equitable relief against judgments and decrees. This relief may be either by perpetual injunction against the enforcement of the judgment, by granting a new trial, or by vacating, annulling and setting aside the judgment, for defects therein or in the proceedings leading up to it.<sup>1</sup> This subdivision does not treat of enjoining a judgment because of some defect in the execution or the proceedings had or to be had upon it.<sup>2</sup> Nor does it treat of relief from the

tion for this relief may, after a previous denial thereof, be renewed, is but a rule of practice, intended to avoid confusion and abuses, it does not affect the power of the court to reconsider its decision on a motion, upon the presentation of additional facts. *Riggs v. Pursell*, 74 N. Y. 370.

[b] **Terms Imposed.**—As a condition to granting leave to make a second application the court may require the applicant to do or perform some act, as the payment of costs. Failure to comply therewith operates to defeat the second application. *Liquari v. Abramson*, 91 N. Y. Supp. 768.

20. *Foohs v. Bilby*, 95 Ark. 302, 129 S. W. 1104.

[a] Where a motion for this relief was voluntarily dismissed, the application may be renewed, especially where made upon new grounds. *Walker v. Bivins*, 57 Ga. 322.

21. *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173, as where the required notice was not given.

22. **Ga.**—*Crim v. Crawford*, 47 Ga. 628. **N. Y.**—*Macomber v. New York*, 17 Abb. Pr. 35; *De Peyster v. Hildreth*, 2 Bart. Ch. 109; *Sutherland v. Mead*,

80 App. Div. 103, 80 N. Y. Supp. 504. **S. D.**—*Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201. **Wis.**—*Robbins v. Kountz*, 44 Wis. 558.

[a] The qualification that these new grounds should have been previously unknown to the applicant does not appear in *Riggs v. Pursell*, 74 N. Y. 370; *Lanahan v. Drew*, 17 N. Y. Supp. 840.

[b] An order denying a motion to set aside a judgment for fraud is not a bar to a motion for this relief made upon statutory grounds. *Robbins v. Kountz*, 44 Wis. 558.

23. *Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201.

24. *Weber v. Tschetter*, 1 S. D. 205, 213, 46 N. W. 201.

25. *Wilson v. Buchanan*, 170 Pa. 14, 32 Atl. 620.

As to right of relief in equity after denial of a motion, see *infra*, XV, C, 6.

26. *Kellogg & Co. v. Spargur*, 3 Neb. (Unof.) 595, 100 N. W. 1025; *Hay v. Cole*, 90 Hun 258, 35 N. Y. Supp. 950.

1. See *infra*, this section.

2. As to relief against executions, see the title "Judgments and Decrees, Enforcement of."

judgment by proceedings in or incidental to the original action.<sup>3</sup> These matters are treated elsewhere in this work. And the same is true as to the question of whether such proceedings are a direct or collateral attack upon the judgment or decree.<sup>4</sup>

**B. NATURE OF REMEDY AND RELIEF. — 1. Enjoining Enforcement of Judgments.** — Courts of equity have undoubted jurisdiction to restrain the enforcement of judgments,<sup>5</sup> in whole or in part,<sup>6</sup> subject to certain well defined rules, which are hereinafter discussed.<sup>7</sup> This power is sometimes recognized by statute.<sup>8</sup> But this procedure, although frequently resorted to, is giving way to that by an action to annul and set aside the judgment.<sup>9</sup>

**2. Granting New Trial.** — Although a court of equity has power, in a proper case, to grant a new trial in an action tried at law,<sup>10</sup>

3. See *supra*, XIV.

4. See *infra*, XVII, A, 4, a, (II).

5. Conn.—Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Carrington v. Holabird, 19 Conn. 84. Ga. Wilson v. Sullivan, 81 Ga. 238, 244, 7 S. E. 274. Ill.—West Chicago St. R. Co. v. Stoltzenfeldt, 100 Ill. App. 142. N. H.—Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467. Mass. Brooks v. Twitchell, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662. N. J. Cutter v. Kline, 35 N. J. Eq. 534. Pa. Given's Appeal, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. Tenn.—Chester v. Apperson, 4 Heisk. 639. Utah. Bailey v. Stevens, 11 Utah 175, 39 Pac. 828.

See also the title "Judgments and Decrees, Enforcement of."

[a] **Not a Statutory Proceeding for New Trial.**—A proceeding praying an injunction against enforcing a judgment and that the judgment be held void is not one for a new trial under the statute providing therefor. Mengel v. Mengel, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899.

6. McTeer v. Briscoe (Tenn.), 61 S. W. 564; Smith v. Van Bebber, 1 Swan (Tenn.) 110, where the court relieved against a judgment to the extent of the payments actually made.

7. See *infra*, XV, C; XV, D, and XV, E.

8. Wilson v. Sullivan, 81 Ga. 238, 244, 7 S. E. 274.

See generally the statutes.

9. Dobbins v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 826. See *infra*, XV, B, 3.

10. Cal.—Painter v. J. B. Painter Co., 133 Cal. 129, 65 Pac. 311. Conn.

Smith v. Hall, 71 Conn. 427, 42 Atl. 86; Carrington v. Holabird, 19 Conn. 84; Carrington v. Holabird, 17 Conn. 530. Ga.—Mullins v. Christopher, 36 Ga. 584; Booth v. Stamper, 6 Ga. 172. Ill.—Simpson v. Simpson, 273 Ill. 90, 112 N. E. 276; Foote v. Despaigne, 87 Ill. 28; Wilday v. McConnel, 63 Ill. 278; How v. Mortell, 28 Ill. 478; Probst v. Meadows, 13 Ill. 157, 169; Hilt v. Heimberger, 140 Ill. App. 129; West Chicago St. R. Co. v. Stoltzenfeldt, 100 Ill. App. 142; Prussian National Ins. Co. v. Chichocky, 94 Ill. App. 168. Ia.—Graves v. Graves, 132 Iowa 199, 109 N. W. 707. Miss.—Tatum v. Tate, 77 Miss. 684, 27 So. 647. Neb.—Lincoln v. Bell, 65 Neb. 351, 91 N. W. 287; Munro v. Callahan, 55 Neb. 75. Ohio.—Oliver v. Pray, 4 Ohio 175, 19 Am. Dec. 595. Tenn.—Ballard v. Nashville & K. R. Co., 94 Tenn. 205, 28 S. W. 1088; Prater v. Robinson, 11 Heisk. 392; Seay v. Hughes, 5 Sneed 155. Tex.—Nevins v. McKee, 61 Tex. 412; Johnson v. Templeton, 60 Tex. 238; Mussina v. Moore, 13 Tex. 7; McKee v. Ziller, 9 Tex. 58; Gross v. McClaran, 8 Tex. 341; Alexander v. San Antonio Lumb. Co. (Tex.), 13 S. W. 1025 (after the term).

See generally the title "New Trial."

[a] **"The history of this branch of Equity Jurisdiction is briefly this:** The first instance to be met with in any book of legal authority, of a new trial, with reference to the merits of the case on the evidence, is in the year 1665. Temp. Charles (11 Styles' R. 462, 466). It is supposed to be owing to the fact that *motions* were not reported before that time. For many years afterwards, new trials were grudgingly granted at Common Law; and for that very reason, Courts of

this jurisdiction has become practically obsolete since the extension of the power of courts of law.<sup>11</sup> Equity, in granting a new trial, does not act directly upon the judgment or upon the court rendering it, but upon the parties.<sup>12</sup> It does not grant a retrial in the court of law as such;<sup>13</sup> but decrees<sup>14</sup> that unless the opposite party shall submit

Equity were liberal in granting relief against Common Law judgments, and the Court of Chancery was inclined to take to itself the decision of legal questions, in many cases, which now appear to have been beyond the legitimate bounds of its jurisdiction. . . . But now, the thing is changed, and it is the every-day practice to grant new trials at law, and upon the most equitable principles, and Courts of Chancery seldom, and always reluctantly, interfere for this purpose." *Taylor v. Sutton*, 15 Ga. 103. To the same effect, see *U. S.—Metzger v. Williams*, 104 U. S. 93, 26 L. ed. 665. **Ala.**—*De Soto Coal M. & D. Co. v. Hill*, 188 Ala. 667, 65 So. 988. **Miss.**—*Herring v. Winans*, Smed. & M. Ch. 466. **N. J.**—*Hayes v. United States Phonograph Co.*, 65 N. J. Eq. 5, 55 Atl. 84. **N. Y.**—*Floyd v. Jayne*, 6 Johns. Ch. 479. **Ohio.**—*Oliver v. Pray*, 4 Ohio 175, 19 Am. Dec. 595. **Tenn.**—*Cox v. Bank of Hartsville*, 63 S. W. 237; *Seay v. Hughes*, 5 Sneed 155. **Tex.**—*Metzger v. Wendler*, 35 Tex. 378; *Vardeman v. Edwards*, 21 Tex. 737.

[1] In Texas, (1) original bills in chancery for the granting of new trials at law do not exist; for having no court of chancery, the application after the term is addressed to the court which rendered the judgment. *Vardeman v. Edwards*, 21 Tex. 737. (2) But applications for new trials at a term subsequent to the trial term at which a judgment is obtained are in the nature of an original suit in equity. And therefore the party complaining is not confined by the rules of the statute in reference to new trials, and the principles of equity must prevail. *Davis v. Ferry*, 33 Tex. 426. Compare, (3) *Vardeman v. Edwards*, 21 Tex. 737, holding such application to be governed by the same principles governing applications during the term, except that an equitable excuse for failing to apply during the term must be shown.

11. **Ala.**—*Hill v. McNeill*, 8 Port. 432. **Ill.**—*Prote v. Despain*, 87 Ill. 28; *Fuller v. Little*, 69 Ill. 229. **Ind.**—*Doubleday v. Makepeace*, 4 Blackf. 9,

28 Am. Dec. 33. **Kan.**—*Laithe v. M'Donald*, 12 Kan. 340. **Miss.**—*Newman v. Taylor*, 69 Miss. 670, 13 So. 831. **N. D.**—*Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392. **Ohio.**—*Oliver v. Pray*, 4 Ohio 175, 19 Am. Dec. 595. **W. Va.**—*Farmers', etc. Warehouse Co. v. Pride-more*, 55 W. Va. 451, 47 S. E. 258.

See generally the title "New Trial."

[a] Jurisdiction Still Exists.—The (1) statute empowering a trial judge to grant new trials after the term at which a judgment is rendered, does not divest equity of its inherent jurisdiction to relieve against fraud, accident or mistake. *Leigh v. Armor*, 35 Ark. 123. And (2) the jurisdiction may still be used where the party is without remedy at law. *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. See *infra*, XV, C, 6.

12. **Ark.**—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; *Jackson v. Woodruff*, 57 Ark. 599, 22 S. W. 566. **Va.**—*Wynne v. Newman's Admr.*, 75 Va. 811. **W. Va.**—*Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245; *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

13. **Ark.**—*Little Rock & H. S. W. R. Co. v. Newman*, 73 Ark. 555, 84 S. W. 727; *Pelham v. Moreland*, 11 Ark. 442. **Kan.**—*Laithe v. M'Donald*, 12 Kan. 340. **Ky.**—*Yancey v. Downer*, 5 Litt. 8. **Me.**—*Cowan v. Wheeler*, 25 Me. 267, 43 Am. Dec. 283.

14. **U. S.**—*Holton v. Davis*, 108 Fed. 138, 47 C. C. A. 246. **Ark.**—*Little Rock & H. S. W. R. Co. v. Newman*, 73 Ark. 555, 84 S. W. 727; *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216; *Leigh v. Armor*, 35 Ark. 123; *Pelham v. Moreland*, 11 Ark. 442. **Ky.**—*Cummins v. Kennedy*, 4 J. J. Marsh. 642; *Yancey v. Downer*, 5 Litt. 8. **Miss.**—*Hillerr & Co. v. Cotton & Co.*, 48 Miss. 593; *Herring v. Winans*, Smed. & M. Ch. 466. **N. J.**—*Hayes v. United States Phonograph Co.*, 65 N. J. Eq. 5, 55 Atl.



to a new trial at law, his judgment shall be enjoined. This power is exercised with caution.<sup>15</sup>

**3. Setting Aside and Vacating Judgments.**—Courts of equity have inherent power to grant relief, in a proper case therefor, against judgments at law by vacating or setting them aside,<sup>16</sup> either in whole

84. **N. C.**—*Moore v. Gulley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242; *Stockton v. Briggs*, 58 N. C. 309. **W. Va.**—*Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

[a] In Virginia "the regular course would seem to be for the chancery court to order such issue or issues as may be proper, and to base its decree on the finding of the jury at the hearing, either dissolving or perpetuating the injunction, in whole or in part, according to circumstances. . . . If a new trial was proper, the court should have ordered an issue, the same as in the action at law, to be tried as other issues out of chancery are tried, the verdict of the jury, if the trial was in the law court, to be certified to the chancery court, and in the meantime continue the injunction till the hearing of the cause; and if the finding was for the defendant and affirmed, dissolved the injunction; if for the plaintiff, perpetuate the injunction and decree for the complainant according to the verdict." *Wynne v. Newman's Admr.*, 75 Va. 811.

15. **Ala.**—*Norman v. Burns*, 67 Ala. 248. **Ark.**—*Jackson v. Woodruff*, 57 Ark. 599, 22 S. W. 566; *Leigh v. Armor*, 35 Ark. 123. **Ga.**—*Mullins v. Christopher*, 36 Ga. 584; *Booth v. Stamper*, 6 Ga. 172. **N. C.**—*Mottu v. Davis*, 153 N. C. 160, 69 S. E. 63; *Moore v. Gulley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242. **Tenn.** *Prater v. Robinson*, 11 Heisk. 391. **Tex.** *Nevins v. McKee*, 61 Tex. 412; *Johnson v. Templeton*, 60 Tex. 238. **Ireland.** *Bateman v. Willoe*, 1 Sch. & Lef. 201, 204.

[a] Due regard is paid to the maxim, that it is for the public good that there be an end to litigation. *Leigh v. Armor*, 35 Ark. 123; *Moore v. Gulley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242.

16. **U. S.**—*Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Brown v. Buena Vista Co.*, 95 U. S. 157, 24 L. ed. 422; *Christy v. Atchison*, etc. R. Co., 214 Fed. 1016. **Ala.**—*De Soto Coal M. & D. Co. v. Hill*, 188 Ala. 667, 65

So. 988. **Cal.**—*Tinn v. United States District Attorney*, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354; *Painter v. J. B. Painter Co.*, 133 Cal. 129, 65 Pac. 311; *Sanford v. Head*, 5 Cal. 297. **Ga.** *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689; *Johnson v. Driver*, 108 Ga. 595, 34 S. E. 158. **Ill.**—*Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276 (to vacate a judgment and grant a new trial therein); *French v. Thomas*, 252 Ill. 65, 96 N. E. 564; *Miller v. Barto*, 247 Ill. 104, 93 N. E. 140; *Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *Holmes v. Stateler*, 57 Ill. 209; *Owens v. Ranstead*, 22 Ill. 161; *Lieserowitz v. R. R. Co.*, 80 Ill. App. 248. See *West Chicago St. R. Co. v. Stoltzenfeldt*, 100 Ill. App. 142. **Ind.** *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; *Nealis v. Dicks*, 72 Ind. 374; *Gorman v. Johnson*, 46 Ind. App. 672, 91 N. E. 971. **Ia.**—*Iowa Sav. & Loan Assn. v. Chase*, 118 Iowa 51, 91 N. W. 807; *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31. **Kan.**—*Laithe v. McDonald*, 12 Kan. 340. **Mich.**—*Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697; *Ewing v. Lamphere*, 147 Mich. 659, 111 N. W. 187, 118 Am. St. Rep. 563; *Finn v. Adams*, 138 Mich. 258, 101 N. W. 533. **Mo.**—*Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; *Bassett v. Henry*, 34 Mo. App. 548. **Neb.** *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. See *Hitchcock County v. Cole*, 87 Neb. 43, 126 N. W. 513. **N. J.**—*Second Workmen's B. & L. Assn. v. Wickers*, 83 N. J. Eq. 397, 91 Atl. 897; *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461, 52 N. J. Eq. 545, 31 Atl. 717; *Dringer v. Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811. **N. Y.**—*Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Wright v. Miller*, 1 Sandf. Ch. 103. **Ohio.**—*Johnson v. Pomeroy*, 31 Ohio St. 247; *Howenstine v. Sweet*, 7 Ohio Cir. Dec. 498, 13 Ohio Cir. Ct. 239. **Okla.**—*Elrod v. Adair*,

or in part.<sup>17</sup> This remedy in equity is recognized by statutes in some jurisdictions.<sup>18</sup> Such relief may be granted even after the term at which the judgment was rendered.<sup>19</sup>

Equity is without power, however, to grant this relief directly,<sup>20</sup> although this power seems to be recognized in some cases.<sup>21</sup>

A suit to vacate a judgment in no sense assails the court in which the judgment is rendered,<sup>22</sup> but is simply a proceeding in personam.<sup>23</sup> The decree adjudges the rights of the parties inter sese in relation to that judgment.<sup>24</sup> Equity in granting such relief merely deprives the judgment-creditor of the benefit of the judgment and of any equitable advantage derived thereunder.<sup>25</sup>

153 Pac. 660. Ore.—*Freebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. Pa.—*Cochran v. Eldridge*, 49 Pa. 365. Tenn.—*Cox v. Bank of Hartsville*, 63 S. W. 237; *Maddox v. Apperson*, 14 Lea 596; *Jones v. Williamson*, 5 Coldw. 371; *Powell v. Cyfers*, 1 Heisk. 526; *John v. Tate*, 7 Humph. 388. Tex.—*McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357; *Buchanan v. Bilger*, 64 Tex. 589; *Williams v. Nolan*, 58 Tex. 708. Va. *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382; *Byrne v. Edmonds*, 23 Gratt. (64 Va.) 200; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136, 141. W. Va.—*Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882. Wis.—*Lamb v. Anderson*, 2 Pin. 251. Canada.—*Charlebois v. Delap*, 26 Canada Sup. 221, 249. Eng.—*Bowen v. Evans*, 2 H. L. Cas. 257, 281, 9 Eng. Reprint 1090.

See Story Eq. Pl., 10th ed., §426.

[a] History of Proceeding.—See 3 Bl. Com. 73; *Cochran v. Eldridge*, 49 Pa. 365.

Grounds of relief, see *infra*, XV, E.

17. *Renner v. Kannally*, 193 Ill. 212, 61 N. E. 1026; *Charlebois v. Delap*, 26 Canada Sup. 221, 249.

18. Ga.—Code, 1910, §§5965, 5966, 4584, 4585, 3218; *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689. Ia.—*Hintrager v. Sumbardo*, 54 Iowa 604, 7 N. W. 92. Ky.—Code, §17; *McCown v. Macklin's Exr.*, 7 Bush 308; *French v. French*, 6 Ky. Opin. 739; *King v. Boles*, 4 Ky. Opin. 147. La.—Code Pr., §§604-613.

See generally the statutes.

19. *Tryon v. Pennsylvania R. Co.*, 213 Fed. 49; *Ragsdale v. Green*, 36 Tex. 193.

20. U. S.—*Smith v. Smith*, 210 Fed. 947. Ky.—See *Ellis v. Gosney's Heirs*, 1 J. J. Marsh. 316. N. Y.—*Ayres v.*

*Lawrence*, 63 Barb. 454, 1 Thomp. & C. 5. Pa.—*Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. Tenn.—*Porter's Lessee v. Cocke*, Peck 30, 51. Eng.—*Barnesty v. Powell*, 1 Ves. Sen. 284, 27 Eng. Reprint 1034.

21. See U. S.—*Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. 177. Cal.—*Martin v. Parsons*, 50 Cal. 498, 501, 49 Cal. 94. Ill.—*Wilday v. McConnel*, 63 Ill. 278.

22. Conn.—*Stanton v. Embry*, 46 Conn. 595; *Pearce v. Olney*, 20 Conn. 544. Mo.—*Wonderly v. Lafayette Co.*, 150 Mo. 635, 653, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386. Pa.—*Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795.

23. *Stanton v. Embry*, 46 Conn. 595; *Pearce v. Olney*, 20 Conn. 544; *Wonderly v. Lafayette Co.*, 150 Mo. 635, 653, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386.

24. Ark.—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. Mo.—*Wonderly v. Lafayette Co.*, 150 Mo. 635, 653, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386. Pa.—*Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795.

25. *Smith v. Smith*, 210 Fed. 947; *Ayres v. Lawrence*, 63 Barb. (N. Y.) 454, 1 Thomp. & C. (N. Y.) 5.

[a] Nature of Relief.—(1) "Though this court cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing; because obtained where nothing was due." *Barnesly v. Powell*, 1 Ves. Sen. 285, 27 Eng. Reprint 1034. (2) Equity will prevent the party obtaining a judgment by fraud from using it to the injury of his adversary; or

A bill to restrain the collection of a judgment is not a proceeding to set it aside.<sup>26</sup>

**4. Revising and Correcting.**—A court of equity has no power to sit in judgment on the lawful acts of other tribunals, and no jurisdiction to try their acts, to see whether, in the exercise of their rightful powers, they have committed errors, either of law or fact.<sup>27</sup> Accordingly, equity can in no case revise or reform a judgment of a court of law in any respect whatever.<sup>28</sup>

**5. Compelling Set-Off.**—The matter of compelling set-offs is treated elsewhere in this work.<sup>29</sup>

### C. GENERAL LIMITATIONS UPON RIGHT TO RELIEF.<sup>30</sup>—1. In Gen-

if he has enforced his judgment, it will hold him as a trustee, and compel him to account for the fruits of his iniquity. *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

26. *Cariker v. Dill* (Tex. Civ.), 140 S. W. 843. See also *Trefz v. Knickerbocker L. Ins. Co.*, 8 Fed. 177; *Martin v. Parsons*, 50 Cal. 498, 501, 49 Cal. 94.

[a] But a suit begun by a petition asking only a preliminary injunction and on final hearing that it be perpetuated and for all other relief legal or equitable to which the plaintiff may be entitled was held, in *Texas & P. R. Co. v. Miller* (Tex. Civ. App.), 171 S. W. 1069, to be a suit in equity to vacate the judgment.

27. **U. S.**—*Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *Folsom v. Ballard*, 70 Fed. 12, 16 C. C. A. 593; *Smith v. Smith*, 210 Fed. 947. **Ark.**—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. **Cal.**—*Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91. **Ill.**—*Chicago Waifs Mission v. Excelsior Electric Co.*, 44 Ill. App. 425; *Alabama Ins. Co. v. Kingman & Co.*, 21 Ill. App. 493. **Mass.**—*Nesson v. Gilson*, 112 N. E. 870. **N. J.** *Dringer v. Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811. **N. C.**—*Peace v. Nailing*, 16 N. C. 289. **Ore.**—*Froeblich v. Lane*, 45 Ore. 13, 22, 76 Pac. 351, 106 Am. St. Rep. 634. **Tenn.**—*Glenn v. Maguire*, 3 Tenn. Ch. 695; *Greenlaw v. Kernahan*, 4 Sneed 371.

[a] "One who in fact appeared and defended against the original action can never maintain a separate action for the mere purpose of reviewing the rulings of the court having jurisdiction

of the original action upon some question of law or fact concerning which such court had the power to decide." *Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988.

23. **Ala.**—*Meyer v. Calera Land Co.*, 133 Ala. 554, 31 So. 938. **Cal.**—*Hull v. Calkins*, 137 Cal. 84, 69 Pac. 838. **Ga.**—*Irvin v. Sanders*, 52 Ga. 350 (for error apparent). **Ky.**—*Cameron v. Bell*, 2 Dana 328. **Md.**—*Ellicott v. Welch*, 2 Bland 242. **Mo.**—*Sumner v. Whitley*, 1 Mo. 708. **N. C.**—*Peace v. Nailing*, 16 N. C. 289. **Ore.**—*Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110.

[a] In *Hull v. Calkins*, 137 Cal. 84, 69 Pac. 838, the court said: "Our attention has not been called to any case where courts of equity have intervened to correct merely clerical errors" in judgments.

[b] **Treating Bill To Reform as Bill To Impeach.**—In *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63, a bill filed to correct and reform a decree upon the ground of erroneous description of the property on which the lien was foreclosed was considered as an original bill in equity brought to impeach a judgment on the ground of fraud or mistake.

[c] **A mistake in a judgment is not corrected** by reviewing the judgment or decree, but by restraining the parties who may take advantage of it, from doing so, or by compelling them to execute proper papers for the purpose of correcting it. *Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452.

**Amendment of judgments**, see *supra*, XIII.

29. See *infra*, XV, F, and generally the title "**Set-Off, Counterclaim and Recoupment.**"

30. **Grounds for relief generally**, see *infra*, XV, E.



eral. — Bills to set aside judgments at law and obtain new trials are not favored by courts of equity;<sup>31</sup> and therefore, the courts require a strict compliance with the limitations upon the right to relief.<sup>32</sup> It is only in cases which commend themselves strongly to equitable relief that the chancellor will exercise his power to vacate a judgment of a court at law.<sup>33</sup> If the applicant could not possibly derive any benefit from the relief sought, equity will withhold its relief.<sup>34</sup> The maxim of equity, that a party coming into equity must come with clean hands applies to this proceeding.<sup>35</sup>

2. Judgment Must Work Injustice. — A judgment at law will not be disturbed in equity when it does substantial justice between the parties,<sup>36</sup> no matter how irregular the proceedings may be.<sup>37</sup> To warrant equitable relief against a judgment, it must clearly appear that the enforcement of the judgment would be unjust and against conscience,<sup>38</sup> and this has been held to be true even if the judgment be

31. *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277.

32. *French v. Garner*, 7 Port. (Ala.) 549.

33. *Holmes v. Stateler*, 57 Ill. 209.

34. *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 106 Pac. 102; *Piggott v. Addicks*, 3 Greene (Iowa) 427, 56 Am. Dec. 547.

35. *Creath's Admr. v. Sims*, 5 How. (U. S.) 192, 12 L. ed. 110; *Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *Elrod v. Adair* (Okla.), 153 Pac. 660.

36. *Ark.*—*Whitehill v. Butler*, 51 Ark. 341, 11 S. W. 477. *Cal.*—*Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. *Mich.*—*Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694.

[a] Even when a defendant is prevented from presenting his defense by unavoidable casualty, judgment will not be set aside in equity if it does substantial justice. *Whitehill v. Butler*, 51 Ark. 341, 11 S. W. 477.

37. *Hartford Fire Ins. Co. v. Meyer*, 30 Neb. 135, 46 N. W. 292, 27 Am. St. Rep. 384; *Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110.

Irregularities as ground for relief, see *infra*, XV, E, 4.

38. *U. S.*—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240. *Ala.*—*Norman v. Burns*, 67 Ala. 248; *French v. Garner*, 7 Port. 549. *Ark.*—*Missouri, etc. R. Co. v. Killebrew*, 96 Ark. 520, 132 S. W. 454; *Little Rock & H. S. W. R. Co. v. Newman*, 73 Ark. 555, 84 S. W. 727; *Little Rock, etc. R. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30

*L. R. A.* 560; *Whitehill v. Butler*, 51 Ark. 341, 11 S. W. 477; *Johnson v. Branch*, 48 Ark. 535, 3 S. W. 819. *Cal.*—*Metropolis T. & S. Bank v. Barnet*, 165 Cal. 449, 132 Pac. 833; *Burbridge v. Rauer*, 146 Cal. 21, 79 Pac. 526; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563. *Colo.*—*Crippen v. X. Y. Irr. D. Co.*, 32 Colo. 447, 76 Pac. 794; *Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290; *Fisher v. Green*, 5 Colo. 541. *Conn.*—*Lithuanian Bro. Society v. Tunila*, 80 Conn. 642, 70 Atl. 25; *Jeffery v. Fitch*, 46 Conn. 601; *Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. *Fla.*—*Peacock v. Feaster*, 52 Fla. 565, 42 So. 889. *Ga.*—*Ponder v. Cox*, 26 Ga. 485. *Ill.*—*Miller v. Barto*, 247 Ill. 104, 93 N. E. 140; *Clark v. Ewing*, 93 Ill. 572; *Garden City Wire & S. Co. v. Kause*, 67 Ill. 108; *Walker v. Kretsinger*, 48 Ill. 502; *Ballance v. Loomiss*, 22 Ill. 82; *Weeks v. Holmes*, 101 Ill. App. 435; *Beveridge v. Hewitt*, 8 Ill. App. 467. *Ia.*—*Commercial State Bank v. Pierce*, 158 N. W. 481; *Hoskins v. Hattenback*, 14 Iowa 311; *Shrieker v. Field*, 9 Iowa 366; *Piggott v. Addicks*, 3 G. Greene 427, 56 Am. Dec. 547. *Kan.*—*Muse v. Wafer*, 29 Kan. 279. *La.*—*Perry v. Rue*, 31 La. Ann. 287; *Brand v. Stafford*, 28 La. Ann. 51; *Swain v. Sampson*, 6 La. Ann. 799; *Norris v. Fristoe*, 3 La. Ann. 646; *Smith v. Barkemeyer*, 1 McGloin 139. *Mich.*—*Barr v. Packard Motor Car Co.*, 182 Mich. 612, 148 N. W. 761; *Finn v. Adams*, 138 Mich. 258, 101 N. W. 533, 4 Ann. Cas. 1186; *Mueller v. Marsh*, 116 Mich. 375, 74 N. W. 513;

void for want of jurisdiction or other cause.<sup>39</sup> But equity will not, of course, set aside a judgment simply on the ground that it is unjust;<sup>40</sup> it must appear that injustice has been done under circumstances warranting equitable interference,<sup>41</sup> and that the party complaining<sup>42</sup> has

**Gray v. Barton**, 62 Mich. 186, 197, 28 N. W. 813; **Miller v. Morse**, 23 Mich. 365, 368. **Miss.**—**Hiller & Co. v. Cotton & Co.**, 48 Miss. 593; **Joslin v. Coffin**, 5 How. 539. **Neb.**—**Petalka v. Fitte**, 33 Neb. 756, 51 N. W. 131; **Hartford Fire Ins. Co. v. Meyer**, 30 Neb. 135, 46 N. W. 292, 27 Am. St. Rep. 384. **N. J.**—**Moore v. Gamble**, 9 N. J. Eq. 246. **N. Y.**—**Schroeppell v. Shaw**, 3 N. Y. 446; **Vilas v. Jones**, 1 N. Y. 274, 281. **Okla.**—**Elrod v. Adair**, 153 Pac. 660. **Pa.**—**Gazzam v. Reading**, 202 Pa. 231, 51 Atl. 1000. **Tenn.** **White v. Cahal's Admr.**, 2 Swan 550; **Randall v. Payne**, 1 Tenn. Ch. 137. **Tex.**—**Alexander v. San Antonio Lumb. Co.**, 13 S. W. 1025; **Owens v. Foley**, 42 Tex. Civ. App. 49, 93 S. W. 1003; **Fox v. Robbins** (Tex. Civ. App.), 62 S. W. 815. **Wash.**—**Brandt v. Little**, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213; **Spokane Co-op. Min. Co. v. Pearson**, 28 Wash. 118, 68 Pac. 165; **Hill v. Lowman**, 15 Wash. 503, 46 Pac. 1042. **W. Va.**—**Iron Co. v. Quisenberry**, 50 W. Va. 451, 40 S. E. 487. **Wis.**—**John V. Farwell Co. v. Hilbert**, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235; **Thomas v. West**, 59 Wis. 103, 17 N. W. 684.

[a] A *prima facie* case of injustice must appear. **Davis v. Terry**, 33 Tex. 426; **Irvin v. Johnson** (Tex. Civ. App.), 170 S. W. 1059.

[b] It is not against good conscience to maintain a judgment rendered against a party who will neither give his personal attention to a suit wherein the judgment was rendered or employ another to represent him. **Milandon v. Gordon**, 18 La. Ann. 280.

**39. U. S.**—**Massachusetts Benefit Life Assn. v. Lohmiller**, 74 Fed. 23, 20 C. C. A. 274. **Conn.**—**Jefferly v. Fitch**, 46 Conn. 601. **Ill.**—**Hier v. Kaufman**, 134 Ill. 215, 25 N. E. 517 (where there was no service); **Colson v. Leitch**, 110 Ill. 504. **Miss.**—**Joslin v. Coffin**, 5 How. 539. **Wis.**—**John V. Farwell Co. v. Hilbert**, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235; **Thomas v. West**, 59 Wis. 103, 17 N. W. 684.

[a] As Affected by Who Applies for Relief.—The principle applies whether the application be made by the debtor

who claims he was not served, or whether it is made by a creditor or other third person. **Hier v. Kaufman**, 134 Ill. 215, 25 N. E. 517.

**Necessity for meritorious defense** where judgment is void, see *infra*, XV, C, 4.

**40. U. S.**—**Massachusetts Benefit Life Assn. v. Lohmiller**, 74 Fed. 23, 20 C. C. A. 274. **Fla.**—**Peacock v. Feaster**, 52 Fla. 565, 42 So. 889. **Ga.**—**Ponder v. Cox**, 26 Ga. 485. **Ill.**—**Walker v. Shreve**, 87 Ill. 474; **Cantwell v. Kimmerle**, 179 Ill. App. 66. **Ia.**—**Shrieker v. Field**, 9 Iowa 366; **Piggott v. Addicks**, 3 Greene 427, 56 Am. Dec. 547. **Md.**—**Kearney v. Sascor**, 37 Md. 264. **N. J.**—**Vaughn v. Johnson**, 9 N. J. Eq. 173. **N. Y.**—**Reich v. Cochran**, 102 App. Div. 615, 105 App. Div. 542, 94 N. Y. Supp. 404; **Foster v. Wood**, 6 Johns. Ch. 87. **Ore.**—**Galbraith v. Barnard**, 21 Ore. 67, 26 Pac. 1110. **Tex.**—**Harn v. Phelps**, 65 Tex. 592; **Johnson v. Templeton**, 60 Tex. 238; **Sperry v. Sperry** (Tex. Civ. App.), 103 S. W. 419. **Va.**—**Holland v. Trotter**, 22 Gratt. (63 Va.) 136; **Faulkner's Admr. v. Harwood**, 6 Rand. (27 Va.) 125. **Wis.**—**Nye v. Sochor**, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896. **Irish.**—**Bateman v. Willoe**, 1 Sch. & Lef. 201, 204.

**41. U. S.**—**Massachusetts Benefit Life Assn. v. Lohmiller**, 74 Fed. 23, 20 C. C. A. 274. **Ga.**—**Ponder v. Cox**, 26 Ga. 485. **Ill.**—**Higgins v. Bullock**, 73 Ill. 205. **Ore.**—**Galbraith v. Barnard**, 21 Ore. 67, 26 Pac. 1110. **Wis.**—**Nye v. Sochor**, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896. **Irish.**—**Bateman v. Willoe**, 1 Sch. & Lef. 201, 204.

**42. U. S.**—**Union Waxed & P. Paper Co. v. Sevigne Bread Wrapper Co.**, 138 Fed. 415; **Town of Andes v. Millard**, 70 Fed. 515. **Ala.**—**Hogan v. Scott**, 186 Ala. 310, 65 So. 209. **Cal.**—**Riddle v. Baker**, 13 Cal. 295 (irreparable injury must be suffered). **Colo.**—**Van Buren v. Posteraro**, 45 Colo. 588, 102 Pac. 1067, 132 Am. St. Rep. 199. **Ga.**—**Fannin v. Thomasson**, 45 Ga. 533. **Ill.** **Fuller v. Little**, 69 Ill. 229. **La.**—**Perry v. Rue**, 31 La. Ann. 287; **Blanc v. Speckman**, 23 La. Ann. 146; **Chinn v. New Orleans**, 1 Rob. 523. **Minn.**—**Mc-**

been injured. This is true even where the judgment sought to be vacated is a foreign judgment.<sup>43</sup>

**3. Party Must Not Have Been at Fault.**—The petitioner must be free from all fault,<sup>44</sup> by way of either fraud,<sup>45</sup> laches,<sup>46</sup> or negli-

*Nair v. Toler*, 21 Minn. 175. **Mo.**—*Mott v. Bernard*, 97 Mo. App. 265, 70 S. W. 1093. **N. Y.**—*Hill v. Hill*, 28 Barb. 23. **Tenn.**—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71; *Smith v. Miller*, 42 S. W. 182. **Tex.**—*Roller v. Wooldridge*, 46 Tex. 485; *Steger Lumb. Co. v. McSwain* (Tex. Civ. App.), 184 S. W. 292; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63; *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815; *Luther v. Western Union Tel. Co.*, 26 Tex. Civ. App. 31, 60 S. W. 1026. **Va.**—*Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013. **Wash.**—*Brandt v. Little*, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213.

[a] **A substantial injury** must be shown. *Van Every v. Sanders*, 69 Neb. 509, 95 N. W. 870; *Roller v. Wooldridge*, 46 Tex. 485.

[b] **Where Judgment Is in Rem.**—A party against whom there is no personal judgment, who is seeking to set aside a void judgment in rem must show some equity in himself. One who holds the bare legal title to property in trust for another cannot have a judgment against the property set aside on the ground that no notice was served on him. *Uehlein v. Burk*, 119 Iowa 742, 94 N. W. 243.

43. *Hill v. Hill*, 28 Barb. (N. Y.) 23.

44. **U. S.**—*Brown v. Buena Vista Co.*, 95 U. S. 157, 24 L. ed. 422; *Denton v. Baker*, 93 Fed. 46, 35 C. C. A. 187. **Ala.**—*McAdams v. Windham*, 191 Ala. 287, 68 So. 51; *Hendley v. Chabert*, 189 Ala. 258, 65 So. 993; *Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Evans v. Wilhite*, 167 Ala. 587, 52 So. 845; *Hardeman v. Donaghey*, 170 Ala. 362, 54 So. 172. **Cal.**—*Boston v. Haynes*, 33 Cal. 31. **Ind.**—*English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270. **Mo.**—*Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365, 374. **N. Y.**—*Harris v. Tren*, 14 Misc. 172, 35 N. Y. Supp. 379, 2 Ann. Cas. 380. **Ore.**—*Froebich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Tenn.**—*Puckett v. Griffith*, 128 Tenn. 565, 162 S. W. 581. **Tex.**—*Gulf, C. & S. F. R. Co. v. Henderson*, 83 Tex. 70,

18 S. W. 432; *Alexander v. San Antonio Lumb. Co.*, 13 S. W. 1025. **Utah.**—*Karren v. Karren*, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294.

45. **Cal.**—*Mastick v. Thorp*, 29 Cal. 444. **Ga.**—*Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869. **Ohio.**—*Wright v. Snell*, 22 Ohio Cir. Ct. 86, 12 Ohio Cir. Dec. 308.

46. **U. S.**—*Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *New River Mineral Co. v. Seeley*, 120 Fed. 193, 56 C. C. A. 505; *Denton v. Baker*, 93 Fed. 46, 35 C. C. A. 187; *Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.*, 76 Fed. 479, 22 C. C. A. 283; *King v. Davis*, 137 Fed. 222. **Ala.**—*Hauser v. Foley & Co.*, 190 Ala. 437, 67 So. 252. **Ariz.**—*National Metal Co. v. Greene Con. Cop. Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062. **Ark.**—*Segers v. Ayers*, 95 Ark. 178, 128 S. W. 1045. **Cal.**—*American Surety Co. v. City St. Imp. Co.*, 169 Cal. 172, 146 Pac. 428. **Colo.**—*Keely v. East Side Imp. Co.*, 16 Colo. App. 365, 65 Pac. 456. **Conn.**—*Kelly v. Wiard*, 49 Conn. 443. **Fla.**—*King v. Dekle*, 53 Fla. 940, 43 So. 586. **Ill.**—*Evans v. Woodworth*, 213 Ill. 404, 72 N. E. 1082; *Owens v. Ranstead*, 22 Ill. 161. **Ia.**—*Nibeck v. Reidy*, 171 Iowa 54, 153 N. W. 186; *Harshey v. Blackmarr*, 20 Iowa 161, 174, 89 Am. Dec. 520. **La.**—*Perry v. Rue*, 31 La. Ann. 287; *Brand v. Stafford*, 28 La. Ann. 51; *Blanc v. Speckman*, 23 La. Ann. 146; *Lanfear v. Mes-tier*, 18 La. Ann. 497, 89 Am. Dec. 658; *Norris v. Fristoe*, 3 La. Ann. 646. **Mich.**—*Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694. **Miss.**—*Hiller & Co. v. Cotton & Co.*, 48 Miss. 593. **Mo.**—*Buffington v. Carty*, 195 Mo. 490, 93 S. W. 779; *Perkins v. St. Louis*, etc. R. Co., 143 Mo. 513, 45 S. W. 260. **Neb.**—*Cleland v. Hamilton L. & T. Co.*, 55 Neb. 13, 75 N. W. 239. **N. C.**—*Moore v. Guley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242. **Ore.**—*Froebich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000. **S. D.**—*Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346. **Va.**—*Ayres v.*



gence;<sup>47</sup> it is an inflexible rule that one seeking equitable relief

Morehead's Admr., 77 Va. 586; Green & Suttle v. Massie, 21 Gratt. (62 Va.) 356. **Wash.**—Spokane Co-op. Min. Co. v. Pearson, 28 Wash. 118, 68 Pac. 165.

47. **U. S.**—Kansas City v. Union Pac. R. Co., 192 Fed. 316, 114 C. C. A. 1; Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283; Massachusetts Benefit Life Assn. v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274. **Ala.**—McAdams v. Windham, 191 Ala. 287, 68 So. 51; Hendley v. Chabert, 189 Ala. 258, 65 So. 993; Hardeman v. Donaghey, 170 Ala. 362, 54 So. 172; Evans v. Wilhite, 167 Ala. 587, 52 So. 845; Norman v. Burns, 67 Ala. 248. **Cal.**—Soule v. Bacon, 150 Cal. 495, 89 Pac. 324; Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361; Mastick v. Thorp, 29 Cal. 444. **Colo.** Venner v. Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 632. **Conn.** Kelly v. Wiard, 49 Conn. 443. **Ga.** Clark v. Ramsey, 143 Ga. 729, 85 S. E. 869; Donaldson v. Roberts, 109 Ga. 832, 35 S. E. 277; Mullins v. Christopher, 36 Ga. 584. **Ill.**—Simpson v. Simpson, 273 Ill. 90, 112 N. E. 276; Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507; Kretschmar v. Ruprecht, 230 Ill. 492, 82 N. E. 836; Higgins v. Bullock, 73 Ill. 205; Wilday v. McConnell, 63 Ill. 278; Hollister v. Sobra, 171 Ill. App. 616; Weeks v. Holmes, 101 Ill. App. 435; West Chicago St. R. Co. v. Stoltzenfeldt, 100 Ill. App. 142. **Ind.**—Adams School Tp. v. Irwin, 150 Ind. 12, 49 N. E. 806; Center Tp. v. Board of Commissioners, 110 Ind. 579, 10 N. E. 291. **Ia.**—Hedrick v. Smith, 137 Iowa 625, 115 N. W. 226; Johnson Lane & Co. v. Nash-Wright Co., 121 Iowa 173, 96 N. W. 760; Tredway v. Sioux City & Pac. R. Co., 39 Iowa 663; Barthell v. Roderick, 34 Iowa 517. **Ky.**—Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 53 Am. St. Rep. 437, 31 L. R. A. 33. **La.**—Perry v. Rue, 31 La. Ann. 287; Brand v. Stafford, 28 La. Ann. 51; Lanfear v. Mestier, 18 La. Ann. 497, 89 Am. Dec. 658; Norris v. Fristoe, 3 La. Ann. 646. **Md.**—Kearney v. Sascor, 37 Md. 264, 279. **Mich.** Lafayette Benevolent Society v. Richardson, 154 N. W. 28. **Minn.**—Wann v. Northwestern Trust Co., 120 Minn. 493, 139 N. W. 1061; State v. Bachelder, 5 Minn. 223. **Miss.**—Newman v. Morris, 52 Miss. 402; Hiller &

Co. v. Cotton & Co., 48 Miss. 593. **Mo.** Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365, 374; Payne v. O'Shea, 84 Mo. 129; Hess v. Fox, 140 Mo. App. 437, 124 S. W. 83; Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131. **Mont.** Boley v. Griswold, 2 Mont. 447. **Neb.** McHale v. Metz, 70 Neb. 106, 96 N. W. 1004; Munro v. Callahan, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366; Cleland v. Hamilton L. & T. Co., 55 Neb. 13, 75 N. W. 239. **N. Y.** Standard Fashion Co. v. Thompson, 137 App. Div. 588, 122 N. Y. Supp. 300; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. Supp. 926; Harris v. Treu, 14 Misc. 172, 35 N. Y. Supp. 379, 25 Civ. Proc. 92, 2 N. Y. Ann. Cas. 380; Smith v. Nelson, 62 N. Y. 286. **Ore.**—Froebich v. Lane, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Pa.**—Gazzam v. Reading, 202 Pa. 231, 51 Atl. 1000. **Tenn.**—Puckett v. Griffith, 128 Tenn. 565, 162 S. W. 581; Ballard v. Nashville, etc. R. Co., 94 Tenn. 205, 28 S. W. 1088; Chester v. Apperson, 4 Heisk. 639; Winchester v. Jackson, 3 Hayw. 305, 309; Reeves v. Hogan, Cooke 177. **Tex.**—Johnson v. Templeton, 60 Tex. 238; Power v. Gillespie, 27 Tex. 370; Alexander v. San Antonio Lumb. Co., 13 S. W. 1025; Goss v. McClaren, 17 Tex. 107, 67 Am. Dec. 646; Crosby v. Di Palma (Tex. Civ. App.), 141 S. W. 321; Bradford v. Malone, 49 Tex. Civ. App. 440, 130 S. W. 1013; Avocato v. Dell' Ara (Tex. Civ. App.), 91 S. W. 830; McLane v. San Antonio Nat. Bank (Tex. Civ. App.), 68 S. W. 63, reversed in 96 Tex. 48, 70 S. W. 201. **Utah.**—Baer v. Higson, 26 Utah 78, 72 Pac. 180. **Va.**—Richmond Enquirer Co. v. Robinson, 24 Gratt. (65 Va.) 548, 552; Holland v. Trotter, 22 Gratt. (63 Va.) 136; Hill v. Bowyer, 18 Gratt. (59 Va.) 364, 385; Turner v. Davis, 7 Leigh (34 Va.) 227, 30 Am. Dec. 502. **Wis.**—Rogan v. Walker, 1 Wis. 631. **Wyo.**—Edwards v. Cheyenne, 19 Wyo. 110, 114 Pac. 677, 687, 122 Pac. 900.

[a] "Any negligence on the part of the complaining party will bar relief." McLane v. San Antonio Nat. Bank (Tex. Civ. App.), 68 S. W. 63.

[b] The negligence of an attorney is the negligence of the client. Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268.

must show diligence on his part.<sup>48</sup> and that the obstacles which prevented him from maintaining his legal rights could not have been overcome or avoided by any reasonable care on his part.<sup>49</sup> The law does not exact the highest degree of care, or such a degree of care as to render mistakes impossible.<sup>50</sup> Ordinary and reasonable care is all that is required.<sup>51</sup>

[c] **Extraordinary activity after a judgment** does not excuse negligence prior thereto. *Standard Fashion Co. v. Thompson*, 137 App. Div. 588, 122 N. Y. Supp. 300.

**Negligence in obtaining relief at law**, see *infra*, XV, C, 6, a.

48. **U. S.**—*Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *United States v. Mani*, 196 Fed. 160. **Ala.**—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Pharr v. Reynolds*, 3 Ala. 521. **Ark.**—*Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696. **Conn.**—*Jeffery v. Fitch*, 46 Conn. 601. **Ga.**—*Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869; *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277; *Tarver v. McKay*, 15 Ga. 550. **Ill.**—*Genz v. Genz*, 254 Ill. 161, 98 N. E. 272; *Miller v. Barto*, 247 Ill. 104, 93 N. E. 140; *Ballance v. Loomis*, 22 Ill. 82; *Johnson v. Anna Bldg. & Loan Assn.*, 133 Ill. App. 213. **Ind.**—*English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; *Doubleday v. Makepeace*, 4 Blackf. 9, 28 Am. Dec. 33. **Ia.**—*Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Bryant v. Williams*, 21 Iowa 329. **La.**—*Moss v. Drost*, 130 La. 285, 57 So. 929; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658; *Millandon v. Gordon*, 18 La. Ann. 280. **Md.**—*Kearney v. Sascor*, 37 Md. 264; *Gott v. Carr*, 6 Gill & J. 309. **Minn.** *Sargeant v. Bigelow*, 24 Minn. 370. **Miss.**—*McRaney v. Coulter*, 39 Miss. 390. **N. Y.**—*New York v. Brady*, 115 N. Y. 599, 22 N. E. 237; *Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114. **N. D.**—*Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392. **Ohio.** *Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537. **Tenn.**—*Ballard v. Nashville & K. R. Co.*, 94 Tenn. 205, 28 S. W. 1088. **Tex.**—*Nevins v. McKee*, 61 Tex. 412; *Johnson v. Templeton*, 60 Tex. 238; *First Nat. Bank v. Henwood* (Tex. Civ. App.), 183 S. W. 5; *Bradford v. Malone*, 49 Tex. Civ. App. 440, 130 S. W. 1013; *Avvocato v. Dell' Ara* (Tex. Civ. App.), 91 S. W. 830; *Wool-*

*ley v. Sullivan* (Tex. Civ. App.), 43 S. W. 919. **Utah.**—*Bailey v. Stevens*, 11 Utah 175, 39 Pac. 828. **Va.**—*Faulkner's Admx. v. Harwood*, 6 Rand. (27 Va.) 125. **W. Va.**—*Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736; *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487.

See also *infra*, XV, E, 5, e, (I).

[a] **Allowing an action on a judgment to proceed to judgment** does not necessarily preclude the party from resorting to equity for relief against the judgment first rendered. *Hauser v. Foley & Co.*, 190 Ala. 437, 67 So. 252.

49. *Hamilton v. Moore*, 32 Miss. 625; *New York v. Brady*, 115 N. Y. 599, 23 N. E. 237.

[a] A party seeking to set aside a judgment must show that he could not have prevented the fraudulent procurement of the judgment by the exercise of reasonable diligence, that he was reasonably diligent in discovering the fraud, and that having discovered the fraud, he proceeded with reasonable diligence to obtain such relief as the law affords. *Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46.

[b] **Misrepresentation by the adversary** as to the merits of the case is not the kind of preventive act contemplated by the rule that the exercise of diligence is excused where a party is prevented from discovering his defense by the act of the adverse party. *Do Sota Coal Min. & Dev. Co. v. Hill* (Ala.), 69 So. 948.

50. **Ind.**—*Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46. **Ia.**—*Barthell v. Roderick*, 34 Iowa 517. **Miss.**—*Hamilton v. Moore*, 32 Miss. 625. **N. Y.** *New York v. Brady*, 115 N. Y. 599, 22 N. E. 237.

See also *infra*, XV, E, 5, e, (I).

51. *Barthell v. Roderick*, 34 Iowa 517. But see *Norman v. Burns*, 67 Ala. 248, requiring of a party the highest degree of diligence.

[a] "A party is never required to exercise more than reasonable and ordi-

Equity will relieve a party who neglected to interpose his defense or to avail himself of his proper legal remedies, if he did not knowingly have his day in court.<sup>52</sup> A defendant who has not been served with process but who knows of the action is not ordinarily guilty of laches and thereby deprived of equitable relief in failing to seek relief in the action itself;<sup>53</sup> but the rule is otherwise if he has been served and the service is for some reason illegal.<sup>54</sup>

nary diligence in preventing a fraud from being perpetrated upon him, and fraud vitiates everything it touches. Of course, a defendant failing to defend cannot have the judgment vacated on account of any innocent mistake, or want of recollection on the part of the plaintiff, or other witness, nor even on account of the perjury of the other witnesses, provided the plaintiff himself is wholly guiltless. Nor can he have the judgment vacated on account of any mistake or error on the part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes and errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit willful and corrupt perjury, and no party is bound to exercise extraordinary diligence in preparing to meet such perjury." *Laithe v. McDonald*, 12 Kan. 340.

52. *Owens v. Ranstead*, 22 Ill. 161.

Failure to present cause of action or defense at law as ground for relief generally, see *infra*, XV, E, 5.

53. *Ariz.*—*National Metal Co. v. Greene Consol. Cop. Co.*, 11 *Ariz.* 108, 89 *Pac.* 535, 9 *L. R. A. (N. S.)* 1062. *Ill.*—*Kochman v. O'Neill*, 202 *Ill.* 110, 66 *N. E.* 1047. *Mo.*—*Siling v. Hendrickson*, 193 *Mo.* 365, 92 *S. W.* 105.

[a] In *National Metal Co. v. Greene Consol. Cop. Co.*, 11 *Ariz.* 108, 89 *Pac.* 535, 9 *L. R. A. (N. S.)* 1062, service upon a foreign corporation was had by serving a person who was not the agent of the corporation. The person served notified the corporation of the fact of service and notified the plaintiff that he was not the agent of the defendant corporation. It was held that the corporation could ignore the matter and assume that a proper service would be made. A distinction is to be observed between knowledge of the pendency of a suit and notice thereof. Jurisdiction can be acquired, if one does not sub-

mit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process, constructive service or by some form of substituted service. Actual service may sometimes be given although there is a formal defect in the manner of service. The failure to attack such service before judgment may amount to a waiver of the informality, and relief in equity cannot be had after judgment. But where there is no service, there is no notice irrespective of any knowledge which the defendant may acquire informally. Therefore the failure to act upon the information received is not neglect and is not such an inaction which bars relief in equity.

[b] But see *State v. Hill*, 50 *Ark.* 458, 8 *S. W.* 401, holding that "One who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of the proceeding in time to make defense, in order to get relief in equity."

[c] Where process is by mistake served upon defendant's daughter of the same name and the defendant does not appear, a judgment against the defendant is void and properly set aside in equity although defendant knew of the mistaken service and was kept advised by counsel of the progress of the case. *Willeke v. Duross*, 144 *Mich.* 243, 107 *N. W.* 907.

Effect of remedies at law upon right to impeach a void judgment, see *infra*, XV, C, 6, b, (IV).

54. *U. S.*—*Massachusetts Ben. Life Assn. v. Lohmiller*, 74 *Fed.* 23, 20 *C. C. A.* 274, 46 *U. S. App.* 103, where the wrong agent of a foreign corporation was served. *Ariz.*—*National Metal Co. v. Greene Consol. Cop. Co.*, 11 *Ariz.* 108, 89 *Pac.* 535, 9 *L. R. A. (N. S.)* 1062. *Conn.*—*Setchel v. Keigwin*, 57 *Conn.* 473, 18 *Atl.* 594 (where the date in the process was illegible); *Gallup v. Manning*, 48 *Conn.* 25 (where there was a



#### 4. Party Must Have Meritorious Defense or Cause of Action.<sup>55</sup>

Where an action is brought in equity to set aside a judgment at law, the plaintiff must show that the judgment was not justified by the facts,<sup>56</sup> or, in other words, he must have a meritorious defense,<sup>57</sup>

mistake known to defendant as to the date of the term).

See also *infra*, XV, E, 4, b, (II).

55. Failure to present cause of action or defense at law as ground for relief, see *infra*, XV, E, 5.

As to affidavit of merits in support of a motion to set aside default, see 1 STANDARD PROC. 655, 687.

56. *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381.

[a] Where Remedy Lost Was a Matter of Right.—Although law gives an absolute right to apply for a certiorari, equity will not grant relief to a party who lost his right because of accident unless it is shown that there is probable cause for saying the party had a case of error. *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

57. U. S.—North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co., 152 U. S. 596, 615, 14 Sup. Ct. 710, 38 L. ed. 565; *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. ed. 113; *Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *Christy v. Atchison, T. & S. F. R. Co.*, 214 Fed. 1016. Ala.—*Hendley v. Chabert*, 189 Ala. 258, 65 So. 993; *Fields v. Henderson*, 161 Ala. 534, 50 So. 56; *McDonald v. Cawhorn*, 152 Ala. 357, 44 So. 395; *Collier v. Parish*, 147 Ala. 526, 41 So. 772. Ark.—*Missouri, etc. R. Co. v. Killebrew*, 96 Ark. 520, 132 S. W. 454; *Simpson & Webb Furn. Co. v. Moore*, 126 S. W. 1074; *Rotan v. Springer*, 52 Ark. 80, 12 S. W. 156; *State v. Hill*, 50 Ark. 458, 8 S. W. 401 (rule obtains even where the judgment is obtained through fraud); *Valentine v. Holland*, 40 Ark. 338. Cal.—*Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542, 558; *Burbridge v. Rauer*, 146 Cal. 21, 79 Pac. 526; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. 381; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 740, 747, 91 Pac. 416. Colo.—*Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623, 632;

*Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290. Conn.—*Lithuanian Bro. Society v. Tunila*, 80 Conn. 642, 70 Atl. 25. Ga.—*Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869; *McCall v. Miller*, 120 Ga. 262, 47 S. E. 920. Idaho.—*Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120. Ill.—*Congregation of the Resurrection v. Laibe*, 152 Ill. App. 417; *Hilt v. Heimberger*, 140 Ill. App. 129; *Chapman v. Selfisberg*, 111 Ill. App. 102; *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248. Ind.—*Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369. Ia.—*Loos v. Callendar Sav. Bank*, 156 N. W. 712; *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Taggart v. Wood*, 20 Iowa 236. Kan.—*Muse v. Wafer*, 29 Kan. 279. La.—*Blanck v. Speckman*, 23 La. Ann. 146. Miss.—*Newman v. Taylor*, 69 Miss. 670, 13 So. 831; *Miller v. Palmer*, 55 Miss. 323, 336; *Walker v. Gilbert, Freem. Ch. 85. Mo.—Hess v. Fox*, 140 Mo. App. 437, 124 S. W. 83; *Weiss v. Coudrey*, 102 Mo. App. 65, 76 S. W. 730. Neb.—*Westman v. Carlson*, 86 Neb. 847, 126 N. W. 515; *Bankers Union v. Landis*, 75 Neb. 625, 106 N. W. 973; *Dowart v. Troyer*, 2 Neb. (Unof.) 22, 96 N. W. 116; *McBride v. Wakefield*, 58 Neb. 442, 78 N. W. 713; *Cleland v. Hamilton L. & T. Co.*, 55 Neb. 13, 75 N. W. 239. N. Y.—*Reich v. Cochran*, 102 N. Y. Supp. 827. N. D.—*Batzler v. Halliday*, 31 N. D. 361, 153 N. W. 994. Ohio.—*Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537; *Oliver & Baum v. Pray*, 4 Ohio 175, 19 Am. Dec. 595. Ore.—*Bowsman v. Anderson*, 62 Ore. 431, 123 Pac. 1092, 125 Pac. 270; *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. R. I.—*Needle v. H. C. Biddle & Co.*, 32 R. I. 342, 79 Atl. 942. Tenn.—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71; *Maddox v. Apperson*, 14 Lea 596. Tex.—*Sharp v. Schmidt*, 62 Tex. 263; *Johnson v. Templeton*, 60 Tex. 238; *Overton v. Blum*, 50 Tex. 417, 423; *Alex-*

or cause of action,<sup>58</sup> especially where the judgment itself is regular upon its face,<sup>59</sup> or where relief is not asked until the demand of the judgment creditor is barred by the statute of limitations.<sup>60</sup> There may be circumstances under which a showing of merits will not be required.<sup>61</sup> Thus where it appears that the court had no jurisdiction to render the judgment, no meritorious defense need be pleaded, ac-

ander v. San Antonio Lumber Co., 13 S. W. 1025; Hester v. Baskin (Tex. Civ. App.), 184 S. W. 726; First Nat. Bank v. Henwood (Tex. Civ. App.), 183 S. W. 5; Crosby v. Di Palma (Tex. Civ. App.), 141 S. W. 321; Chambers v. Gallup, 30 Tex. Civ. App. 424, 70 S. W. 1009; Luther v. Western Union Tel. Co., 25 Tex. Civ. App. 31, 60 S. W. 1026; Woolley v. Sullivan (Tex. Civ. App.), 43 S. W. 919. Wash.—Brandt v. Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213. W. Va.—Iron Co. v. Quesenberry, 50 W. Va. 451, 40 S. E. 487. Wis.—Ableman v. Roth, 12 Wis. 81.

[a] "The showing of merits should not be required to the extent of compelling a party against whom a judgment has been obtained, without jurisdiction over his person, to come into a court of equity and assume the burden of disproving his liability. On the contrary, a party thus circumstanced is entitled to the maintenance of his right to defend against such supposed liability in an action wherein his adversary must assume the burden of proof. This distinction is important in all cases, and in many may be absolutely controlling. The allegation of merits, though not traversable, may very properly be required as an earnest of good faith from the party seeking relief from a supposed unauthorized judgment; and as a rule, under our system, such pleading may be required to be verified. If a pleading be demurred to for want of such averment, it may be dismissed, unless amended; but in this case the absence of the averment not having been made a ground of demurrer, did not justify the dismissal of the complaint." Wilson v. Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290.

[b] When it is shown that the result of the original action would probably have been different, the measure of the law is fulfilled, and the parties are then relegated to their original status of plaintiff and defendant, with the burden of proof resting upon the

plaintiff to make his case, leaving the defendant the right, if he sees fit, to rely merely upon the weakness of his adversary's case. Crosby v. Di Palma (Tex. Civ. App.), 141 S. W. 321.

As to the sufficiency of the averments of defense, see 4 STANDARD PROC. 487.

58. Jackson v. Woodruff, 57 Ark. 599, 22 S. W. 566.

59. Idaho.—Bernhard v. Idaho Bank & Trust Co., 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120. Ind. Ter. Snyder v. Sherrell, 7 Ind. Ter. 35, 103 S. W. 756. Ia.—Piggott v. Addicks, 3 Greene 427, 56 Am. Dec. 547. Mo. Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131. Ohio.—Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537. Wash.—Brandt v. Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213.

[a] Where a judgment is voidable merely, or where although void, it appears regular on the face of the record, a showing of merits is required before equity will interfere. But equity will sometimes interfere without a showing of merits. Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537.

60. Masterson v. Ashcom, 54 Tex. 324.

[a] Where Judgment Is Fraudulently Obtained.—That the defense is not barred by the statute of limitations need not be shown where the judgment was obtained by fraud. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

61. See the cases and notes following, and 1 STANDARD PROC. 652, 655.

[a] There may be exceptions to the rule requiring a party to show that the result would have been different if he had an opportunity to present his defense, in a case of a nonresident, or perhaps, in a case where the defendant, had he known of the judgment being taken against him, could have paid, adjusted or satisfied it more advantageously, says the court in Brandt v. Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213, but "as to these matters, we do not decide at this time."

[b] A distinction is sometimes made

according to some authorities,<sup>62</sup> though the weight of authority requires a showing of a meritorious defense even where the court rendering

between cases in which the judgment subjects the petitioner's property and those in which a money judgment is recovered. Under the former, equity, it has been held, should grant relief without inquiring into the merits of the original claim, but under the latter the petitioner might be required to allege that a defense existed to the original action. *Great West Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *Keely v. East Side Imp. Co.*, 16 Colo. App. 365, 65 Pac. 456.

[c] **Where Fiduciary Relation Exists.**—Where the fraud is that the plaintiff at law occupies a fiduciary relation to the defendant which makes it inequitable for him to use his position so as to destroy the rights of other creditors, equity will set aside a judgment obtained by him without a showing of a meritorious defense. *Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542, 558.

[d] **Where defendant tenders into court the full amount of the judgment alleged to have been obtained without service of process, no allegation or showing of a meritorious defense is required.** *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, where the purpose of the action was to clear property of the cloud caused by an execution sale under the judgment.

62. **Colo.**—*Crippen v. X. Y. Irr. D. Co.*, 32 Colo. 447, 76 Pac. 794; *Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290. **Conn.** *Blakeslee v. Murphy*, 44 Conn. 188. **Fla.**—*Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110. **Ia.**—*Worrall v. Chase & Co.*, 144 Iowa 665, 123 N. W. 338; *Arnold v. Hawley*, 67 Iowa 313, 25 N. W. 259 (*distinguishing Parsons v. Nutting*, 45 Iowa 404, and *Taggart v. Wood*, 20 Iowa 236, in which the court says "our attention has not been called to any adjudged case which holds that before a party can obtain relief . . . he must deny and show that he is not indebted to the party obtaining the judgment"). *Compare, Gerrish v. Hunt*, 66 Iowa 682, 24 N. W. 274; *Piggott v. Addicks*, 3 G. Gr. 427. **Mo.**—*Bornschein v. Finck*, 13 Mo. App. 120. **Ohio.**—*Gifford v. Morrison*, 37 Ohio St.

502, 41 Am. Rep. 537. **Tenn.**—*Bell v. Williams*, 1 Head 229. **Tex.**—*Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *San Bernardo Townsite Co. v. Hocker* (Tex. Civ. App.), 176 S. W. 644; *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815. But *compare, Masterson v. Ashcom*, 54 Tex. 324.

[a] **The reasons for not requiring a showing of a meritorious defense where the judgment attacked is void are variously stated, namely that "there is no presumption in favor of a judgment creditor," and "neither reason nor sound policy will require a defendant so imposed upon to try the merits of the cause on a petition in chancery to set aside the judgment;" "that the injury of which he justly complains is that a judgment was rendered against him without notice and without defense."** *Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274.

[b] **The effect of a rule requiring a showing of a meritorious defense would be that a void judgment is prima facie evidence of indebtedness.** *Arnold v. Hawley*, 67 Iowa 313, 25 N. W. 259.

[c] **Where Law and Equity Are United.**—In *Magin v. Lamb*, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216, the court said: "It was intimated *obiter*, in the opinion in the latter case [*Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342], that in a suit in equity it would be incumbent on the plaintiff to show reasons for equitable intervention beyond the bare fact of want of jurisdiction; and such was the prevailing rule when the interference of courts of equity was sought to restrain the enforcement of judgments of separate courts of law. But the reasons for any distinction in respect to the conditions upon which relief is to be granted in an action to restrain or vacate a judgment, and in a motion for the same purpose, have disappeared with the uniting of equitable and legal jurisdictions in the same court. If now a defendant, upon motion to the court rendering the judgment, may have it set aside merely because no action was ever commenced against him, there is no longer any reason why, if he prosecutes an action in the same court, for



the judgment was without jurisdiction, as where there was no legal service of process.<sup>63</sup>

The defense must be such that it is likely to produce a different result on a new trial.<sup>64</sup> If the defense of the petitioner is purely technical,<sup>65</sup> and without merit,<sup>66</sup> or if the defense is unconscionable,<sup>67</sup> equity will not vacate or set aside the judgment.

the same purpose, any different grounds for relief should be required."

63. **U. S.**—Massachusetts Benefit Life Assn. *v.* Lohmiller, 74 Fed. 23, 20 C. C. A. 274. **Ala.**—McDonald *v.* Cawhorn, 152 Ala. 357, 44 So. 395; Cromelin *v.* McCauley, 67 Ala. 542. **Ark.**—State *v.* Hill, 50 Ark. 458, 8 S. W. 401, *disapproving* Ryan *v.* Boyd, 33 Ark. 778. **Cal.**—Logan *v.* Hillegass, 16 Cal. 200; Gibbons *v.* Scott, 15 Cal. 284; Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639. **Del.**—Emerson *v.* Gray (Del. Ch.), 63 Atl. 768. **Idaho.**—Bernhard *v.* Idaho Bank & T. Co., 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120 (unauthorized appearance). **Ill.**—Hier *v.* Kaufman, 134 Ill. 215, 25 N. E. 517; Colson *v.* Leitch, 110 Ill. 504; Pierson *v.* Linn, 101 Ill. App. 624; Geraty *v.* Druiding, 44 Ill. App. 440. **Ind.**—Meyer *v.* Wilson, 166 Ind. 651, 76 N. E. 748; Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369; Williams *v.* Hitzie, 83 Ind. 303. But see Dobbins *v.* McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 826. **Miss.**—Newman *v.* Taylor, 69 Miss. 670, 13 So. 831; Joslin *v.* Coffin, 5 How. 539. **Neb.**—Campbell P. P. & Mfg. Co. *v.* Marder, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Wilson *v.* Shipman, 34 Neb. 573, 52 N. W. 576, 33 Am. St. Rep. 660. **N. D.**—Batzner *v.* Halliday, 31 N. D. 361, 153 N. W. 994; Halverson *v.* Bennett, 22 N. D. 67, 132 N. W. 434. **Okla.**—Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054. **Ore.**—Miller *v.* Shute, 55 Ore. 603, 107 Pac. 467. See George *v.* Nowlan, 38 Ore. 537, 64 Pac. 1. **Wash.**—Brandt *v.* Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213. *Compare*, McEachern *v.* Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922. **Wis.**—John V. Farwell Co. *v.* Kilbert, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235; Stokes *v.* Knarr, 11 Wis. 389, 407.

[a] **Must Be Inequitable.**—Equity will not set aside a judgment at law merely because it may be void, for if the judgment is not inequitable as between the parties, no matter how irregular or void it may be, a court of

equity will not interfere, but will leave the defendant to such remedies as a court of law can give him, to avoid its effect. Thomas *v.* West, 59 Wis. 103, 17 N. W. 684.

[b] **Relaxation of Rule Where Defendant Is Without the Jurisdiction.** A party who is without the jurisdiction of the court rendering the judgment may upon establishing the fact of lack of authority of the attorney to appear for him may be relieved from the enforcement of the judgment. But where the defendant was within the jurisdiction of the court and an unauthorized appearance has been entered for him by counsel, he cannot obtain relief unless he shows a defense on the merits. Wiley *v.* Pratt, 23 Ind. 628.

64. **Ark.**—Jackson *v.* Woodruff, 57 Ark. 599, 22 S. W. 566. **Ind.**—Hollinger *v.* Reeme, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46. **Tex.**—Crosby *v.* Di Palma (Tex. Civ. App.), 141 S. W. 321; Sperry *v.* Sperry (Tex. Civ. App.), 103 S. W. 419. **W. Va.**—Iron Co. *v.* Quesenberry, 50 W. Va. 451, 40 S. E. 487.

[a] A general denial is not a sufficient allegation of matters constituting a defense to the action. Johnson, Lane & Co. *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760.

[b] A counterclaim is no answer in itself to the right of a plaintiff to recover on his cause of action and will not be considered, especially where it is not made to appear that they relate to the same matters. Johnson, Lane & Co. *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760.

65. Missouri, etc. R. Co. *v.* Killebrew, 96 Ark. 520, 132 S. W. 454; Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639.

66. Missouri, etc. R. Co. *v.* Killebrew, 96 Ark. 520, 132 S. W. 454.

67. Herbert *v.* Herbert, 47 N. J. Eq. 11, 20 Atl. 290.

As to what are unconscionable defenses, see *supra*, XIV.

5. **Party Must Do Equity.**<sup>68</sup>—As one who comes into equity is required to show his readiness to do equity to the party against whom he complains,<sup>69</sup> a party asking an injunction against a judgment must first pay or offer to pay what he really owes,<sup>70</sup> or show some sufficient excuse for his failure to do so.<sup>71</sup> In some states an injunction bond

68. **Effect upon requirement of showing of merits,** see *supra*, XV, C, 4.

69. *Lipsecomb's Admr. v. Winston*, 1 Hen. & M. (11 Va.) 453. See generally 8 STANDARD PROC. 388.

70. *Ala.*—*Yonge v. Shepperd*, 44 Ala. 315; *Tucker v. Hooley*, 20 Ala. 426. *Cal.*—*Jackson v. Norton*, 6 Cal. 187 (denying relief because the party seeking to enjoin a judgment for the purchase money did not offer to return possession of the realty). *Colo.*—*Brewer v. Mock*, 14 Colo. App. 454, 60 Pac. 578. *Ga.*—*Hill v. Harris*, 42 Ga. 412. *Idaho.*—*Bernhard v. Idaho Bank & T. Co.*, 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120. *Ill.*—*Tompkins v. Lang*, 74 Ill. App. 500. *Ind.*—*Keifer v. Summers*, 137 Ind. 106, 35 N. E. 1103, 36 N. E. 894; *Eaton v. Markley*, 126 Ind. 123, 25 N. E. 150. *Ia.*—*Byers v. O'Dell*, 56 Iowa 618, 10 N. W. 102. *Ky.*—*Thomas v. Bush's Admrs.*, 1 Bibb 506. *Md.*—*Neurath v. Hecht*, 62 Md. 221; *Fowler v. Lee*, 10 Gill & J. 358, 32 Am. Dec. 172. *Mo.*—*Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454. *Ohio.*—*Shelton v. Gill*, 11 Ohio 417. *Tex.*—*Smith v. Smith*, 75 Tex. 410, 12 S. W. 678.

[a] In a suit to enjoin a judgment, the validity of the judgment cannot be inquired into unless it appears that no debt is owing for which the judgment could equitably be rendered, or that the complainant is not equitably bound to pay any part of the debt, or that the amount which he is equitably bound to pay is tendered, at least, in the bill. *Tompkins v. Lang*, 74 Ill. App. 500.

[b] **Money Should Be Paid Into Court.**—When a bill admits an indebtedness past due, promised and incurred in compromise of a larger claim, a simple offer to pay is not enough to authorize a restraining order enjoining an execution in the hands of the sheriff. The sum admitted to be due should be paid into court. *Roebbing Sons Co. v. Stevens Elec. Co.*, 93 Ala. 39, 9 So. 369.

[c] **Where Judgment Is Void.**—The

rule requiring a tender or offer of payment of the amount admitted to be justly due before equity will enjoin the judgment applies as well where the judgment is void for want of jurisdiction as where it is claimed to be irregularly or erroneously rendered. *Byers v. Odell*, 56 Iowa 618, 10 N. W. 102. But see *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918, holding that a party seeking to enjoin a void judgment need not bring the money into court if he admits the indebtedness. And compare the preceding section.

[d] No tender is required in an action to set aside a judgment on the ground that the court has no jurisdiction, when there was a lack of service and judgment was rendered on an unauthorized appearance of an attorney. *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922.

[e] The rule that before a party can go into equity to have a judgment made without notice to him set aside, he must pay the debt in judgment, does not apply to the case of a judgment rendered for a penalty against a party so amerced without notice. *Chester v. Miller*, 13 Cal. 558.

[f] **Relief from a judgment on a usurious contract** will not be granted a party who does not tender or offer to bring into court the amount of principal and interest actually due on the judgment after deducting the alleged usury. *Neurath v. Hecht*, 62 Md. 221; *Rogers v. Rathbun*, 1 John. Ch. (N. Y.) 367. See also *Chester v. Apperson*, 4 Heisk. (Tenn.) 639, where the party gave an injunction bond.

[g] **Where the complainant was for a fraudulent purpose committed to a lunatic asylum,** and then the defendants by fraud procured a judgment for an excessive amount on a claim not yet due, a tender of the amount really due before the filing of the bill need not be made. *Lockwood v. Mitchell*, 19 Ohio 418, 53 Am. Dec. 438.

71. *Yonge v. Shepperd*, 44 Ala. 315; *Tompkins v. Lang*, 74 Ill. App. 500.

is given in lieu of payment.<sup>72</sup> But one who has a good defense against a claim upon which a void judgment has been rendered need not as a condition precedent to bringing a suit to set it aside pay or offer to pay the amount alleged to be due on the claim.<sup>73</sup>

**6. Effect of Adequacy or Inadequacy of Remedy at Law.**—a. *Statement of General Rules.*—The maxim of equity that when a party aggrieved has a plain, speedy, and adequate remedy at law, equity will not lend its aid applies to this proceeding.<sup>74</sup> If, therefore, a

72. *Chester v. Apperson*, 4 Heisk. (Tenn.) 639, 653.

73. *Nibeck v. Reidy*, 171 Iowa 54, 153 N. W. 186.

74. See the following: **U. S.**—*Phillips v. Negley*, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. ed. 1013; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123; *Sanford v. White*, 132 Fed. 531; *Brown v. Arnold*, 127 Fed. 387. **Ala.**—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209; *Hardeman v. Donaghey*, 170 Ala. 362, 54 So. 172; *J. A. Roebeling Sons Co. v. Stevens Elec. Co.*, 93 Ala. 39, 9 So. 369. **Ariz.**—*San Pedro Cattle Co. v. Williams*, 4 Ariz. 166, 36 Pac. 34. **Ark.**—*Rogers v. Haines*, 114 Ark. 50, 21 S. W. 411; *Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Cummins v. Bentley*, 5 Ark. 9. **Cal.**—*Bacon v. Bacon*, 150 Cal. 477, 490, 89 Pac. 317; *Curtis v. Schell*, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; *Ede v. Hazen*, 61 Cal. 360; *Chipman v. Bowman*, 14 Cal. 157; *Riddle v. Baker*, 13 Cal. 295; *Borland v. Thornton*, 12 Cal. 440. **Conn.**—*Lithuanian Bro. Society v. Tunila*, 80 Conn. 642, 70 Atl. 25; *Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. **Ill.**—*Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276; *Ballance v. Loomiss*, 22 Ill. 82; *Propst v. Meadows*, 13 Ill. 157; *Alabama Ins. Co. v. Kingman & Co.*, 21 Ill. App. 493. **Ind.**—*Jamieson v. Caster*, 16 Ind. 426. **Ia.**—*Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760; *Iowa Sav. & Loan Assn. v. Chase*, 118 Iowa 51, 91 N. W. 807; *Bellows v. Tod*, 52 Iowa 359, 3 N. W. 102; *Piggott v. Adicks*, 3 Greene 427, 56 Am. Dec. 547. **Kan.**—*Laithe v. McDonald*, 12 Kan. 340. **Ky.**—*Crutchers v. Wolf*, 1 Mon. 88. **Me.**—*Cunningham v. Gushee*, 73 Me. 417. **Md.**—*Chappell Chemical & Fert. Co. v. Sulphur Mines Co.*, 36 Atl. 260. **Mass.**—*Currier v. Esty*, 110 Mass. 536. **Mich.**—*Maek & Davis v. Doty*, Har. Ch. 366. **Minn.**—*Johnston v. Paul*,

23 Minn. 46 (before statute); *State v. Bachelder*, 5 Minn. 223, 80 Am. Dec. 410. **Mont.**—*Dunne v. Yund*, 155 Pac. 273; *State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291. **Mo.**—*Perkins v. St. Louis, K. C. & C. R. Co.*, 143 Mo. 513, 45 S. W. 260. **Neb.**—*Nebraska L. & T. Co. v. Crook*, 73 Neb. 485, 103 N. W. 57; *James v. O'Neill*, 70 Neb. 132, 97 N. W. 22. **Nev.**—*Dalton v. Libby*, 9 Nev. 192. **N. J.**—*Clark v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319; *Hayes v. United States Phenograph Co.*, 65 N. J. Eq. 5, 55 Atl. 84; *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045; *Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486; *Moore v. Gamble*, 9 N. J. Eq. 246. **N. Y.**—*Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Vilas v. Jones*, 1 N. Y. 274; *Ludwig v. Walker*, 138 App. Div. 850, 123 N. Y. Supp. 468; *Matthews v. Carman*, 122 App. Div. 582, 107 N. Y. Supp. 694. **N. C.**—*Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520; *Peace v. Nailing*, 16 N. C. 289. **Okla.**—*Rumsey v. Howe*, 150 Pac. 1060; *Missouri, O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Racey v. Racey*, 12 Okla. 650, 73 Pac. 305. **Ore.**—*Whelan v. McMahan*, 47 Ore. 37, 82 Pac. 19, 114 Am. St. Rep. 906; *Hoover v. Bartlett*, 42 Ore. 145, 70 Pac. 378; *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. **S. C.**—*New York Life Ins. Co. v. Mobley*, 90 S. C. 552, 563, 73 S. E. 1032; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831. **Tenn.**—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71; *McClanahan v. Stovall*, 6 Lea 505; *Smith v. Van Bebber*, 1 Swan 110. **Tex.**—*Weaver v. Vandervanter*, 84 Tex. 691, 19 S. W. 889; *Long v. Smith*, 39 Tex. 160; *De Garcia v. San Antonio & A. P. R. Co. (Tex. Civ. App.)*, 77 S. W. 275; *Houston, E. & W. T. R. Co. v. Ellis*, 14 Tex. Civ. App. 706, 37 S. W. 972. **Utah.**—*Baer v. Higson*, 26 Utah 78, 72 Pac. 180. **Va.**—*Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24



petitioner, seeking equitable relief from a judgment rendered by a law court had an adequate remedy at law of which he negligently failed to avail himself, equity will not aid him,<sup>75</sup> unless the remedy is merely cumulative.<sup>76</sup> But if a party has no remedy at law or the remedy at law is inadequate, he may bring a suit in equity and have a judgment set aside upon a proper showing therefor.<sup>77</sup> And in some

S. L. 1013; *Goolsby v. St. John*, 25 Gratt. (66 Va.) 146. Wash.—*Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088; *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955. W. Va.—*Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882; *Railway Co. v. Ryan*, 31 W. Va. 361, 6 S. E. 924, 13 Am. St. Rep. 865. Wyo. *Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687. Eng.—*Lloyd v. Mansel*, 2 P. Wms. 73, 24 Eng. Reprint 645.

See generally the title "Legal Remedy."

Equity has no jurisdiction where the party has an adequate remedy at law. See 4 STANDARD PROC. 478.

[a] **Remedy Available in Sister State Inadequate.**—A remedy which a party is compelled to go into a foreign jurisdiction to avail himself of is not adequate. The remedy must be that which the courts of the state in which the bill is filed can apply. *Stanton v. Embry*, 46 Conn. 595.

[b] **A person not a party to the action** is not required to proceed at law in the case for relief although he learns of the rendition of a judgment against him in time to do so. He may seek relief in equity in the first instance. *Owens v. Cage & Crow*, 101 Tex. 286, 106 S. W. 880, *distinguishing Hamblin v. Knight*, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818, in which the petitioner was regularly sued, and judgment was rendered against him on the return of a sheriff showing service of a citation. It was held he had an adequate remedy by a motion for new trial and could not resort to equity.

75. Ala.—*Hendley v. Chabert*, 189 Ala. 258, 65 So. 993. Cal.—*Mastick v. Thorp*, 29 Cal. 444. Ga.—*Leathers v. Leathers*, 138 Ga. 740, 76 S. E. 44, where the grounds were such that by reasonable diligence they could have been discovered in time to incorporate them in a motion for new trial in the original case. Ill.—*Klinesmith v. Van Bramer*, 104 Ill. App. 384. Ia.—*Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am. St.

Rep. 573. Miss.—*Fleming v. Nunn & Anderson*, 61 Miss. 603; *Herring v. Winans*, Smed. & M. Ch. 466. Mo.—*Perkins v. St. Louis, K. C. & C. R. Co.*, 143 Mo. 513, 45 S. W. 260; *Smith v. Taylor*, 78 Mo. App. 630. Mont.—*Vantilburg v. Black*, 3 Mont. 459. N. Y.—*Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494. Okla.—*Racey v. Racey*, 12 Okla. 650, 73 Pac. 305. Ore.—*Freebrich v. Lane*, 45 Ore. 13, 23, 76 Pac. 351, 106 Am. St. Rep. 634. Tex.—*Long v. Smith*, 39 Tex. 160; *Bergstrom v. Kiel*, 28 Tex. Civ. App. 532, 67 S. W. 781; *Moore v. Britton*, 15 Tex. Civ. App. 237, 38 S. W. 528. Utah.—*Baer v. Higson*, 26 Utah 78, 72 Pac. 180. Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687.

[a] Where a party fails to avail himself of his proper legal remedies, equity will be slow to grant him relief. *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277.

76. *Hauser v. Foley & Co.*, 190 Ala. 437, 67 So. 252. See *Evans v. Wilhite*, 176 Ala. 287, 58 So. 262, 167 Ala. 587, 52 So. 845 (*distinguishing* *Roebbling Sons Co. v. Stevens Elec. Co.*, 93 Ala. 39, 9 So. 369, holding the remedy provided by the code, allowing a rehearing when a party has been prevented from making his defense, is cumulative with the remedy by bill); *Geisberg v. O'Laughlin*, 88 Minn. 431, 93 N. W. 310, holding the statutory remedy for setting aside a judgment by action in certain cases (Gen. Laws, 1905, §4277) is concurrent with the legal remedy and either may be resorted to by the defrauded party.

77. U. S.—*Sanford v. White*, 132 Fed. 531. Cal.—*Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232. Conn.—*Blakeslee v. Murphy*, 44 Conn. 188. Ga.—*Howell v. Ware*, 133 Ga. 674, 66 S. E. 884; *Donaldson v. Roberts*, 109 Ga. 832, 35 S. E. 277. Ia.—*Worrall v. Chase & Co.*, 144 Iowa 665, 123 N. W. 338. N. M.—*Pickering v. Palmer*, 18 N. M. 473, 138 Pac. 198, 50 L. R. A. (N. S.) 1055. N. Y.—*Reich*

jurisdictions, equity may grant relief against a judgment procured by fraud, although the party might find a remedy at law,<sup>78</sup> and even though a party may have made an abortive attempt to obtain relief at law.<sup>79</sup>

These rules are particularly applicable in those states where legal and equitable relief is administered in different courts.<sup>80</sup> The rule under which a court of equity declines to interfere until after an application for the relief has been made to the court in which the judgment was rendered, has no application when relief has been sought and denied by that court.<sup>81</sup>

**Where Remedy at Law Is Lost.** — Although a party had an adequate remedy at law, equity will relieve him from a judgment against him, in a proper case, if he has lost the benefit of that remedy through no fault or neglect of his own.<sup>82</sup> Thus where he did not discover the

*v. Cochran*, 41 Misc. 621, 85 N. Y. Supp. 247. **Tenn.**—*Isler v. Turner*, 7 Humph. 116. **W. Va.**—*Railway Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

**78. Ga.**—*Griffin v. Sketoe*, 30 Ga. 300. **Ill.**—*Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038; *Foote v. Despain*, 87 Ill. 28; *Babeock v. McCamant*, 53 Ill. 214; *Nelson v. Rockwell*, 14 Ill. 375; *Prussian Nat. Ins. Co. v. Chichocky*, 94 Ill. App. 168. **Ia.**—See *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Lumpkin v. Snook*, 63 Iowa 515, 19 N. W. 333. **Mo.**—*Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460.

[a] "It is the fraud which gives jurisdiction to this court, and the aggrieved party is not obliged to resort to another tribunal possessed of less power and appliances to ascertain the truth and grant the requisite remedy, although the other tribunal may have jurisdiction." *Nelson v. Rockwell*, 14 Ill. 375, *quoted in* *Foote v. Despain*, 87 Ill. 28.

**Fraud in procurement of judgment** as a ground of relief generally, see *infra*, XV, E, 6.

**79.** "The fact, too, that the party had notice of the judgment in time to have appealed the case by certiorari under the statute, and that he made an abortive attempt to do so, does not deprive him of the right to apply to a court of equity for relief against the fraud which has been perpetrated." *Nelson v. Rockwell*, 14 Ill. 375.

**80.** "It is a familiar rule that a separate action to restrain the enforcement of a judgment will not be sus-

tained when the same relief can be obtained through a motion or other proceeding in the action in which the judgment was obtained; and in a jurisdiction in which legal and equitable relief is dispensed in different tribunals, a court of equity will not grant relief against a judgment when the same relief can be obtained by the aid of the court that rendered the judgment. But under the system of procedure which obtains in this state, where the various kinds of relief are administered by the same tribunal, and where there is but one form of civil action for the enforcement or protection of civil rights, . . . a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action." *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 787.

**81.** *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786, the denial of relief by the court rendering judgment gives a court of equity the same authority as if that court was powerless to act.

**82. Ark.**—*Valentine v. Holland*, 40 Ark. 338. **Conn.**—*Seymour v. Miller*, 32 Conn. 402, inadvertence of clerk. **Ia.**—*Tuefel v. Wilson*, 152 Iowa 559, 132 N. W. 846; *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Lumpkin v. Snook*, 63 Iowa 515, 19 N. W. 333. **Ky.** *Cummins v. Kennedy*, 4 J. J. Marsh. 642; *Saunders v. Jennings*, 2 J. J. Marsh. 513. **Mass.**—*Currier v. Esty*, 110 Mass. 536. **Miss.**—*Hamilton v. Moore*, 32 Miss. 625. **Neb.**—*Langan v.*

defect until too late to obtain relief at law,<sup>83</sup> or where he is prevented from availing himself of it by the fraud or procurement,<sup>84</sup> or by some unfair act of his adversary,<sup>85</sup> or by mistake,<sup>86</sup> or through accident or

Parkhurst, 1 Neb. (Unof.) 804, 96 N. W. 63. **N. Y.**—New York & N. J. Tel. Co. v. Rosenthal, 128 App. Div. 220, 111 N. Y. Supp. 612; *Jacobs v. Morange*, 1 Daly 523. **Okla.**—*Rumsey v. Howe*, 150 Pac. 1060; *Missouri O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Whitely v. St. Louis, etc. R. Co.*, 29 Okla. 63, 116 Pac. 165. **Tex.**—*Bell v. Walnitch*, 39 Tex. 132; *Gill v. Rodgers*, 37 Tex. 628; *Le Master v. Dalhart Real Est. Agency*, 56 Tex. Civ. App. 302, 121 S. W. 185. **Utah.**—*Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

[a] Although a party had a remedy at law, equity will grant him relief against a judgment after the time for invoking it has expired, if no laches or want of diligence is imputable to the petitioner. *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Bibend v. Kreutz*, 20 Cal. 109. Effect of laches or want of diligence on right to relief, see *supra*, XV, C, 3.

[b] Where a party is prevented from appealing the judgment, equity has jurisdiction to enjoin the judgment. *Patterson v. Naehr*, 6 N. Y. Supp. 513.

[c] **Refusal to Seal Bill of Exceptions.**—Where a court refused to decide upon points properly submitted to it, and later refused to seal a bill of exceptions, thus shutting out the parties from having the errors corrected, equity will relieve against the judgment, there being a proper showing that the judgment is against conscience, etc. *Pickett v. Morris*, 2 Wash. (2 Va.) 255.

[d] A plaintiff who sought a reversal of a judgment on an unfair and incomplete bill of exceptions, the judge having refused to sign a full and fair bill, cannot thereafter obtain equitable relief in equity on the sole ground that the judge refused to give him a fair bill and that if such bill had been allowed the judgment would have been reversed. *Bellows v. Tod*, 52 Iowa 359, 3 N. W. 102.

[e] **Failure of Reporter To Furnish Transcript.**—A party is justified in relying upon the court reporter for a transcript of the oral proceedings at the trial, and if, without fault on his part, such transcript cannot be furnished nor a bill of exceptions pre-

pared, equity will grant a new trial in a proper case. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85.

[f] Where a party being a stranger is unable to get sureties for an appeal or certiorari from a justice's judgment, he is without an adequate remedy at law through no fault of his own, and equity will relieve him, there being a mistake. *Roberts v. Cantrell*, 3 Hayw. (Tenn.) 219.

[g] **Loss of Papers.**—Whether a court of equity will grant a new trial in an action at law on account of the loss of a bill of exceptions duly settled, allowed and filed with the clerk, *quaere*. *Lincoln v. Bell*, 65 Neb. 351, 91 N. W. 287.

[h] An injunction to suspend an execution is not the proper remedy where the petition for a suspensive appeal and appeal bond are lost. *State v. Judge*, 18 La. 542.

83. **Cal.**—*Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786, where a party first learned of a judgment against him after the time for an appeal had expired. **Ill.**—*Brall v. Agnew*, 15 Ill. App. 122. **Ky.**—*Colyer v. Langford's Admrs.*, 1 A. K. Marsh. 237. **Mass.**—*Currier v. Esty*, 110 Mass. 536. **Mont.**—*Dunne v. Yund*, 155 Pac. 273. **S. C.**—*Cohen v. Dubose*, *Harp. Eq.* 102, 14 Am. Dec. 709.

84. **Ark.**—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 339, 341, 33 S. W. 208; *Harkey v. Tillman*, 40 Ark. 551. **Ind.**—*Johnson's Admrs. v. Unversaw*, 30 Ind. 435. **Ia.**—*Clark v. Elsworth*, 84 Iowa 525, 51 N. W. 31; *Lumpkin v. Snook*, 63 Iowa 515, 19 N. W. 333. **Okla.**—*Missouri O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Ellis v. Akers*, 32 Okla. 96, 121 Pac. 258. **Tenn.**—*Graham v. Roberts*, 1 Head 56. **Vt.**—*Paddock v. Palmer*, 19 Vt. 581.

85. **Kan.**—*Muse v. Wafer*, 29 Kan. 279. **Okla.**—*Missouri O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Ellis v. Akers*, 32 Okla. 96, 121 Pac. 258. **Tenn.**—*Graham v. Roberts*, 1 Head 56. **Vt.**—*Delaney v. Brown*, 72 Vt. 344, 17 Atl. 1067.

86. **Ark.**—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 339, 341, 33 S. W.



some unavoidable casualty,<sup>87</sup> equity may relieve on a proper showing. But the mere loss of remedy is not of itself sufficient to authorize relief. There must be some failure of justice from the loss of remedy to warrant the interference of equity.<sup>88</sup>

b. *Rules Applied.*—(I.) *Generally.*—Applying these general rules, if the party aggrieved by a judgment has a plain, speedy, and adequate remedy at law by motion to vacate the judgment,<sup>89</sup> by motion to quash or stay the execution,<sup>90</sup> by motion for a new trial,<sup>91</sup> by writ

208; *Harkey v. Tillman*, 40 Ark. 551. Okla.—*Missouri O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Ellis v. Akers*, 32 Okla. 96, 121 Pac. 258 (mistake of fact). Ohio.—*Oliver v. Pray*, 4 Ohio 175, 19 Am. Dec. 595.

[a] Where for some omission of the clerk in drawing the appeal bond, the appeal is dismissed, equity has jurisdiction to enjoin the judgment. *Saunders v. Jennings*, 2 J. J. Marsh. (Ky.) 513; *Oliver v. Pray*, 4 Ohio 175, 19 Am. Dec. 595.

87. Ark.—*Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 339, 33 S. W. 208; *Johnson v. Branch*, 48 Ark. 535, 3 S. W. 819; *Harkey v. Tillman*, 40 Ark. 551; *Leigh v. Armor*, 35 Ark. 123. Ga.—*Tarver v. McKay*, 15 Ga. 550. Okla.—*Missouri O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Ellis v. Akers*, 32 Okla. 96, 121 Pac. 258. Tenn.—*Graham v. Roberts*, 1 Head 56. Utah.—See *Bailey v. Stevens*, 11 Utah 175, 39 Pac. 828, denying relief where plaintiff delayed appealing because he had more time, and where the records were destroyed by fire in the meantime. W. Va.—*Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

[a] An adjournment of court which prevents a party from availing himself of his remedy by new trial or appeal is an accident authorizing relief in equity in a proper case. Ark.—*Johnson v. Branch*, 48 Ark. 535, 3 S. W. 819; *Vallentine v. Holland*, 40 Ark. 338 (where term lapsed). Ga.—*Tarver v. McKay*, 15 Ga. 550. Ore.—*Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110. Va.—*Knifong v. Hendricks*, 2 Gratt. (43 Va.) 212, 44 Am. Dec. 385.

[b] Absence of one of the justices at the time for the hearing of a motion for new trial, is ground for equitable relief. *Vallentine v. Holland*, 40 Ark. 338; *Foushee v. Lea*, 4 Call (8 Va.) 279.

[c] Illness of the trial judge, dis-

abling him from disposing of a motion for new trial, will warrant relief in equity on a proper bill. *Leigh v. Armor*, 35 Ark. 123.

[d] *Death of Trial Judge.*—Equity will relieve against a judgment against good conscience where the party's right to a new trial and to an appeal was cut off by the sudden death of the trial judge. *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560; *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211. To same effect see, *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

88. Ark.—*Church v. Gallie*, 75 Ark. 507, 88 S. W. 307; *Little Rock & H. S. W. R. Co. v. Newman*, 73 Ark. 555, 84 S. W. 727; *Whitehill v. Butler*, 51 Ark. 341, 11 S. W. 477; *Johnson v. Branch*, 48 Ark. 535, 3 S. W. 819. Ore.—*Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110. Vt.—*Burton v. Wiley*, 26 Vt. 430.

Necessity that judgment work injustice to entitle one to equitable relief therefrom, see *supra*, XV, C, 2.

89. See *infra*, XV, C, 6, b, (II).

90. Ala.—*Larkin v. Mason*, 71 Ala. 227. Cal.—*Estudillo v. Security Loan, etc., Co.*, 149 Cal. 556, 87 Pac. 19; *Moulton v. Knapp*, 85 Cal. 385, 24 Pac. 803; *Sanchez v. Carriaga*, 31 Cal. 170; *Logan v. Hillegass*, 16 Cal. 200; *Chipman v. Bowman*, 14 Cal. 157. S. C.—*New York Life Ins. Co. v. Mobley*, 90 S. C. 552, 561, 73 S. E. 1032; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831. Va.—*Coleman's Admx. v. Anderson*, 29 Gratt. (70 Va.) 425; *Goolsby v. St. John*, 25 Gratt. (66 Va.) 146.

91. Ala.—*Hendley v. Chabert*, 189 Ala. 258, 65 So. 993; *Ex parte Wallace*, 60 Ala. 267. Cal.—*Bacon v. Bacon*, 150 Cal. 477, 490, 89 Pac. 317; *Mastick v. Thorp*, 29 Cal. 444. Ill.—*Owens v. Ranstead*, 22 Ill. 161. Ia.—*Graves v.*

of error,<sup>92</sup> certiorari,<sup>93</sup> or appeal,<sup>94</sup> or by petition in the cause,<sup>95</sup> equity will not lend its aid. So also where the plaintiff has an adequate remedy by an action at law, equity will not grant relief.<sup>96</sup>

Graves, 192 Iowa 199, 109 N. W. 707; Dalhoff v. Keenan, 66 Iowa 679, 24 N. W. 273. Ky.—Ward v. Chiles, 3 J. J. Marsh. 480. N. C.—Peace v. Nailing, 16 N. C. 289. Okla.—Estes v. Timmons, 12 Okla. 537, 73 Pac. 303. Tex.—Owens v. Cage & Crow (Tex.), 106 S. W. 880, reversing (Tex. Civ. App.) 103 S. W. 1191; Bryorly v. Clark, 48 Tex. 345.

92. Conn.—See Blakeslee v. Murphy, 44 Conn. 188, holding writ of error to be inadequate. Mo.—Perkins v. St. Louis, K. C. & C. R. Co., 143 Mo. 513, 45 S. W. 260. Neb.—Nebraska Loan & T. Co. v. Crook, 73 Neb. 485, 103 N. W. 57. Pa.—Eyster's Appeal, 65 Pa. 473. Tenn.—Isler v. Turner, 7 Humph. 116, holding that where remedy by writ of error is not free, unembarrassed or adequate, a bill in equity for relief will lie. But see Williams v. Pile, 104 Tenn. 273, 56 S. W. 833, holding that notwithstanding a remedy by writ of error coram nobis, equity has inherent jurisdiction to set aside a judgment obtained as a result of fraud, accident or mistake. Tex.—Weaver v. Vandervanter, 84 Tex. 691, 19 S. W. 889; De Garcia v. San Antonio & A. P. R. Co. (Tex. Civ. App.), 77 S. W. 275.

93. Miss.—Fleming v. Nunn, 61 Miss. 603. Tex.—Long v. Smith, 39 Tex. 160. W. Va.—Railway Co. v. Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

94. Cal.—Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Estudillo v. Security Loan etc., Co., 149 Cal. 556, 87 Pac. 19. Colo.—Miller v. Owens, 55 Colo. 88, 133 Pac. 141. Ill.—Simpson v. Simpson, 273 Ill. 90, 112 N. E. 276. Ind.—Earl v. Matheney, 60 Ind. 202. Ia.—Shricker v. Field, 9 Iowa 366. La.—Perry v. Rue, 31 La. Ann. 287; Blanc v. Speckman, 23 La. Ann. 146; Taliaferro v. Steele, 14 La. Ann. 656; Chinn v. New Orleans, 1 Rob. 5, 23; Chiasson v. Duplantier, 10 La. 570. Mo.—Perkins v. St. Louis K. C. & C. R. Co., 143 Mo. 513, 45 S. W. 260. Neb.—Nebraska L. & T. Co. v. Crook, 73 Neb. 485, 103 N. W. 57. N. Y.—Barron v. Feist, 122 App. Div. 687, 107 N. Y. Supp. 494; Bush v. O'Brien, 47 App. Div. 581, 62 N. Y. Supp. 685; Hoskins v. Nichols,

48 Misc. 465, 96 N. Y. Supp. 926. N. C.—Peace v. Nailing, 16 N. C. 289. Okla.—Ellis v. Akers, 32 Okla. 96, 121 Pac. 258, 260. Ore.—Galbraith v. Barnard, 21 Ore. 67, 26 Pac. 1110. Tex.—Long v. Smith, 39 Tex. 160; Cage & Crow v. Owen (Tex. Civ. App.), 103 S. W. 1191; Avocato v. Dell' Ara (Tex. Civ. App.), 91 S. W. 830. Wash.—Strelau v. Seattle, 85 Wash. 255, 147 Pac. 1144. W. Va.—Grafton & G. R. Co. v. Davison, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799. Wyo.—Edwards v. Cheyenne, 19 Wyo. 110, 114 Pac. 677, 687.

[a] Louisiana.—The remedy by action for nullity of a judgment is not intended as a substitute for the remedy by appeal, and will not interfere with a party's right to appeal from the same judgment. The case taken up by an appeal is the case heard and decided in the court of first instance, while the action of nullity is one which has not been heard and decided, and which is dehors the record lodged in the appellate courts; hence an action of nullity and the appeal may be maintained at the same time. State ex rel. Pelletier v. Sommersville, 112 La. 1091, 36 So. 864; Cockfield v. Tourres, 24 La. Ann. 168.

[b] Whether Case Presented Is Same as That Pending on Appeal Is Discretionary.—The relief by an annulment proceeding is to provide relief against fraud in the obtention of the judgment which does not appear in the record and for which an appeal would afford no remedy. Whether a petition presents a case of this kind, or whether it presents the same case which has already been heard and decided, and which is pending on appeal, is a question left to the sound discretion of the judge of the first instance. State ex rel. Pelletier v. Sommersville, 112 La. 1091, 36 So. 864.

95. See *infra*, XV, C, 6, b, (III).

96. U. S.—Barhorst v. Armstrong, 42 Fed. 2. Ga.—Ponder v. Cox, 26 Ga. 485. Ill.—Antes v. Seider, 55 Ill. 498. Ky.—See Crutchers v. Wolf, 1 Mon. 88. Md.—Beall v. Brown, 7 Md. 393. Mo.—Straub v. Simpson, 74 Mo. App. 230. N. M.—Gutierrez v. Pino, 1 N. M. 392. N. C.—Henry v. Elliott, 59

These rules prevent a party who has a defense which is available at law from coming into equity after the rendition of judgment for the purpose of setting it up.<sup>97</sup>

(II.) **Motion To Set Aside and Vacate.**—In some jurisdictions, if the party has an adequate remedy by motion to vacate the judgment, equity will deny him relief.<sup>98</sup> But in other jurisdictions it is held that the remedy by motion to vacate is a concurrent and cumulative remedy,<sup>99</sup> for the reason that the original jurisdiction of a court of

N. C. 175. **Tex.**—Steger Lumber Co. v. McSwain (Tex. Civ. App.), 184 S. W. 292.

[a] Where a party has been unlawfully arrested, he should seek redress by action at law and not on a bill in equity to enjoin the judgment. *Baldwin v. Murphy*, 82 Ill. 485.

Where party has an action at law on his set-off, see *infra*, XV, F, 1.

Action of false return against the officer, see *infra*, XV, E, 3, b, (II), (B).

Where fraud is practiced by stranger to the action, see *infra*, XV, E, 6, c.

Where judgment is void, see *infra*, XV, E, 3, a.

97. *Cummins v. Bentley*, 5 Ark. 9. See *infra*, XV, E, 5, a.

98. **U. S.**—*Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299. **Ala.**—*Hendley v. Chabert*, 189 Ala. 258, 65 So. 993; *National Fertilizer Co. v. Hinson*, 103 Ala. 532, 15 So. 844. **Ill.**—*Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276; *King v. Hawley*, 135 Ill. App. 596; *Pyle v. Crebs*, 112 Ill. App. 480. **Mont.** *Dunne v. Yund*, 155 Pac. 273. **N. Y.** *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926; *Reich v. Cochran*, 41 Misc. 621, 85 N. Y. Supp. 247 (motion held inadequate); *Bush v. O'Brien*, 47 App. Div. 581, 62 N. Y. Supp. 685 (in the absence of fraud). See *Ludwig v. Walker*, 138 App. Div. 850, 123 N. Y. Supp. 468 (decided on another ground). **N. C.**—*Faison v. McIlwaine*, 72 N. C. 312; *McRae v. Davis*, 58 N. C. 140. **Ore.**—*Miller v. Shute*, 55 Ore. 603, 107 Pac. 467. But compare *Froebich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **S. C.**—*Crocker v. Allen*, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831. **Tex.**—*Gulf C. & S. F. R. Co. v. Henderson*, 83 Tex. 70, 18 S. W. 432. **Utah.**—*Baer v. Higson*, 26 Utah 78, 72 Pac. 180.

[a] **Arkansas.**—§4431 sub. 4, of Kirby's Digest, providing that the court in which a judgment is rendered

shall have the power, after the term, to vacate or modify such judgment on the ground of fraud practiced by the successful party in obtaining it has no application to judgments of the supreme court; and in such a case a suit in chancery is the appropriate remedy. *Corney v. Corney*, 108 Ark. 415, 159 S. W. 20.

[b] In **Minnesota**, as to all judgments except judgments procured by fraud, obtained in suits where jurisdiction of the parties has been acquired, suits in equity for relief against them will not lie as the remedy by direct application to the court rendering the judgment under §4160 R. L. 1905 is exclusive. But where no jurisdiction has been acquired, the equitable and statutory remedies are cumulative. *Cremer v. Michelet*, 114 Minn. 454, 131 N. W. 627. See also *Cornish v. Coates*, 91 Minn. 108, 97 N. W. 579; *Magin v. Lamb*, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216.

99. **Ga.**—*Lester v. Reynolds*, 144 Ga. 143, 86 S. E. 321; *Howell v. Ware & Harper*, 133 Ga. 674, 66 S. E. 884. **Idaho.**—*Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho 598, 123 Pac. 481. **Ia.**—*Blain v. Dean*, 160 Iowa 708, 719, 142 N. W. 418. See *Day v. Goodwin*, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465. **Neb.**—*Abbott v. Johnston*, 93 Neb. 726, 141 N. W. 821. **N. C.** *Moody v. Wike*, 87 S. E. 350. But compare *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520; *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581. **Ohio.**—*Michael v. American Nat. Bank*, 84 Ohio St. 370, 95 N. E. 905; *Coates v. Chillicothe Branch St. Bank*, 23 Ohio St. 415. **Wash.**—*Boylan v. Bock*, 60 Wash. 423, 111 Pac. 454. Compare *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955 (the proceeding under Ball. Code §5153-5162 is exclusive). **Wyo.** *Harden v. Card*, 17 Wyo. 210, 97 Pac. 1075.

[a] In case of a gross wrong and



equity is not affected by a statute conferring like or similar jurisdiction upon courts of law, unless the statute so provides.<sup>1</sup> But if the party elects to proceed under either remedy, he is bound by his election and cannot later abandon that remedy and pursue the other.<sup>2</sup>

(III.) **Relief by Petition in the Cause.**<sup>3</sup> — In some states, there are statutes providing for the setting aside of judgments by petition in the cause in certain enumerated cases.<sup>4</sup> Where this remedy is adequate, equity will not generally grant relief.<sup>5</sup> On the other hand, it has been held that these statutes furnish a concurrent and cumulative remedy,<sup>6</sup> and do not deprive the equity courts of their inherent jurisdiction.<sup>7</sup> These statutes generally limit the time within which the court at law may grant relief, and when the court has no power to act under the statute equity will grant relief upon a proper application.<sup>8</sup> If, however, there are any equitable grounds of relief which

fraud, equity will not stop to inquire whether or not the injured party might possibly get relief upon an application to open the judgment. *Moore v. Gamble*, 9 N. J. Eq. 246.

[b] **Where Party Is Without Notice.**—Where the notice apprised a defendant of only a part of the demands, he may seek relief in equity against a default judgment. As to the claims to which he had no notice, the statute regulating proceedings to set aside defaults vacate judgments and for a new trial does not afford an exclusive remedy. *Blain v. Dean*, 160 Iowa 708, 719, 142 N. W. 418.

[c] Though the party has a remedy by motion in the supreme court, he may proceed by bill in equity. *McTeer v. Briscoe* (Tenn.), 61 S. W. 564; *Dodds v. Duncan*, 12 Lea (Tenn.) 731, 736.

[d] **California.**—§473 Code Civ. Proc., providing for relief by motion from a judgment taken against a party through mistake, accident, inadvertence, or excusable neglect is not an exclusive method for the exercise of the equity jurisdiction. It is a cumulative remedy and does not displace the equitable remedy. *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Altpeter v. Postal Telegraph-Cable Co.*, 25 Cal. App. 255, 143 Pac. 93. But see *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *Ede v. Hazen*, 61 Cal. 360; *Ketchum v. Crippen*, 37 Cal. 223; *Bibend v. Kreutz*, 20 Cal. 109; *Hawley v. State Assur. Co.*, 28 Cal. App. 41, 151 Pac. 153.

1. *Evans v. Wilhite*, 167 Ala. 587, 52 So. 845.

2. *Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho 598, 123 Pac. 481.

3. See *supra*, XIV.

4. See the various statutes, and see *supra*, XIV.

5. **U. S.**—*Travelers' Protective Assn. v. Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538. **Ia.**—*Johnson Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760; *Hedrick v. Smith*, 137 Iowa 625, 115 N. W. 226; *Hintrager v. Sumbardo*, 54 Iowa 604, 7 N. W. 92. See *Day v. Goodwin*, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465. **N. C.**—*Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520. **Okla.**—*Estes v. Timmons*, 12 Okla. 537, 73 Pac. 303; *Crist v. Cosby*, 11 Okla. 635, 69 Pac. 885. **Wash.**—*Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

[a] **Effect Upon Equitable Remedy.** The statute of Washington providing for the setting aside judgments by petition filed within one year is exclusive. But if the fraud has been concealed or is not known to the moving party in time to take advantage of the statutory remedy, resort can be had to a suit in equity to annul the judgment. *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

6. **Kan.**—*List v. Jockheck*, 45 Kan. 748, 27 Pac. 184. **Neb.**—*Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. **Ohio.**—*Wheeler v. White*, 2 Ohio Dec. (Reprint) 584.

7. *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. See *Hitchcock v. Cole*, 87 Neb. 43, 126 N. W. 513.

8. **Ia.**—*Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760; *Larson v. Williams*, 100 Iowa 110,

are not covered by the statute, the party may seek relief upon those grounds as formerly.<sup>9</sup>

(IV.) **Where the Judgment Is Void.**<sup>10</sup> — While in some jurisdictions it is held that equity will not interfere to enjoin or set aside a void judgment where there is an adequate remedy at law,<sup>11</sup> by certiorari,<sup>12</sup> appeal,<sup>13</sup> an action at law,<sup>14</sup> or otherwise,<sup>15</sup> in other jurisdictions, it is held that regardless of whether a party has an adequate remedy<sup>16</sup> at

63 N. W. 464; *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Lumpkin v. Snook*, 63 Iowa 515, 19 N. W. 333. **Ky.** *Colyer v. Langford's Admrs.*, 1 A. K. Marsh. 237. **Wash.**—*Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

9. *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760.

10. **Void judgment as ground for relief**, see *infra*, XV, E, 3.

11. **Ala.**—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706. **Cal.**—*Sanchez v. Carriaga*, 31 Cal. 170; *Logan v. Hille-gass*, 16 Cal. 201. **Ga.**—*Hart v. Lazaron*, 46 Ga. 396, where there was no jurisdiction at law for want of service. **Neb.**—*Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559. **Okla.**—*Hockaday v. Jones*, 8 Okla. 156, 56 Pac. 1054. **Tex.**—*Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918. **Wis.** *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

12. **Mich.**—See *Wileke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394, holding certiorari would not have been an appropriate remedy under the facts, however. **Tex.**—*Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *Texas Mexican Ry. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200. **W. Va.** *Railway Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865. **Wis.** *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

13. **Ark.**—*Wingfield v. McLure*, 48 Ark. 510, 3 S. W. 439. **Mo.**—*Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454. **N. C.**—*Whitehurst v. Merchants' & F. Transp. Co.*, 109 N. C. 342, 13 S. E. 937. **Tex.**—*Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918. **W. Va.**—*Railway Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

[a] A party cannot sue in equity to set aside a void decree offered in evidence upon which a judgment against him is rendered, for he has an

adequate remedy by appealing from the judgment. *Hoover v. Bartlett*, 42 Ore. 145, 70 Pac. 378.

14. **U. S.**—*Walker v. Robbins*, 14 How. 584, 14 L. ed. 552. **Ky.**—*Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135. **N. H.**—*Everett v. Warner Bank*, 58 N. H. 340. **Nev.**—*Connery v. Swift*, 9 Nev. 39.

[a] Where a judgment is void, the officers executing the judgment are trespassers, and the party has an adequate remedy at law by an action of trespass. *Gutierrez v. Pino*, 1 N. M. 392.

15. The remedy by affidavit of illegality is adequate, and equity will not enjoin a judgment void for want of service. *Hart v. Lazaron*, 46 Ga. 396.

[a] If a judgment is void on its face it is a nullity and resort to equity is unnecessary as its nullity may be shown in any action at law to which it might be necessary to assert rights thereunder. *Buffington v. Carty*, 195 Mo. 490, 93 S. W. 779; *Dalton v. Libby*, 9 Nev. 192. *Contra*, *Coltart v. Ham*, 2 Tenn. Ch. 356.

[b] But if the judgment is apparently valid, equity will interfere. *Goldie Const. Co. v. Rich. Const. Co.*, 112 Mo. App. 147, 86 S. W. 587.

16. *Connell v. Stelson*, 33 Iowa 147; *Caruthers v. Hartsfield*, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580.

[a] If a judgment is utterly void for want of jurisdiction, it is not necessary for the party to move to set it aside. He may treat it as void until it is attempted to enforce it and then bring an action to have it declared so. *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798; *Rice v. Allen*, 69 Neb. 349, 95 N. W. 704.

[b] The proceeding by a statute providing for an application to amend, need not be resorted to by the petitioner where the judgment is void. *Houston E. & W. T. R. Co. v. Skeeter Bros.*, 44 Tex. Civ. App. 105, 98 S. W. 1064.

law, by motion to vacate,<sup>17</sup> certiorari,<sup>18</sup> or appeal,<sup>19</sup> equity will enjoin the enforcement of the judgment or set it aside.

7. **Effect of Rights of Third Parties.**—If the rights of innocent purchasers for value would be affected by granting equitable relief against a judgment, regular on its face, such relief will not be granted;<sup>20</sup> not even, it has been held, when the ground of attack is

17. **Mont.**—Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798. **Neb.**—Rice v. Allen, 69 Neb. 349, 95 N. W. 704. **Tenn.**—Caruthers v. Hartsfield, 3 Yerg. 366, 24 Am. Dec. 580.

[a] Statutes providing for the vacation of judgments by motion and petition do not generally apply to void judgments, and equity will grant relief. See Iowa Sav. & Loan Assn. v. Chase, 118 Iowa 51, 91 N. W. 807, under Code 1897, §4091. As to vacation of void judgment by motion, see generally *supra*, XIV, B, 1.

18. Worrall v. Chase & Co., 144 Iowa 665, 123 N. W. 338, holding that although a certiorari may be available as against a void judgment, it is neither adequate nor speedy; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580.

19. **Cal.**—Postal Tel.-Cable Co. v. Superior Court, 22 Cal. App. 770, 779, 136 Pac. 538. **Ill.**—Follansbee v. Scottish-Am. Mort. Co., 7 Ill. App. 486. *Compare*, Lasher v. Annunziata, 119 Ill. App. 653. **Ia.**—Worrall v. Chase & Co., 144 Iowa 665, 123 N. W. 338 (an appeal although available is neither adequate nor speedy in the sense required to exclude equitable jurisdiction); Leonard v. Capital Ins. Co., 101 Iowa 482, 70 N. W. 629 (appeal is not the only remedy). **Ky.**—Landrum v. Farmer, 7 Bush 46. **N. M.**—Pickering v. Palmer, 18 N. M. 473, 138 Pac. 198, 50 L. R. A. (N. S.) 1055.

[a] "It is a well established principle that a judgment rendered without jurisdiction is void, and may be attacked collaterally in any proceeding in which its validity may be called in question. This principle is in no way affected by the fact that the defendant has a right to have such void judgment reversed on appeal or error. It is clearly within the jurisdiction of courts of equity to vacate or enjoin judgments at law, which, by reason or [sic] fraud, want of jurisdiction in the court before which it was rendered, or any other circumstance, it would be

inequitable and against conscience to have enforced." Follansbee v. Scottish-Am. Mort. Co., 7 Ill. App. 486, 498.

20. **Ala.**—Dunklin v. Wilson, 64 Ala. 162, an action to impeach decree on the ground of false return. **Cal.**—Stern v. Judson, 163 Cal. 726, 127 Pac. 38. **Ill.**—Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116, an action to impeach a decree on the ground of false return by a sheriff. **N. J.**—Wilson v. Hoffman (N. J. Eq.), 50 Atl. 592. **Tex.**—Johnston v. Loop, 2 Tex. 331; Fox v. Robbins (Tex. Civ. App.), 62 S. W. 815.

[a] When the court entering the decree had jurisdiction of the parties and the subject-matter of the suit, and persons who were not parties to the suit and who have dealt with the subject-matter of the suit in good faith, relying upon the decree, have acquired interests in the subject-matter of the suit, the court will not set aside the decree and thereby divest and destroy their interests in the subject-matter of the suit. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192.

[b] In Reeve v. Kennedy, 43 Cal. 643, 650, which was an action to set aside a judgment because there was in fact no service of the summons, and no appearance by the defendant, and because the judgment was fraudulently obtained, the court said: "The defendant being a purchaser for value, at a judicial sale, without notice of the extrinsic facts, which are relied upon to impeach the judgment, cannot be affected thereby. No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and had in a Court of competent jurisdiction, is not affected by any mere error of the Court, for which the judgment might be reversed on appeal, nor for any secret vice in the judgment, not appearing on the face of the record, and which can be made to appear only



the fraud of the plaintiff in procuring a colorable jurisdiction of the defendant.<sup>21</sup>

8. **Effect of Affirmance on Appeal.**—The affirmance of a judgment on appeal does not affect the right of a party to impeach a judgment by a suit in equity.<sup>22</sup>

9. **Effect of Death of Plaintiff in Judgment.**—The right to seek this relief in equity is not terminated by the death of the party procuring the judgment.<sup>23</sup>

10. **Estoppel.**—One may become estopped from attacking a judgment in equity,<sup>24</sup> as by accepting the fruits of the judgment.<sup>25</sup> By delaying to proceed in equity to obtain relief, the party may be estopped in favor of third persons, who acquire interests in the judgment.<sup>26</sup>

by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the Court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. Unless the plaintiff in the action be also the purchaser at the sale, the latter will not be affected by any mere error of the Court, even though the judgment be afterwards reversed for such error; nor can his rights be impaired by any secret vice in the proceedings, resulting from fraud or other similar cause of which he has no notice. . . . But there would be no security in titles acquired at judicial sales if the rights of a bona fide purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the defendant, was in fact false." *Affirmed* in *Stokes v. Geddes*, 46 Cal. 17.

[c] A judgment upon the unauthorized appearance of an attorney, where no original process has been issued and served can be set aside in an action instituted for that purpose, whether innocent third persons may suffer thereby or not. *Turner v. Turner*, 33 Wash. 118, 74 Pac. 55; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922.

21. *Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151.

22. **U. S.**—*Nelson v. First Nat. Bank*, 70 Fed. 526. **Ia.**—*Partridge & Co. v. Harrow*, 27 Iowa 96, 99 Am. Dec. 643. **Miss.**—*Wilson v. Montgomery*, 14 Smed. & M. 205, void judgment.

**Neb.**—*Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273. **N. Y.**—*Wilmore v. Flack*, 96 N. Y. 512, void judgment.

[a] The judgment of an appellate court affirming a judgment on writ of error does not bar a bill to impeach the judgment for errors not apparent on the face of the record of the judgment. *Cassidy v. Automatic Time Stamp Co.*, 185 Ill. 431, 56 N. E. 1116.

23. *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341, was an action to set aside a judgment of divorce obtained by fraud. The statute of Minnesota does not make the right to sue to set aside a judgment dependent on any contingency, but it must be brought within the statutory period.

24. **Ill.**—*Blackburn v. Bell*, 91 Ill. 434; *Maier v. Title Guar. & Trust Co.*, 95 Ill. App. 365, 378. **Ia.**—*Melick v. First Nat. Bank*, 52 Iowa 94, 2 N. W. 1021; *Bryant v. Williams*, 21 Iowa 329. **La.**—*Maraist, Fournet & Co. v. Caillier*, 30 La. Ann. 1087. **Mo.**—*Sullivan v. Holbrook*, 211 Mo. 99, 109 S. W. 668. **Ohio.**—*Wright v. Snell*, 22 Ohio Cir. Ct. 86, 12 Ohio Cir. Dec. 308. **Wash.**—See *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

25. **Ill.**—*Maier v. Title Guar. & Trust Co.*, 95 Ill. App. 365. **La.**—*Maraist Fournet & Co. v. Caillier*, 30 La. Ann. 1087. **Mo.**—*Sullivan v. Holbrook*, 211 Mo. 99, 109 S. W. 668.

26. *Bryant v. Williams* 21 Iowa 329. Effect of rights of third parties upon right to relief, see *infra*, XV, C, 7.

As to necessity for diligence on party who seeks relief, see *supra*, XV, C, 3.

D. JUDGMENT AGAINST WHICH RELIEF MAY BE OBTAINED.<sup>27</sup> — 1. **In General.** — It may be stated generally that equity has jurisdiction, in a proper case, to relieve against judgments and decrees of any court,<sup>28</sup> whether standing above,<sup>29</sup> or below<sup>30</sup> it, whether of original<sup>31</sup> or appellate<sup>32</sup> jurisdiction. Thus equity can set aside judgments of courts of law,<sup>33</sup> decrees of courts of equity,<sup>34</sup> or of probate,<sup>35</sup> judgments of justices of the peace,<sup>36</sup> and decrees of spiritual courts.<sup>37</sup> But it has no jurisdiction to vacate or set aside the judgment of a criminal court.<sup>38</sup>

27. Nature and classification of judgments generally, see 14 STANDARD PROC. 734, et seq.

28. *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; *Murphy v. Johnson*, 107 Tenn. 552, 64 S. W. 894; *Cox v. Bank of Hartsville* (Tenn.), 63 S. W. 237; *John v. Tate*, 7 Humph. (Tenn.) 388. See also 6 STANDARD PROC. 797.

[3] *Compare*, *Greenlee v. McDowell*, 39 N. C. 481, 483, holding (1) that an application to a court of equity to restrain its own proceedings is a novelty. (2) But a chancery court of one district has no authority to usurp jurisdiction of a chancery court of another district with any interference with its decrees. *Whiteside v. Latham*, 2 Coldw. (Tenn.) 91; *In re Chadwell*, 7 Heisk. (Tenn.) 630; *Deaderick v. Smith*, 6 Humph. (Tenn.) 138. (3) *Compare*, *Greenfield v. Hutton*, 1 Baxt. (Tenn.) 216, holding that although this is true, yet it is competent for any chancellor to enjoin an execution from another chancery court upon the ground that it has been satisfied.

As to vacation of judgments of federal courts, see 4 STANDARD PROC. 479.

29. **N. J.**—*Dringer v. Receiver of Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811. **N. C.**—*Kincaid v. Conly*, 62 N. C. 270. **Tenn.**—*Murphy v. Johnson*, 107 Tenn. 552, 64 S. W. 894; *McTeer v. Briscoe*, 61 S. W. 564.

30. *Dringer v. Receiver of Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811.

[a] A judgment of a mayor's court may be enjoined by the district court. *Smith v. Deweese*, 41 Tex. 594.

31. *Murphy v. Johnson*, 107 Tenn. 552, 64 S. W. 894.

32. **Ga.**—*Wade v. Watson*, 133 Ga. 608, 66 S. E. 922. **N. C.**—*Kincaid v. Conly*, 62 N. C. 270. **Tenn.**—*Murphy v. Johnson*, 107 Tenn. 552, 64 S. W. 894; *Cox v. Bank of Hartsville*, 63 S. W. 237.

Affirmance of judgment as affecting right to relief in equity, see *supra*, XV, C, 8.

33. See *supra*, XV, B, 3.

34. **U. S.**—*Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156. **Ore.**—*Froebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Pa.**—*Cochran v. Eldridge*, 49 Pa. 365. **Eng.**—*Bowen v. Evans*, 2 H. L. Cas. 257, 281, 9 Eng. Reprint 1090.

See 6 STANDARD PROC. 797.

35. See *infra*, XV, D, 2.

36. **Ala.**—*Hauser v. Foley & Co.*, 190 Ala. 437, 67 So. 252. **Ga.**—*McClatchey v. Bryan*, 144 Ga. 292, 86 S. E. 1085. **Ill.**—*Nelson v. Rockwell*, 14 Ill. 375; *Dickinson v. Hoffman*, 90 Ill. App. 83. **Ia.**—*Worrall v. Chase & Co.*, 144 Iowa 665, 123 N. W. 338; *Tomlinson v. Litze*, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458; *Connell v. Stelson*, 33 Iowa 147. **Mich.**—*Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697. **Miss.**—*Hilliard v. Chew*, 76 Miss. 763, 25 So. 489. **Okla.**—*Rumsey v. Howe*, 150 Pac. 1060; *Missouri, O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391. **Tex.**—*Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918. **W. Va.**—*Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799; *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

See generally the title "Justices of the Peace."

37. *Cochran v. Eldridge*, 49 Pa. 365; *Vanbrough v. Cock*, 1 Ch. Cas. 200, 22 Eng. Reprint 761.

38. **Conn.**—*Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479. **Ga.**—*Gault v. Wallis*, 53 Ga. 675. **Wash.**—*Brown v. State*, 59 Wash. 195, 109 Pac. 802.

[a] An apparent exception to this general rule exists where property rights will be destroyed or rendered

**2. Particular Kinds of Judgments.**—Among the various judgments which may be set aside or vacated in equity are default judgments,<sup>39</sup> judgments by confession,<sup>40</sup> judgments by consent,<sup>41</sup> compromise judgments,<sup>42</sup> judgments upon stipulation,<sup>43</sup> judgments on awards of arbitrators,<sup>44</sup> and divorce decrees.<sup>45</sup>

Foreign,<sup>46</sup> as well as domestic judgments,<sup>47</sup> and void,<sup>48</sup> as well as voidable judgments,<sup>49</sup> may be relieved against.

Equitable relief may also be granted from final judgments or decrees in partition,<sup>50</sup> decrees against incompetents,<sup>51</sup> orders admitting aliens to citizenship,<sup>52</sup> as well as from various judgments, orders and

valueless by the enforcement of a void statute or ordinance. *Brown v. State*, 59 Wash. 195, 109 Pac. 802.

39. **U. S.**—*Kibbe v. Benson*, 17 Wall. 624, 21 L. ed. 741. **Ill.**—See *Hofmann v. Burris*, 210 Ill. 587, 71 N. E. 584. **Ia.**—*Blain v. Dean*, 160 Iowa 708, 719, 142 N. W. 418. **Mo.**—*Jackson v. Chestnut*, 151 Mo. App. 275, 131 S. W. 747. See also 6 STANDARD PROC. 844.

**Judgments by default generally**, see 14 STANDARD PROC. 854, et seq.

40. **U. S.**—*The Hiram*, 1 Wheat. 440, 4 L. ed. 131, judgment confessed under a clear mistake. **Md.**—*Kearney v. Sasser*, 37 Md. 264. **Wis.**—*Rogan v. Walker*, 1 Wis. 631.

See 4 STANDARD PROC. 475.

**Judgments by confession generally**, see 14 STANDARD PROC. 791, et seq.

41. **Ala.**—*Adler v. Van Kirk Land & Con. Co.*, 114 Ala. 551, 562, 21 So. 490, 62 Am. St. Rep. 133. **Ga.**—*Roland v. Roland*, 139 Ga. 825, 78 S. E. 249. **La.**—*Edison Elec. Co. v. New Orleans*, 130 La. 693, 58 So. 512. **Minn.**—*Spooner v. Spooner*, 26 Minn. 137, 1 N. W. 838. **N. J.**—*Gifford v. Thorn*, 9 N. J. Eq. 702, 722. **N. Y.**—*Crouse v. McViekar*, 207 N. Y. 213, 100 N. E. 697, 45 L. R. A. (N. S.) 1159; *French v. Shotwell*, 5 Johns. Ch. 555, 571. **N. C.**—*Moody v. Wike*, 87 S. E. 350. **Tenn.**—*Jones v. Williamson*, 5 Coldw. 371.

**Judgments by consent generally**, see 14 STANDARD PROC. 913, et seq.

42. *Hahn v. Hart*, 12 B. Mon. (Ky.) 426.

43. **N. Y.**—*Crouse v. McViekar*, 207 N. Y. 213, 100 N. E. 697, 45 L. R. A. (N. S.) 1159. **N. C.**—*Moody v. Wike*, 87 S. E. 350. **Tex.**—*Cetti v. Dunman*, 26 Tex. Civ. App. 433, 64 S. W. 787.

See also 4 STANDARD PROC. 474.

44. *Milnor & Co. v. Georgia R. & B. Co.*, 4 Ga. 385; *Cochran v. Eldridge*, 49 Pa. 365.

45. *Scribner v. Scribner*, 93 Minn. 195, 101 N. W. 163; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291. See also 4 STANDARD PROC. 475; 7 STANDARD PROC. 799.

[a] **Federal courts can annul a divorce decree obtained by fraud.** *McNeil v. McNeil*, 78 Fed. 834.

46. **Ill.**—*Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Payne v. O'Shea*, 84 Mo. 129. **Tenn.**—*Winchester v. Jackson*, 3 Hayw. 305; *Glasgow v. Lowther*, *Cooke* 464.

**Foreign judgments generally**, see *infra*, XVIII.

[a] **There is no difference in granting injunctions against domestic and foreign judgments.** *Pearce v. Olney*, 20 Conn. 544.

47. *Payne v. O'Shea*, 84 Mo. 129.

[a] **A judgment based upon a judgment of a sister state may be enjoined in equity for equitable causes.** *Black v. Smith*, 13 W. Va. 780, 793.

48. See *infra*, XV, E, 3.

49. **Ill.**—*Nelson v. Rockwell*, 14 Ill. 375. **Ind.**—*Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626, *contra*, *Earl v. Matheney*, 60 Ind. 202. **Ohio.**—*Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. St. Rep. 537.

50. *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777. See generally the title "Partition."

51. **As to vacating decrees against infants**, see 12 STANDARD PROC. 784.

**As to relief from judgments against insane persons**, see 13 STANDARD PROC. 616.

**Relief from judgments against married women**, see 11 STANDARD PROC. 810, 812.

52. *Tinn v. United States District*



decrees of a probate court,<sup>55</sup> such as judgments granting letters of administration,<sup>54</sup> judgments on settlements of executors,<sup>55</sup> or guardians.<sup>56</sup> A decree of distribution may be reviewed in equity in a proceeding of this character.<sup>57</sup> A court of equity is without jurisdiction, however, to set aside the probate of a will;<sup>58</sup> but notwithstanding this

Attorney, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354.

53. **U. S.**—*Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630; *Smith v. Smith*, 210 Fed. 947. **Ala.**—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293. **Ark.**—*West v. Waddill*, 33 Ark. 575. **Cal.**—*Sanford v. Head & Merritt*, 5 Cal. 297. **Mich.** *Babcock v. Babcock*, 150 Mich. 558, 114 N. W. 352. **Ohio.**—*Woodward v. Curtis*, 19 Ohio Cir. Ct. 15; *Howenstine v. Sweet*, 13 Ohio Cir. Ct. 239. **Okla.**—*Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934. **Ore.**—*Bowsman v. Anderson*, 62 Ore. 431, 123 Pac. 1092; *Froebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Utah.** *Benson v. Anderson*, 10 Utah 135, 37 Pac. 256. **Vt.**—See *Scoville v. Brock*, 79 Vt. 449, 65 Atl. 577.

[a] Courts of equity of Indian Territory had inherent power to set aside probate decrees in a proper case. *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934.

[b] A judgment discharging an administrator may be impeached in a superior court. *Lester v. Reynolds*, 144 Ga. 143, 86 S. E. 321; *Pass v. Pass*, 98 Ga. 791, 25 S. E. 752.

[c] An order authorizing the sale of property of a decedent, which had been set apart, during his lifetime, as a homestead for the benefit of his family is a judgment of a court which equity may set aside on good cause shown. *Phillips v. James*, 115 Ga. 425, 41 S. E. 663. See also 6 STANDARD PROC. 564.

[d] A probate order allowing a claim against an estate may be set aside in equity on a showing of fraud or mistake in the procurement of the order. *Hendron v. Kinner*, 110 Iowa 544, 80 N. W. 419. See also 6 STANDARD PROC. 534.

Injunction against exercise of authority by executor, see 6 STANDARD PROC. 510.

54. *Neal v. Boykin*, 129 Ga. 676, 59 S. E. 912; *McArthur v. Matthewson*, 67 Ga. 134.

55. Settlement of Executors. — A

judgment of a county court in a settlement between an executor and trustee and cestui que trust, may be impeached for fraud in a court of equity in a proper case. *Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038; *Froebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. See also 6 STANDARD PROC. 612.

56. Settlement of Guardians. — A judgment settling and allowing a final account of a guardian may be impeached in equity for fraud. *Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038. See also 10 STANDARD PROC. 846.

57. **Cal.**—*Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232. **Mich.**—*Ewing v. Lamphere*, 147 Mich. 659, 111 N. W. 187. **Minn.** *Leighton v. Bruce*, 156 N. W. 285.

See also 6 STANDARD PROC. 634.

[a] But, as was said in *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98, the utmost that a court of equity can do if it finds that the decree was obtained by fraud is to decree that the defendant hold as an involuntary trustee of the plaintiff the property vested in him by the decree, and compel him to convey and transfer to the plaintiff accordingly all that he may have obtained from the estate of the deceased to which plaintiff is entitled, or, if a conveyance of specific property may not be had, then to hold him accountable to the plaintiff for the value thereof. See also *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317. Compare, **Cal.**—*Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232, holding the plaintiff has the right to have the decree cancelled and set aside. **Mich.**—*Ewing v. Lamphere*, 147 Mich. 659, 111 N. W. 187. **Utah.** *Benson v. Anderson*, 10 Utah 135, 37 Pac. 256, remanding the cause to the district court with directions to set aside the decree of distribution. As to relief generally, see 4 STANDARD PROC. 490.

58. **U. S.**—*Broderick's Will Case*, 21

fact, equity may, it has been held, take from a party the benefit of a will established by his fraud.<sup>59</sup>

**E. GROUNDS FOR RELIEF. — 1. In General.** — Courts of equity will not interfere with a judgment at law unless there exists some well-defined equitable ground justifying it.<sup>60</sup> But as a general rule, any facts which clearly prove it to be against conscience to execute a judgment will justify an application to a court of chancery for relief

Wall. 503, 23 L. ed. 599; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *Pulver v. Leonard*, 176 Fed. 586. **Cal.** *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965. **Ill.**—See *Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276. **Mass.**—*Waters v. Stickney*, 12 Allen 1, 90 Am. Dec. 122. **Eng.**—*Allen v. M'Pherson*, 1 H. L. Cas. 191, 9 Eng. Reprint 727.

See generally the title "**Probate Courts.**"

[a] The reason for the rule is that the proceeding is essentially one in rem, and not inter partes, and that all the world is concluded where the provisions of the law are substantially observed. *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463.

[b] An exception to this general rule, says the court in *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463, exists in those states where by statutory authority or by custom the probate of a will may be challenged by independent suit for forgery or fraud attending its execution and probate. The federal courts, in such jurisdictions, will adopt the remedy obtaining by local statute and custom, and entertain a suit to obviate the effect of probate. *Pulver v. Leonard*, 176 Fed. 586.

[c] Where there has been a breach of duty arising from a fiduciary relation on the part of those securing the probate of a will, and the facts alleged to constitute extrinsic fraud are such as to prevent the heirs from appearing in the probate court and contesting the will, and exhibiting fully their case against its being admitted to probate, equity will grant relief. *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965.

[d] **In Federal Courts.**—Where a suit to vacate a probate will not lie in equity, it will not lie in the federal courts to disturb the finality of pro-

bate. *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463.

59. *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98, relying upon *Barnes v. Powell*, 1 Ves. Sr. (Eng.) 284, 27 Eng. Reprint 1034, holds, "It thus became the principle of the English courts of chancery, while permitting the probate to stand, as having no power to set it aside, to decree that the false legatee or wrongful executor was the trustee for the rightful claimant. So here we hold that, under our system, the utmost that the court in equity could do, . . . would be to decree that the defendant P. R. holds title as trustee of the minor plaintiffs, and compel him to make conveyance and transfer to them accordingly of all that he may have obtained from the estate of the deceased to which they were entitled, or, if a conveyance of specific property may not be had, then to hold him accountable to the plaintiffs for the value thereof."

[a] But see *Allen v. M'Pherson*, 1 H. L. Cas. (Eng.) 191, 9 Eng. Reprint 727, refusing to follow *Barnes v. Powell*, 1 Ves. Sr. (Eng.) 284, 27 Eng. Reprint 1034, and holding equity has no jurisdiction to declare the party in whose favor the probate is granted to be a trustee, for by this process one would obtain a review of the judgment upon the probate.

60. **Ala.**—*Lockard v. Lockard*, 16 Ala. 423. **Md.**—*Contee v. Cooke*, 2 Har. & J. 179. **R. I.**—*Furbush v. Collingwood*, 13 R. I. 720. **N. Y.**—*Hyatt v. Bates*, 35 Barb. 308.

[a] **Equity is without jurisdiction** unless there exists some equitable ground. **N. J.**—*Clark v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319. **Ore.**—*Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110. **Tenn.**—*White v. Cabal's Admr.*, 2 Swan 550.

[b] **Impairing Obligation of Contract.**—A judgment will not be vacated in equity on the ground that it violates the federal constitution in im-

against it.<sup>61</sup> Such facts must either be those of which the party could not avail himself at law, or those of which he was prevented from availing himself by fraud, accident, or the act of the opposite party, unmixed with negligence on his part.<sup>62</sup> In general, where it would have been proper for a court of law to have granted a new trial upon timely application therefor, equity will afford its aid and grant it, if the application be made upon grounds arising after the court of law ceased to have power to act.<sup>63</sup>

While the specific grounds for equitable relief against judgments are limited by statute in some jurisdictions,<sup>64</sup> it may be stated generally that where a judgment has been obtained by or is the result

pairing the obligation of contracts. This provision of the constitution does not apply to an erroneous decision of a court. *Allen v. Allen*, 97 Fed. 525, 38 C. C. A. 336.

**Cverture as a ground for relief in equity**, see 11 STANDARD PROC. 810.

**Infancy as a ground**, see 12 STANDARD PROC. 779, et seq.

**Insanity as a ground of relief**, see 13 STANDARD PROC. 616.

**61. U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 715, 38 L. ed. 565; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Kibbe v. Benson*, 17 Wall. 624, 21 L. ed. 741; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L. ed. 362; *Humphreys v. Leggett*, 9 How. 297, 313, 19 L. ed. 145; *Truly v. Wanzler*, 5 How. 141, 12 L. ed. 88; *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156; *Brown v. Pegram*, 149 Fed. 515. **Ala.**—*Norman v. Burns*, 67 Ala. 248. **Ill.**—*Walker v. Shreve*, 87 Ill. 474. **Mass.**—*Brooks v. Twitchell*, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662. **Mo.**—*Bassett v. Henry*, 34 Mo. App. 548. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. **N. Y.**—*Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152; *Paterson v. Bangs*, 9 Paige Ch. 627; *Jacobs v. Morange*, 1 Daly 523; *Ladew v. Hart*, 8 App. Div. 150, 40 N. Y. Supp. 509; *Lane v. Moss*, 64 Hun 632, 18 N. Y. Supp. 605. **Tenn.**—*Hickerson v. Raiguol*, 2 Heisk. 329. **Tex.**—*Byars v. Justin*, 2 Wills. Civ. Cas., §66.

**Necessity that judgment work injustice**, see *supra*, XV, C, 2.

**62. U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed.

1240; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L. ed. 362. **Ala.**—*Norman v. Burns*, 67 Ala. 248; *Shannon v. Reese*, 38 Ala. 586. **Ill.**—*Walker v. Shreve*, 87 Ill. 474. **Ky.**—*Colyer v. Langford's Admrs.*, 1 A. K. Marsh. 237. **Mo.**—*Engler v. Knoblaugh*, 131 Mo. App. 481, 110 S. W. 16; *Bassett v. Henry*, 34 Mo. App. 548. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. **N. Y.**—*Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152; *Jacobs v. Morange*, 1 Daly 523; *Duncan v. Lyon*, 3 Johns. Ch. 351, 8 Am. Dec. 513. **R. I.**—*Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873. **Tenn.**—*Chester v. Apperson*, 4 Heisk. 639. **Tex.**—*Burnley v. Rice, Adams & Co.*, 21 Tex. 171. See also *supra*, XV, C, 6, a; *infra*, XV, E, 5, e; XV, E, 6, b, (III).

**63. Ia.**—*Hoskins v. Hattenback*, 14 Iowa 314. **Ky.**—*Colyer v. Langford's Admrs.*, 1 A. K. Marsh. 237. **Neb.**—*Bankers' Union v. Landis*, 75 Neb. 625, 106 N. W. 973; *Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679; *Horn v. Queen*, 4 Neb. 108. **Tex.**—*Vardeman v. Edwards*, 21 Tex. 737.

**Effect of adequacy of remedy at law upon right to equitable relief**, see *supra*, XV, C, 6.

**64. See generally the statutes.**

[a] Under some statutes, it is provided that a judgment obtained by ordinary proceedings cannot be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the rendition of the judgment. *Leonard v. Capitol Ins. Co.*, 101 Iowa 482, 70 N. W. 629; *Walker v. Thomas*, 88 Ky. 486, 11 S. W. 434; *Emmerson's Admr. v. Herriford*, 8 Bush (Ky.) 229; *McGown v. Macklin*, 7 Bush



of imposition,<sup>65</sup> circumvention,<sup>66</sup> fraud,<sup>67</sup> or mistake,<sup>68</sup> it will be set aside or enjoined, as well as where it is obtained by accident,<sup>69</sup>

(Ky.) 308; *French v. French*, 6 Ky. Op. 739; *King v. Boles*, 4 Ky. Op. 147.

[b] This statute does not apply to void judgments. *Leonard v. Capitol Ins. Co.*, 101 Iowa 482, 70 N. W. 629.

[c] Where the alleged matters of defense were substantially within the knowledge of the defendant at the time the judgment was rendered against him, a petition for a modification of an injunction against the judgment on the ground such defenses were discovered since the rendition of the judgment will be dismissed. *McCown v. Macklin's Exr.*, 7 Bush (Ky.) 308.

[d] In Louisiana (1) as to the vices of form specified in Code of Practice, art. 606, the grounds are limited to those specified; but as to the causes of nullity which appertain to the merits of the question tried, referred to in art. 607, the statute is illustrative and not exclusive. *Lazarus v. McGuirk*, 42 La. Ann. 194, 8 So. 253; *Blanch v. Speckman*, 23 La. Ann. 146. (2) A judgment may be annulled for a cause not expressly included in those mentioned in the statutes regulating proceedings for the annulment of judgments, when the party attacking it shows he will sustain real injury unless relieved, and this relief cannot be had on appeal, and the case presents facts on which a court of equity of the other states would interfere. *Perry v. Rue*, 31 La. Ann. 287; *Brand v. Stafford*, 28 La. Ann. 51; *Blanch v. Speckman*, 23 La. Ann. 146; *Norris v. Frisbie*, 3 La. Ann. 646; *Chinn v. New Orleans*, 1 Rob. 5, 23, *overruling* *Derbigny v. Peirce*, 18 La. 551; *Smith v. Barkemeyer*, 1 McGloin 139.

[e] In Massachusetts equitable relief from a judgment may be had in an action at law only under Rev. Laws, 1902, c. 173, §§28-32. *Corbett v. Craven*, 196 Mass. 319, 82 N. E. 37.

65. *Ga.*—Code, 1910, §4629; *Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536. *Tenn.* *Jones v. Williamson*, 5 Coldw. 371. *Wis.*—*Johnson v. Huber*, 106 Wis. 282, 82 N. W. 137, where judgment has been obtained inequitably.

66. *Moore v. Guley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242.

67. See *infra*, XV, E, 6.

68. See *infra*, XV, E, 7.

69. *U. S.*—*Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Davis v. Tileston*, 6 How. 114, 12 L. ed. 366; *Christy v. Atchison*, etc. R. Co., 214 Fed. 1016; *United States v. Mani*, 196 Fed. 160; *Sanford v. White*, 132 Fed. 531; *Nelson v. First Nat. Bank*, 70 Fed. 526. *Ark.* *Bentley v. Dillard*, 6 Ark. 79. *Cal.* *Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91; *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777; *Mastick v. Thorp*, 29 Cal. 444. *Conn.*—*Kelly v. Wiard*, 49 Conn. 443; *Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. *Del.*—*Whitaker v. Wickersham*, 5 Del. Ch. 187. *Fla.*—*Day v. Hurchman*, 65 Fla. 186, 61 So. 445. *Ga.*—Code, 1910, §§5965, 4584; *Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869. *Ill.* *Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276; *Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507; *Foot v. Despaigne*, 87 Ill. 28; *Holmes v. Stateler*, 57 Ill. 209; *How v. Mortell*, 28 Ill. 478; *Propst v. Meadows*, 13 Ill. 157, 169 (inevitable accident); *West Chicago St. R. Co. v. Stoltzenfeldt*, 100 Ill. App. 142; *Prussian National Ins. Co. v. Chichocky*, 94 Ill. App. 168. *Me.*—*Bailey v. Merchants' Ins. Co.*, 110 Me. 348, 86 Atl. 328. *Md.*—*Ellicott v. Welch*, 2 Bland 242. *Miss.*—*Newman v. Taylor*, 69 Miss. 670, 13 So. 831. *Mo.*—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458 (unavoidable accident); *Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Payne v. O'Shea*, 84 Mo. 129. *Neb.* *McHale v. Metz*, 70 Neb. 106, 96 N. W. 1004; *Cleland v. Hamilton L. & T. Co.*, 55 Neb. 13, 75 N. W. 239. *N. J.* *Clark v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319. *N. Y.*—*Harris v. Treu*, 14 Misc. 172, 35 N. Y. Supp. 379, 25 N. Y. Civ. Proc. 92, 2 Ann. Cas., §380. *S. C.*—*Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5. *Tenn.*—*Powell v. Cyfers*, 1 Heisk. 526, unavoidable accident. *Tex.*—*McMurray*, 67 Tex. 665, 4 S. W. 357; *Williams v. Nolan*, 58 Tex. 708; *Kalmans v. Baumbush* (Tex. Civ. App.), 187 S. W. 697; *Bradford v. Malone*, 49 Tex. Civ. App. 440, 130 S. W. 1013; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63. *Va.*—*Thomas v. Jones*, 98 Va. 323, 36 S. E. 382; *Rosen-*

or surprise,<sup>70</sup> collusion,<sup>71</sup> or improper acts of the adverse party.<sup>72</sup> So

*Harper v. Bowen*, 84 Va. 660, 5 S. E. 697; *Byrnes v. Edmunds*, 13 Gratt. (63 Va.) 309; *Holland v. Trotter*, 22 Gratt. (63 Va.) 141. **W. Va.**—*Clark v. Sayers*, 48 W. Va. 33, 35 S. E. 882; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

See also *infra*, XV, E, 5, e, (III).

**70. Me.**—*Bailey v. Merchants' Ins. Co.*, 110 Me. 348, 86 Atl. 328. **Neb.** *Bankers' Union v. Landis*, 75 Neb. 625, 106 N. W. 973. **N. Y.**—*Harris v. Treu*, 14 Misc. 172, 35 N. Y. Supp. 379, 25 Civ. Proc. 92, 2 N. Y. Ann. Cas. 380. **N. C.**—*Wilder v. Lee*, 64 N. C. 50. **Va.**—*Thomas v. Jones*, 98 Va. 323, 36 S. E. 382; *Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136, 141; *Knifong v. Hendricks*, 2 Gratt. (43 Va.) 212, 44 Am. Dec. 385; *Foushee v. Lea*, 4 Call (8 Va.) 279; *Smith v. Wallace*, 1 Wash. (1 Va.) 254. **W. Va.**—*Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245. **Eng.**—*Richmond v. Tayleur*, 1 P. Wms. 734, 24 Eng. Reprint 591.

[a] "Surprise" is practically synonymous with "accident." *Ludwig v. Walker*, 59 Misc. 62, 111 N. Y. Supp. 1102.

[b] **Nature of Surprise.**—The surprise on which courts of equity act "must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him." *Turley v. Taylor*, 65 Tenn. 391.

[c] **Unexpected Character of Opponent's Evidence.**—The loss of a case by reason of the unexpected character of the adversary's testimony is not sufficient to sustain an independent action in equity for relief against the judgment unless there has been some fraudulent conduct. *Moore v. Guley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242. To same effect, see *Ala. Powell v. Stewart*, 17 Ala. 719. **Ill.** *Bell v. Gardner*, 77 Ill. 319. **Va.**—*Oswald-Deniston & Co. v. Tyler*, 4 Rand. (25 Va.) 19.

[d] The rule as to granting new trials at law either before the inferior court or on appeal to revising courts on the ground of the unexpected intro-

duction of testimony and the rule as to granting new trials in chancery after a trial at law on the same ground are so different that cases supporting one furnish no guide whatever for action in the other. *Turley v. Taylor*, 6 Baxt. (Tenn.) 394.

[e] **Surprise at the rejection of testimony** is not ground for relief. *Post v. Boardman*, 1 Clark Ch. (N. Y.) 333.

[f] **Failure of Witness To Remember.**—That the witnesses relied on to make the defense appear to the jury failed to remember the circumstances which he is called to give in evidence, is no ground for equitable interposition. *Drew v. Hayne*, 8 Ala. 438.

[g] **The fact that the witness failed to state a material fact upon his examination at law, and that the complainant did not know of such omission until after the trial because he could not hear well, is insufficient to give a court of equity jurisdiction.** *Stone v. Moody*, 6 Yerg. (Tenn.) 31.

**71. Ala.**—*Patterson v. Carter*, 147 Ala. 522, 41 So. 133. **Cal.**—*American Sur. Co. v. City Street Imp. Co.*, 169 Cal. 172, 146 Pac. 428. **Conn.**—*Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479. **Ill.**—*Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. **Ia.** *Hendron v. Kinner*, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; *Harshay v. Blackmarr*, 20 Iowa 161, 174, 89 Am. Dec. 520. **Me.**—*Cunningham v. Gushee*, 73 Me. 417. **Mo.**—*Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460. **N. J.**—*First Baptist Church v. Syms*, 52 N. J. Eq. 545. **Wyo.**—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687. **Can.**—*Charlebois v. Delap*, 26 Canada Sup. 221, 249.

[a] **Collusion to conceal material evidence**, which, if offered, might have produced a different result, will suffice to move a court of equity to give relief against a judgment in that action. *First Baptist Church v. Syms*, 52 N. J. Eq. 545, 31 Atl. 717, reversing 51 N. J. Eq. 363, 28 Atl. 461.

**72. Georgia Code**, 1910, §5965; *Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869; *Tumlin v. O'Bryan*, 68 Ga. 65.

[a] A judgment against a party kept in ignorance of a suit against him by the willful act of his opponent will be set aside in equity. *United States v. Main*, 196 Fed. 160.

too, where it is inequitable to enforce a judgment, although regularly obtained, by reason of events subsequent to its rendition, equity will restrain its enforcement.<sup>73</sup>

**Effect of Statutes Granting Power to Courts of Law.** — The jurisdiction of courts of equity in granting relief against judgments is not limited to the grounds enumerated in the statutes providing for a vacation of a judgment by the court rendering it.<sup>74</sup>

**Grounds Affording Relief From Decrees.** — The same grounds warranting relief against judgments warrant relief by a chancery court against its own decrees.<sup>75</sup>

**2. Matters Presented Must Not Have Been Considered by Law Court.** — Equity will not set aside a judgment or decree for any matter actually presented or considered in the judgment or decree assailed.<sup>76</sup> Relief can be granted only upon some new matter of equity

73. *Jarman v. Saunders*, 64 N. C. 367; *Johnson v. Huber*, 103 Wis. 282, 82 N. W. 137. See also *infra*, XV, E, 5, e, (II); XV, E, 9; XV, E, 10.

[a] Equity will exercise its power to prevent a fraudulent, corrupt, and inequitable use of a judgment at law, even though regularly obtained. *Merritt v. Baldwin*, 6 Wis. 439.

74. *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 96 N. W. 760. But see *Richards v. Moran*, 137 Iowa 220, 114 N. W. 1035; *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31.

[a] The statute concerning review of judgments does not restrict the power of the equity courts to the grounds therein specified. *Nealis v. Dicks*, 72 Ind. 374, 376. As to review of judgments, see *infra*, XVI.

[b] The grounds for an application for a new trial in equity are such only as would authorize an application therefor to the court rendering the decree. *Graves v. Graves*, 132 Iowa 199, 109 N. W. 707.

75. A chancery court will stay its own decrees upon precisely the same grounds it will enjoin proceedings in other courts. *Montgomery v. Whitworth*, 1 Coop. Ch. (Tenn.) 174.

[a] "It is well-settled law that a decree may be set aside when procured by fraud, accident, or mistake without fault on the part of the party aggrieved thereby, . . . as where an appearance was entered by an unauthorized attorney, and a decree procured on such appearance; so where a decree was procured without the concurring

steps necessary to give the chancery court jurisdiction, and such omission was kept from view by false recitals; so where the name of a party was signed to an appeal bond without his authority, and judgment taken thereon in the supreme court; so where an ex parte judgment on motion was taken in the supreme court against an officer for non-return of an execution for too large an amount, the motioner concealing the fact of certain payment; so where, in a case carried to the supreme court on a bond for appeal executed after the time for procuring the appeal had expired, the supreme court erroneously took jurisdiction, and rendered judgment; so where the satisfaction of a judgment of the supreme court was erroneously set aside by that court upon an ex parte application; so where the supreme court rendered a decree upon the false statement of an appellee that the appellant had abandoned his appeal." *McTeer v. Briscoe* (Tenn.), 61 S. W. 564.

76. **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *Graver v. Faurot*, 64 Fed. 241, *reversed*, 76 Fed. 257, 22 C. C. A. 156. **Ala.**—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209; *Powell v. Stewart*, 17 Ala. 719. **Ark.**—*Corney v. Corney*, 108 Ark. 415, 159 S. W. 20; *Andrews v. Fenter*, 1 Ark. 186, 197. **Ill.**—*Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156. **Ia.** *Fulliam v. Drake*, 105 Iowa 615, 75 N. W. 479. **Ky.**—*Moffett v. White*, 1 Litt. 324. **La.**—*Gusman v. De Poret*, 33 La. Ann. 333. **Mich.**—*Miller v. Morse*, 23 Mich. 365. **Miss.**—*Desearn v. Babers*,



not arising in the former case.<sup>77</sup> Accordingly, equity will not disturb a judgment at law on account of any defense that has been tried, whether legal<sup>78</sup> or equitable.<sup>79</sup> If, however, a party is prevented from fully exhibiting his case by fraud or mistake, he will not be denied relief because the fact on which his defense depended was technically at issue in the original proceeding.<sup>80</sup>

Where a party moves for a new trial and fails, he cannot obtain relief in equity on the same facts.<sup>81</sup> The same is true where a motion

62 Miss. 421. **Mo.**—*Hamilton v. McLean*, 169 Mo. 51, 68 S. W. 930, 139 Mo. 678, 41 S. W. 224. **Neb.**—*Slater v. Shirling*, 51 Neb. 108, 70 N. W. 493, 68 Am. St. Rep. 414. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. **N. J.**—*Isham v. Cooper*, 56 N. J. Eq. 398, 37 Atl. 462. **N. Y.**—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. **Ohio.**—*Reynolds v. Reynolds' Admr.*, 3 Ohio 268. **Okl.**—*Estes v. Timmons*, 12 Okla. 537, 73 Pac. 303. **Tenn.**—*Evans v. International Trust Co.*, 59 S. W. 373. **Utah.**—*Mosby v. Gisborn*, 17 Utah 257, 54 Pac. 121. **Vt.**—*Camp v. Ward*, 49 Vt. 296, 37 Atl. 747, 60 Am. St. Rep. 929; *Continental Life Ins. Co. v. Currier*, 58 Vt. 229, 4 Atl. 866. **Va.**—*Norris v. Hamer*, 2 Leigh (29 Va.) 334, 21 Am. Dec. 631. **Wash.**—*Wingard v. Jamison*, 2 Wash. Ter. 402, 7 Pac. 863. **W. Va.**—*Farmers & Shippers, etc. Warehouse Co. v. Pridemore*, 55 W. Va. 451, 47 S. E. 258; *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799; *Bias v. Vickers*, 27 W. Va. 456. **Wyo.**—*Harden v. Card*, 17 Wyo. 210, 97 Pac. 1075. **Irish.** *Bateman v. Willoe*, 1 Sch. & Lef. 201.

[a] "I do not know," says Lord Redesdale in *Bateman v. Willoe*, 1 Sch. & Lef. (Irish) 201, "that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." To same effect, *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91.

[b] An adverse ruling of the court rendering the judgment upon the question of its want of jurisdiction is res judicata of the question and these grounds cannot be urged in equity as ground for setting aside the judgment. *Miller v. Owens*, 55 Colo. 88, 133 Pac. 141.

Insufficiency of the complaint or declaration as ground for relief, see *infra*, XV, E, 4, b, (III).

77. **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Graver v. Faurot*, 64 Fed. 241, *reversed*, 76 Fed. 257, 22 C. C. A. 156. **N. Y.** *Ross v. Wood*, 70 N. Y. 8; *Simpson v. Hart*, 1 Johns. Ch. 91. **Irish.**—*Bateman v. Willoe*, 1 Sch. & Lef. 201.

[a] If some new matter not considered at law which constitutes a sufficient ground for setting aside a judgment when taken in connection with the matter urged at law, has since come to the knowledge of the petitioner, equity will grant relief. *Hoffmann v. Burris*, 210 Ill. 587, 71 N. E. 584. See *infra*, XV, E, 5, e, (IV); XV, E, 12.

78. **U. S.**—*Tompkins v. Drennen*, 56 Fed. 694, 6 C. C. A. 83, 13 U. S. App. 308; *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 71 Fed. 826. **Cal.**—*Barnett v. Kilbourne*, 3 Cal. 327. **Ky.**—*Moffett v. White*, 1 Litt. 324. **Mo.** *Bassett v. Henry*, 34 Mo. App. 548, 558. **N. J.**—*Amey v. Calkins* (N. J. Eq.), 19 Atl. 388. **N. C.**—*Peace v. Nailing*, 16 N. C. 289. **Tenn.**—*Reeves v. Hogan*, *Cooke* 175, 5 Am. Dec. 684.

79. **Ala.**—*Powell v. Stewart*, 17 Ala. 719. **Ark.**—*Hempstead v. Watkins*, 6 Ark. 317, 358, 42 Am. Dec. 696. **Ill.** *Abrams v. Camp*, 4 Ill. 290. **Ky.**—*Harlan v. Wingate*, 2 J. J. Marsh. 138; *Moffett v. White*, 1 Lit. 324; *Morrison's Exr. v. Hart*, 2 Bibb 4, 4 Am. Dec. 663. **Tenn.**—*Click v. Gillespie*, 4 Hayw. 4; *Reeves v. Hogan*, *Cooke* 175, 5 Am. Dec. 684.

[a] An unsuccessful attempt to assert at law a purely equitable defense does not prejudice the right to relief in equity. *Howell v. Motes*, 54 Ala. 1. 80. *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317.

Fraud preventing presentation of party's case or defense as ground for relief, see *infra*, XV, E, 6, b, (III).

81. *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156.

[a] An adverse decision upon an application for new trial is final, and

to vacate or set aside,<sup>82</sup> or where a motion to strike out a judgment,<sup>83</sup> has been made and denied.

As the truth of the averments in the pleadings is directly involved and determined by the judgment rendered, it is not a ground for relief in equity that the allegations in the pleadings are untrue.<sup>84</sup> The same is true of the evidence in the case. Equity will not set aside a judgment on the ground that the evidence was false in fact and that this was known to the party obtaining the judgment.<sup>85</sup>

**3. Where Judgment Is Void.**—a. *In General.*—Where a judgment is void, equity will vacate or enjoin it in a proper case.<sup>86</sup> The

equity will not thereafter order a new trial at law upon the same grounds.

**U. S.**—Hendrickson v. Bradley, 85 Fed. 508, 29 C. C. A. 303; Folsom v. Ballard, 70 Fed. 12, 16 C. C. A. 593. **Mich.** Gray v. Barton, 62 Mich. 186, 28 N. W. 813. **Mo.**—Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365, 375. **Tex.** Metzger v. Wendler, 35 Tex. 378. *Compare*, Bryorly v. Clark, 48 Tex. 345.

**82. Ark.**—Ward v. Derrick, 57 Ark. 500, 22 S. W. 93. **Idaho.**—Bernhard v. Idaho Bank & Trust Co., 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120.

**Ill.**—Hofmann v. Burris, 210 Ill. 587, 592, 71 N. E. 584. **Ind. Ter.**—Stewart v. Snow, 5 Ind. Ter. 126, 82 S. W. 696. **Wash.**—Boylan v. Boek, 60 Wash. 423, 111 Pac. 454; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159; Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874; McCord v. McCord, 24 Wash. 529, 64 Pac. 748.

[a] Where a motion to set aside a default had been abandoned, equity will grant relief in a proper case. State Ins. Co. v. Waterhouse, 78 Iowa 674, 43 N. W. 611.

[b] In California, an adverse decision on a motion to vacate a judgment is not a bar to a subsequent suit to vacate the judgment for the same cause. "It would seem . . . the correct practice would be to move promptly under section 473 of the Code of Civil Procedure, and if defeated in that proceeding to commence a separate action for relief upon the ground of the plaintiff's fraud." *Estudillo v. Security Loan, etc. Co.*, 149 Cal. 556, 87 Pac. 19.

**Effect of relief by motion to set aside or vacate on right to equitable relief generally, see *supra*, XV, C, 6, b, (II).**

**83. Leaverton v. Albert**, 116 Md. 252, 81 Atl. 601.

**84. Garrett Biblical Inst. v. Minard**, 82 Kan. 338, 108 Pac. 80; *Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 735, 106 Pac. 1079; *Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873; *Furbush v. Collingwood*, 13 R. I. 720.

[a] A judgment rendered on a complaint, containing allegations which are false and were made with a knowledge of their falsity, is fraudulently obtained and will be set aside in equity, where plaintiff had no actual notice of the pendency of the action. *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. *Contra*, *Cassady v. Norris*, 118 Ark. 449, 177 S. W. 10. Fraud in procuring judgment as ground for equitable relief therefrom, see generally *infra*, XV, E, 6, b, (II).

**False answer as concealment of facts furnishing ground for equitable relief, see *infra*, XV, E, 6, b, (V).**

**85. Turner v. Turner**, 33 Wash. 118, 74 Pac. 55.

**As to vacation on the ground of perjured evidence, see 4 STANDARD PROC. 1476.**

**86. Colo.**—Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. 794. **Ga.** *Jordan v. J. A. Callaway & Co.*, 138 Ga. 209, 75 S. E. 101. But see *Hart v. Lazaron*, 46 Ga. 396. **Ill.**—*Nelson v. Rockwell*, 14 Ill. 375; *Follansbee v. Scottish-Am. Mort. Co.*, 7 Ill. App. 486. See *Pfeiffer v. McCullough*, 115 Ill. App. 251, stating that the holding that an injunction will not lie to restrain the collection of a void judgment applies only where the judgment creditor threatens to enforce its collection and nobody is involved except the judgment creditor and the judgment debtor. *Compare*, *Alabama Ins. Co. v. Kingman*, 21 Ill. App. 493. **Ind.**—*Hart v. O'Rourke*, 151 Ind. 205, 51 N. E. 330; *Fitch v. Byall*, 149 Ind. 554, 49

fact of the existence of an adequate remedy at law in such cases,<sup>87</sup> and the necessity of the judgment's working some injustice on the complaining party,<sup>88</sup> and of the complaining party having a meritorious defense,<sup>89</sup> are hereinbefore discussed.

b. *For Want of Jurisdiction*.—(I.) In General. —The want of jurisdiction in a court to render a particular judgment is a ground for relief by bill in equity.<sup>90</sup>

N. E. 455; *Bunier v. Miller*, 105 Ind. 309, 4 N. E. 867; *Cain v. Goda*, 84 Ind. 209; *Carl v. Mathewey*, 60 Ind. 202. **Ind.**—*Warrall v. Chase & Co.*, 144 Iowa 665, 123 N. W. 338; *Iowa Savings & Loan Assn. v. Chase*, 118 Iowa 51, 91 N. W. 807; *Burand v. Northwestern L. & S. Co.*, 112 Iowa 296, 83 N. W. 972; *Leonard v. Capital Insurance Co.*, 101 Iowa 482, 70 N. W. 629; *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611. **Kan.**—*Missouri Pac. R. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Chambers Bros. & Co. v. King Wrought-Iron Bridge Man.*, 16 Kan. 270. **Miss.**—*Oliver v. Baird*, 90 Miss. 718, 44 So. 35; *Thomas v. Phillips*, 4 Smed. & M. 358, 427. **Mont.**—*Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798. **Neb.**—*Rice v. Allen*, 69 Neb. 349, 95 N. W. 704. **Ore.**—*Hanley v. Medford*, 56 Ore. 171, 108 Pac. 188; *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. **Tenn.**—*Murphy v. Johnson*, 107 Tenn. 552, 64 S. W. 894; *McTeer v. Briscoe*, 61 S. W. 564; *Wooten v. Daniel*, 16 Lea 156; *Nicholson v. Patterson*, 6 Humph. 394; *Caruthers v. Hartsfield*, 3 Yerg. 366; *Coltart v. Ham*, 2 Tenn. Ch. 356. **Tex.**—*Cotton v. Rhea*, 106 Tex. 220, 163 S. W. 2; *Witt v. Kaufman*, 25 Tex. Sup. 384; *Houston L. & W. T. R. Co. v. Skeeter Bros.*, 44 Tex. Civ. App. 105, 98 S. W. 1064; *Byars v. Justin*, 2 Wills. Civ. Cas., §689. **W. Va.**—*Kanawha & O. Railway Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865. **Wyo.**—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677.

[a] Notwithstanding the fact that a void judgment appears to be valid and regular on its face it may be enjoined. **Kan.**—*McNeill v. Edie*, 24 Kan. 108; *Chambers Bros. & Co. v. King Wrought Iron Bridge Man.*, 16 Kan. 270. **Mo.**—*Lillibridge v. Ross*, 59 Mo. 217. **Neb.**—*Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559, holding an action to enjoin the enforcement of a void judgment will lie where the invalidity is not disclosed by the record.

[b] Where the nullity of a judgment is affirmatively disclosed by the record, it may be enjoined. *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Cotton v. Rhea*, 106 Tex. 220, 163 S. W. 2.

[c] Where a person is joined as plaintiff without his consent, a judgment rendered is void as to him and may be enjoined. *Lillibridge v. Ross*, 59 Mo. 217. Enjoining judgment in an action brought by attorney without authority, see *infra*, XV, E, 3, b, (III).

As to the general limitations on the right to relief in equity, see *supra*, XV, C.

87. See *supra*, XV, C, 6.

88. See *supra*, XV, C, 2.

89. See *supra*, XV, C, 4.

90. **Cal.**—*Lapham v. Campbell*, 61 Cal. 296; *Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 Pac. 538; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. **Colo.**—*Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290. **Ill.**—*Kochman v. O'Neill*, 202 Ill. 110, 66 N. E. 1047; *Owens v. Ranstead*, 22 Ill. 161; *Nelson v. Rockwell*, 14 Ill. 375; *Propst v. Meadows*, 13 Ill. 157, 169; *Dickinson v. Hoffman*, 90 Ill. App. 83; *Peoria, D. & E. R. Co. v. Duggan*, 32 Ill. App. 351; *Follansbee v. Scottish-Am. Mort. Co.*, 7 Ill. App. 486, 498. **Ia.**—*Blain v. Dean*, 160 Iowa 708, 142 N. W. 418; *Iowa Sav. & Loan Assn. v. Chase*, 118 Iowa 51, 91 N. W. 807; *Heath v. Heflhill*, 106 Iowa 131, 76 N. W. 522; *Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; *Ashlock v. Ashlock*, 52 Iowa 219, 1 N. W. 594, 3 N. W. 131. **Kan.**—*Olson v. Nunnally*, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296. **Mich.**—*Wileke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394. **Minn.**—*Magin v. Lamb*, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. **Miss.**—*Hilliard v. Chew*, 76 Miss. 763, 25 So. 489. **Mont.**—*Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798. **Neb.**—*Radzuweit v.*



(II.) Absence of Legal Service.—(A.) IN GENERAL.<sup>91</sup>—When without service of process, either actual or constructive, no opportunity is given a party to be heard in his defense, equity will set aside a judgment against him.<sup>92</sup> And as an invalid service is the same as no service whatever,<sup>93</sup> if a party has not been legally served with process, and there has been no appearance by him,<sup>94</sup> he may have a judgment against

Watkins, 53 Neb. 412, 73 N. W. 679. N. Y.—Reich v. Cochran, 102 App. Div. 615, 105 App. Div. 542, 94 N. Y. Supp. 404; Barron v. Feist, 51 Misc. 589, 101 N. Y. Supp. 72. Ore.—George v. Nowlan, 38 Ore. 537, 64 Pac. 1. Tenn.—Murphy v. Johnson, 107 Tenn. 552, 64 S. W. 891. Tex.—Smith v. Deweese, 41 Tex. 594; Houston E. & W. T. R. Co. v. Skeeter Bros., 44 Tex. Civ. App. 165, 98 S. W. 1064; Graham v. East Texas L. & I. Co. (Tex. Civ. App.), 50 S. W. 579; Byars v. Justin, 2 Wills. Civ. Cas., §§686, 689.

Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6.

[a] Facts Showing Want of Jurisdiction Must Be Dehors the Record. When the attack is based upon the alleged want of jurisdiction of a judgment defendant, the facts upon which the attack is made must be extrinsic to the record, for the reason that it is presumed the court deciding it had jurisdiction and that the record is true. This rule has no application to records showing on their face that the court was without jurisdiction. Welsh v. Koch, 4 Cal. App. 571, 88 Pac. 604.

91. Defect in service as ground for relief, see *infra*, XV, E, 4, b, (II).

92. Ala.—Stubbs v. Leavitt, 30 Ala. 352. Cal.—Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007. Colo.—Nelson v. Chittenden, 53 Colo. 30, 123 Pac. 656. Conn.—Jeffery v. Fitch, 46 Conn. 601; Blakeslee v. Murphy, 44 Conn. 188. Fla.—Purviance v. Edwards, 17 Fla. 140. Ga.—Wade v. Watson, 133 Ga. 608, 66 S. E. 922, forged acknowledgment of service to bill of exceptions. Idaho.—Bernhard v. Idaho Bank & T. Co., 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120. Ill.—Weaver v. Poyer, 70 Ill. 567; Owens v. Ranstead, 22 Ill. 161. Ind.—Dobbins v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626. Ia.—Uehlein v. Burk, 119 Iowa 742, 94 N. W. 243 (denying relief as the party was not injured); State Ins. Co. v. Waterhouse, 78 Iowa 674, 43 N. W. 611; Arnold v. Hawley, 67 Iowa

313, 25 N. W. 259. La.—Bird v. Cain, 20 La. Ann. 248; Keith v. Renard & Co., 18 La. Ann. 734. Minn.—Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. Miss.—Joslin v. Coffin, 5 How. 539. Mo.—Capitain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466. Tex.—San Bernardino Townsite Co. v. Hocker (Tex. Civ. App.), 176 S. W. 644. Utah.—Mosby v. Gisborn, 17 Utah 257, 280, 54 Pac. 121. Wis.—See Merritt v. Baldwin, 6 Wis. 439.

Effect of remedy at law upon right to relief, see *supra*, XV, C, 6.

Necessity for meritorious defense, see *supra*, XV, C, 4.

[a] In South Carolina an action on the equity side of the court to set aside a judgment on the ground that it is a nullity by reason of the fact that the summons was not served on the defendant cannot be maintained, unless the complaint alleges some other fact entitling the plaintiff to equitable relief. New York Life Ins. Co. v. Mobley, 90 S. C. 552, 73 S. E. 1032. See also Crocker v. Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831.

93. See generally the title "Service of Process and Papers."

94. U. S.—Kibbe v. Benson, 17 Wall. 624, 21 L. ed. 741. Ala.—Hauser v. Foley & Co., 190 Ala. 437, 67 So. 252; Fields v. Henderson, 161 Ala. 534, 50 So. 56; McDonald v. Cawhorn, 152 Ala. 357, 44 So. 395. Cal.—Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232 (holding the remedy under Code Civ. Proc., §473, inadequate); Martin v. Parsons, 49 Cal. 94. Colo.—Watkins v. Perry, 25 Colo. App. 425, 139 Pac. 551. Idaho.—Bernhard v. Idaho Bank & Trust Co., 21 Idaho 598, 123 Pac. 481, Ann. Cas. 1913E, 120. Ind.—Graham v. Loh, 32 Ind. App. 183, 69 N. E. 474. Ia.—Gaar, Scott & Co. v. Taylor, 128 Iowa 636, 105 N. W. 125; Day v. Goodwin, 104 Iowa 374, 73 N. W. 864; York v. Boardman, 40 Iowa 57 (notice held sufficient); Newcomb v.

him set aside by a proceeding in equity, notwithstanding the judgment recites the fact of service.<sup>95</sup>

(B.) FALSE RETURN.<sup>96</sup>—While the federal courts<sup>97</sup> and many of the state courts,<sup>98</sup> adhere to the doctrine that the return of the sheriff is

Dewey, 27 Iowa 381. **Kan.**—Chambers Bros. & Co. v. King Wrought Iron Bridge Man., 16 Kan. 270, where service was on bookkeeper of corporation. **La.** Ridge v. Alter, 14 La. Ann. 866. **Mich.** Wileke v. Duross, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394. **Minn.** Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627; Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. **Miss.**—Wellons v. Newell, 7 Smed. & M. 399; Walker v. Gilbert, Freem. Ch. 85. **Mo.**—Mullins v. Rieger, 169 Mo. 521, 70 S. W. 4, 92 Am. St. Rep. 651; United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571. **Mont.**—State ex rel. Happel v. District Court, 38 Mont. 166, 99 Pac. 291; Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798. **Tenn.**—Walker v. Day, Griswold & Co., 8 Baxt. 77; Berdanatti v. Sexton, 2 Tenn. Ch. 699. **Tex.**—Galveston, H. & S. A. R. Co. v. Ware, 74 Tex. 47, 11 S. W. 918; Graham v. East Texas L. & Imp. Co. (Tex. Civ. App.), 50 S. W. 579. **Wash.**—State ex rel. Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724. **W. Va.**—Kanawha & O. Railway Co. v. Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

**Remedy at law as affecting right to relief, see *supra*, XV, C, 6.**

[a] **Where the service of summons is a nullity, a judgment thereupon will be set aside in equity.** **Colo.**—Nelson v. Chittenden, 53 Colo. 30, 123 Pac. 656, service by attorney in the case. **Mont.**—Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798, service on Sunday. **Utah.**—Mosby v. Gisborn, 17 Utah 257, 54 Pac. 121, order of publication fatally defective.

[b] **Where the sheriff serving the process was the plaintiff in the law action, the judgment recovered is void, and will be enjoined in equity.** **Knott v. Jarboe, 1 Mete. (Ky.) 704.**

[c] **Notice to One Joint Plaintiff.** A joint bill by two parties to set aside a decree for fraud, the fraud consisting in want of notice, cannot be sustained if either did in fact have notice, or waived the notice by appear-

ance. **Berdanatti v. Sexton, 2 Tenn. Ch. 699.**

[d] **Where Party Not Bound by Notice.**—If a party has notice under such circumstances that it is unreasonable to hold him bound by the notice, and the judgment is unjust, equity will grant relief. **Peoria D. & E. R. Co. v. Duggan, 32 Ill. App. 351.**

**Service by publication on a false affidavit, see *infra*, XV, E, 6, b, (III).**

95. **Ia.**—Newcomb v. Dewey, 27 Iowa 381. **Miss.**—Wilson v. Montgomery, 14 Smed. & M. 205. **Mo.**—Captain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466. **Mont.**—Hauswirth v. Sullivan, 6 Mont. 203, 9 Pac. 798. **Tenn.**—Walker v. Day, Griswold & Co., 8 Baxt. 77.

[a] If the court did not in fact have jurisdiction its judgment is a nullity regardless of what it decided with respect to its jurisdiction. **Newcomb v. Dewey, 27 Iowa 381.**

96. **Fraud in procuring judgment generally as ground for relief, see *infra*, XV, E, 6, b, (II).**

97. **Knox Co. v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586; Walker v. Robbins, 14 How. 584, 14 L. ed. 552; King v. Davis, 137 Fed. 222.**

98. **Del.**—Emerson v. Gray, 63 Atl. 768. **Fla.**—Lewter v. Hadley, 68 Fla. 131, 66 So. 567. **Ind.**—Miedreich v. Lauenstein, 172 Ind. 140, 86 N. E. 963, 87 N. E. 1029; Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687; Cully v. Shirk, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414. **Ky.**—Taylor v. Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135. **Mo.**—Ellis v. Nuckols, 237 Mo. 290, 140 S. W. 867; Reiger v. Mullins, 210 Mo. 563, 109 S. W. 26, 124 Am. St. Rep. 755; Smoot v. Judd, 184 Mo. 508, 83 S. W. 481, *overruling*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; McClanahan v. West, 100 Mo. 399, 13 S. W. 671. **S. C.**—See New York Life Ins. Co. v. Mobley, 90 S. C. 552, 73 S. E. 1032, plaintiff has an adequate remedy at law. **Va.**—Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777. **W. Va.**—Stewart v. Stewart, 27 W. Va. 167.

conclusive and cannot be impeached in equity, except where the plaintiff in the judgment advised or procured the false return to be made, or knowing of the false return, nevertheless took judgment upon it, or in other words, except where the plaintiff in judgment has been guilty of fraud in the concoction of the judgment,<sup>99</sup> in most states the return of the officer is not conclusive in a proceeding in equity to set aside or enjoin the judgment, and equity will set aside or enjoin the judgment where it appears to have been based on a false return of the officer as to service of process.<sup>1</sup> In the latter jurisdictions, the remedy at law by action against the officer who served the writ is not deemed a plain, speedy and adequate remedy which prevents relief.<sup>2</sup>

Where a return is fraudulently altered by plaintiff's counsel, so as to show service on parties not served, equity will relieve against the judgment.<sup>3</sup>

[a] In Kansas the sheriff's return is conclusive as to matters that fall within his personal knowledge, unless the falsity of the return is disclosed by other parts of the record. As to facts upon which jurisdiction depends not within the personal knowledge of the officer, his return is not conclusive and may be impeached in equity. *Goddard v. Harbour*, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608, *disapproving Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840; *McNeill v. Edie*, 24 Kan. 108; *Chambers Bros. & Co. v. King Wrought Iron Bridge Co.*, 16 Kan. 270; *Eastwood v. Carter*, 9 Kan. App. 471, 61 Pac. 510.

99. Fraud need be alleged only where, in the absence of fraud, the sheriff's return is conclusive. *National Metal Co. v. Greene Consol. Copper Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062.

[a] The remedy of the plaintiff where a judgment was obtained upon the false return of a sheriff is an action at law on the sheriff's official bond. *Lewter v. Hadley*, 68 Fla. 131, 66 So. 567; *Reiger v. Mullins*, 210 Mo. 563, 109 S. W. 26, 124 Am. St. Rep. 755; *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481.

1. Ala.—*Dunklin v. Wilson*, 64 Ala. 162. Ariz.—*National Metal Co. v. Greene Consol. Copper Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062. Ark.—*State v. Hill*, 50 Ark. 458, 8 S. W. 401; *Ryan & Co. v. Boyd*, 33 Ark. 778. Cal.—*Lapham v. Campbell*, 61 Cal. 296. Colo.—*Great West Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac.

771, 13 Am. St. Rep. 204; *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. Ill.—*Hilt v. Heimberger*, 235 Ill. 235, 85 N. E. 304; *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188; *Cassidy v. Automatic Time Stamp Co.*, 185 Ill. 431, 56 N. E. 1116; *Owens v. Ranstead*, 22 Ill. 161. Compare, *Hunter v. Stoneburner*, 92 Ill. 75. Ia.—See *Wyland v. Frost*, 75 Iowa 209, 39 N. W. 241, holding the evidence insufficient conceding the rule to be as stated in the text for the purpose of this case. Ia.—*Sloan v. Menard*, 5 La. Ann. 218. Minn. *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452. Miss.—*Duncan v. Gerdine*, 59 Miss. 550. Mont.—*Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798. Neb. *Larr v. Stein*, 97 Neb. 488, 150 N. W. 655; *Westman v. Carlson*, 86 Neb. 847, 126 N. W. 515; *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573. Ore.—*Huntington v. Crouter*, 33 Ore. 408, 54 Pac. 208, 72 Am. St. Rep. 726. R. I.—*Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873. Tenn.—*Ridgeway v. Bank of Tennessee*, 11 Humph. 523. Tex.—*Hamblen v. Knight*, 60 Tex. 36; *Randall v. Collins*, 58 Tex. 231; *State v. Dashiell*, 32 Tex. Civ. App. 454, 74 S. W. 779. Wash.—*Johnson v. Gregory & Co.*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907.

2. *Owens v. Ranstead*, 22 Ill. 161; *Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873. See generally the cases cited in the preceding note.

3. *Wilson v. Montgomery*, 14 Smed. & M. (Miss.) 205.



(III.) **Unauthorized Appearance.** — A judgment against a person upon an unauthorized appearance by an attorney may be set aside by a bill in equity.<sup>4</sup> So also, a judgment in a suit brought by an attorney without authority from the plaintiff will be enjoined in equity where the attorney is unable to respond in damages.<sup>5</sup>

c. *Because of Incapacity of Judge.* — A judgment may be annulled because of the legal incapacity of the trial judge to preside and try the case.<sup>6</sup>

d. *Judgment in Violation of Injunction.* — A judgment taken in violation of an existing injunction is, it has been held, void, and may be enjoined in equity.<sup>7</sup>

#### 4. Defects, Errors and Irregularities in Proceedings or Judgment.

a. *In General.* — Equity will not relieve against judgments<sup>8</sup> on ac-

4. **U. S.**—United States v. Mani, 196 Fed. 160; United States v. Aaker-vik, 180 Fed. 137. **Ga.**—Bigham v. Kistler, 114 Ga. 453, 460, 40 S. E. 303; Longman v. Bradford, 108 Ga. 572, 33 S. E. 916. **Ill.**—Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Lancaster v. Snow, 184 Ill. 163, 56 N. E. 416; Anderson v. Hawke, 115 Ill. 33, 3 N. E. 566; Nelson v. Rockwell, 14 Ill. 375. **Ia.**—Walsh v. Doran, 145 Iowa 110, 123 N. W. 999; Uehlein v. Burk, 119 Iowa 742, 94 N. W. 243 (denying relief, there being no injury); Bryant v. Williams, 21 Iowa 329; Harshy v. Blackmarr, 20 Iowa 161, 172, 89 Am. Dec. 520; Piggott v. Addicks, 3 Greene 427, 56 Am. Dec. 547. **Kan.** Electric Plaster Co. v. Blue Rapids Tp., 81 Kan. 730, 106 Pac. 1079. **Ky.** Cummins v. Kennedy, 4 J. J. Marsh. 642. **La.**—Ridge v. Alter, 14 La. Ann. 866. **N. J.**—Dringer v. Receiver of Erie Ry., 42 N. J. Eq. 573, 8 Atl. 811; Gifford v. Thorn, 9 N. J. Eq. 702, 722. **N. Y.**—Ormsby v. Jacques, 12 Hun 443. **Tenn.**—Boro v. Harris, 13 Lea 36; Me-Teer v. Briscoe, 61 S. W. 564; Berdantti v. Sexton, 2 Tenn. Ch. 699. **Wash.** Turner v. Turner, 33 Wash. 118, 74 Pac. 55.

**Effect of appearance by unauthorized attorney,** see 2 STANDARD PROC. 559.

[a] *In New Hampshire* equity will not restrain the enforcement of a judgment recovered without notice upon an unauthorized appearance in his behalf of a responsible attorney. The party's remedy is by action at law against the attorney. Everett v. Warner Bank, 58 N. H. 340; Smyth v. Balch, 40 N. H. 363; Banton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144.

5. Smyth v. Balch, 40 N. H. 363; Latimer v. Latimer, 22 S. C. 257.

6. **La.**—Lanfear v. Mestier, 18 La. Ann. 497, 89 Am. Dec. 658. **Tenn.** Smith v. Pearce, 6 Baxt. 72, by reason of relationship to a party. **Tex.**—Chambers v. Hodges, 23 Tex. 104.

[a] **An award of an interested arbitrator** will be set aside in equity. Milnor & Co. v. Georgia R. & B. Co., 4 Ga. 385.

[b] **Estoppel.**—Where the parties conspire together and have their action tried before one whom they know to be a mere intruder on the judicial bench, and where they appeal the judgment as genuine, equity will not grant relief from the judgment on the petition of one of the perpetrators of the fraud. Blackburn v. Bell, 91 Ill. 434.

**As to grounds of disqualification of judge,** see the title "Judicial Officers."

7. Lee v. Gross, 126 Ind. 102, 25 N. E. 891; Collins v. Fraiser, 27 Ind. 477.

[a] Where a party prosecutes his action to judgment in spite of an injunction against further proceedings in the suit, equity will declare the judgment void and perpetually enjoin its enforcement. Patterson v. Gordon, 3 Tenn. Ch. 18.

8. **U. S.**—Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547; Massachusetts Benefit Life Assn. v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274. **Ala.**—Saunders v. Albritton, 37 Ala. 716; McCollum v. Prewitt, 37 Ala. 573. **Ark.**—Citizens' Bank v. Commercial Nat. Bank, 107 Ark. 142, 155 S. W. 102; Little Rock & Ft. S. R. Co. v. Wells, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560; Scanland v. Mixer, 34 Ark. 354; An-

count of mere errors or irregularities, unless there is also some equitable ground for relief.<sup>9</sup>

b. *Errors in Proceedings.*—(I.) *In General.*—More particularly, equity will not vacate or enjoin a judgment because of errors or irregularities in the proceedings leading up to it.<sup>10</sup> Thus, the im-

draws *v.* Fenter, 1 Ark. 186, 195. **Cal.** Bacon *v.* Bacon, 150 Cal. 477, 490, 89 Pac. 317; Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Logan *v.* Hillegass, 16 Cal. 200; Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639. **Ill.**—Crafts *v.* Hall, 4 Ill. 131; Cantwell *v.* Kimmerle, 179 Ill. App. 66; Klinesmith *v.* Van Bramer, 104 Ill. App. 384; Maher *v.* Title Guar. & T. Co., 95 Ill. App. 365. **Ind.**—Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455; Wilhite *v.* Wilhite, 124 Ind. 226, 24 N. E. 1039; Kleyla *v.* Hasket, 112 Ind. 515, 14 N. E. 387; Edgerton *v.* Comstock, 3 Ind. 383 (error in refusing new trial). **Ia.**—*In re* Culver's Est., 159 Iowa 679, 140 N. W. 878; Shricker *v.* Field, 9 Iowa 366. **La.** Conery *v.* Creditors, 118 La. 864, 43 So. 530; Bird *v.* Cain, 6 La. Ann. 248. **Md.**—Chappell Chemical, etc. Co. *v.* Virginia Sulphur Mines Co., 36 Atl. 260; Fowler *v.* Lee, 10 Gill & J. 358, 363, 32 Am. Dec. 172. **Mo.**—Ellis *v.* Nuckolls, 237 Mo. 290, 140 S. W. 867; Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; Mott *v.* Bernard, 97 Mo. App. 265, 70 S. W. 1093; Missouri, K. & T. R. Co. *v.* Warden, 73 Mo. App. 117. **N. J.**—Brady *v.* Atlantic City, 53 N. J. Eq. 440, 32 Atl. 271; Mechanics Nat. Bank *v.* Burnet Mfg. Co., 33 N. J. Eq. 486; Stratton *v.* Allen, 16 N. J. Eq. 229. **N. Y.**—Holmes *v.* Remsen, 7 Johns. Ch. 286. **N. C.**—Insurance Co. *v.* Scott, 136 N. C. 157, 48 S. E. 581; Stockton *v.* Briggs, 58 N. C. 309. **Ore.** Miller *v.* Shute, 55 Ore. 603, 107 Pac. 467; Froebrieh *v.* Lane, 45 Ore. 13, 22, 76 Pac. 351, 106 Am. St. Rep. 634; George *v.* Nowlan, 38 Ore. 537, 64 Pac. 1. **Pa.**—Eyster's Appeal, 65 Pac. 473. **R. I.**—Furbush *v.* Collingwood, 13 R. I. 720. **S. C.**—McDowall *v.* McDowall, Bailey Eq. 324. **Tenn.**—Whiteside *v.* Latham, 2 Coldw. 91; Glenn *v.* Maguire, 3 Tenn. Ch. 695; Nicholson *v.* Patterson, 6 Humph. 394; Greenlaw *v.* Kernahan, 4 Sneed 371. **Tex.**—Cotton *v.* Rea, 163 S. W. 2; Lester *v.* Gatewood (Tex. Civ. App.), 166 S. W. 389. **Va.**—Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777. **W. Va.**

Grafton & G. R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 73 Am. St. Rep. 799; Harner *v.* Price, 17 W. Va. 523. **Wis.**—John V. Farwell Co. *v.* Hilbert, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235; Merritt *v.* Baldwin, 6 Wis. 439. **Wyo.**—Edwards *v.* Cheyenne, 19 Wyo. 110, 114 Pac. 677, 687. **Eng.**—Patch *v.* Ward, L. R. 3 Ch. App. 203.

See also *infra*, XV, E, 4, b, (I); XV, E, 4, c.

[a] **Defects in judicial proceedings** such as want of appearance, judgment by default, or misconduct and neglect of a curator ad hoc cannot be remedied by an action of nullity. Seymour *v.* Cooley, 9 La. 72.

[b] **An irregular affirmation** of a judgment presents no ground for equitable interference. Roebling Sons Co. *v.* Stevens Elec. Co., 93 Ala. 39, 9 So. 369.

9. **Ark.**—Citizens Bank *v.* Commercial Nat. Bank, 107 Ark. 142, 155 S. W. 102. **Cal.**—Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007. **Wyo.**—Edwards *v.* Cheyenne, 19 Wyo. 110, 114 Pac. 677, 687.

**Necessity that judgment work in-**justice, see *supra*, XV, C, 2.

10. **Ala.**—McCullum *v.* Prewitt, 37 Ala. 573. **Ark.**—Jackson *v.* Woodruff, 57 Ark. 599, 22 S. W. 566; Clopton *v.* Carlross, 42 Ark. 560. **Cal.**—Johnson *v.* Reed, 125 Cal. 74, 57 Pac. 680. **Ga.** Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156. **Ill.**—Maher *v.* Title Guar. & Trust Co., 95 Ill. App. 365. **Ind.**—Shrack *v.* Covault, 144 Ind. 260, 43 N. E. 229; Rhodes Burford Furn. Co. *v.* Mattox, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11. **Ia.**—Mengel *v.* Mengel, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899. **Kan.**—Publishing House of Evangelical Assoc. *v.* Heyl, 61 Kan. 634, 60 Pac. 317. **Ky.**—Covington & C. Bridge Co. *v.* Covington, 30 Ky. L. Rep. 1115, 100 S. W. 269; M'Kean *v.* Read, Litt. Sel. Cas. 395, 12 Am. Dec. 318 (improper assessment of damages). **La.**—McKnight *v.* Connell, 14 La. Ann. 396. **Md.**—Boyd *v.* Chesapeake & Ohio Canal Co., 17 Md. 195, 79 Am. Dec. 646. **Mo.** Mesker *v.* Cornwell, 145 Mo. App. 646.

proper overruling of a motion for a continuance,<sup>11</sup> or the want of a trial by jury,<sup>12</sup> or of findings of fact sufficient to support the judgment,<sup>13</sup> or of service of interrogatories,<sup>14</sup> or a failure of the court to observe its own rules,<sup>15</sup> are not grounds for equitable relief from the judgment.

(II.) **Defects and Irregularities in Process, and Service Thereof.**<sup>16</sup> Mere defects or irregularities in the process,<sup>17</sup> in the affidavit for order of publication,<sup>18</sup> in the service of process,<sup>19</sup> or in the proof of such service,<sup>20</sup> are not of themselves sufficient to warrant equitable relief against the judgment. But where the defect in the service of process is of such a character as to render the service void, the court is without jurisdiction and equity will relieve the party on a proper showing.<sup>21</sup>

(III.) **Defects and Irregularities in Reference to Pleadings.** — Whether a declaration or complaint states facts sufficient to constitute a cause of action is a question to be determined in the original action, and equity will not enjoin a judgment for insufficiency of the initial plead-

123 S. W. 488. N. J.—*Jackson v. Darcy*, 1 N. J. Eq. 194, absence of affidavit of demand when judgment was confessed. N. Y.—*Bush v. O'Brien*, 47 App. Div. 581, 62 N. Y. Supp. 685. Ore.—*Miller v. Shute*, 55 Ore. 603, 107 Pac. 467. S. C.—*Henderson v. Mitchell*, Bailey Eq. 113, 21 Am. Dec. 526. Tex.—*Rooler v. Wooldridge*, 46 Tex. 485.

[a] Interest of a witness is not good ground for an action of nullity. *Cressap v. Winchester*, 6 Rob. (La.) 458.

[b] **Where No Evidence Is Heard.** Rendition of judgment against a defaulting garnishee without hearing evidence is a mere irregularity of procedure which is not relievable in equity. *Mesker v. Cornwell*, 145 Mo. App. 646, 123 S. W. 488.

[c] **Invalidity of a bail bond** given in a criminal case because of failure to follow the wording of the statute, is not one of the causes for which an action will lie to annul a judgment of forfeiture rendered on it on defendant's failure to appear. *Taliaferro v. Steele*, 14 La. Ann. 656.

11. Ark.—*Andrews v. Fenter*, 1 Ark. 186. Tex.—*Western v. Woods*, 1 Tex. 1. Va.—*Syme v. Montague*, 4 Hen. & M. (14 Va.) 180.

12. *Blanck v. Speckman*, 23 La. Ann. 146; *Chappell Chemical & Fert. Co. v. Sulphur Mines Co.* (Md.), 36 Atl. 260.

13. *Petalla v. Fitle*, 33 Neb. 756, 51 N. W. 131.

14. *McKnight v. Connell*, 14 La. Ann. 396.

15. A failure of the court to ob-

serve its own rules is but error and equity will not set aside a judgment on this ground. *Klinesmith v. Van Bramer*, 104 Ill. App. 384.

16. See generally the titles "Process;" "Service of Process and Papers."

17. Cal.—*Logan v. Hillegass*, 16 Cal. 200. Conn.—See also *Gallup v. Manning*, 48 Conn. 25; *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252. Ind.—*McCormick v. Webster*, 89 Ind. 105. Ia. *Charles C. Taft Co. v. B. Bounani*, 110 Iowa 739, 81 N. W. 469, incorrect naming of defendant's capacity. Mo. *Hunter v. Kansas City Safe Dep. & S. Bank*, 158 Mo. 262, 58 S. W. 1053.

18. *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1.

**Falsity of affidavit** as ground for relief, see *infra*, XV, E, 6, b, (II).

19. Ala.—*McDonald v. Cawhorn*, 152 Ala. 357, 44 So. 395. Cal.—*Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. Ind. *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748; *McCormick v. Webster*, 89 Ind. 105. Va.—*Chisholm v. Anthony*, 2 Hen. & M. (12 Va.) 13, service on wrong person.

20. Cal.—*Logan v. Hillegass*, 16 Cal. 200; *Pico v. Sunol*, 6 Cal. 294. Ill. *Peoria D. & E. R. Co. v. Duggan*, 32 Ill. App. 351; *Alabama Ins. Co. v. Kingman & Co.*, 21 Ill. App. 493. Wash. *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139, where the affidavit stated a conclusion instead of the facts.

21. See *supra*, XV, E, 3, b, (II).



ing.<sup>22</sup> Likewise, the fact that no declaration was ever filed,<sup>23</sup> or that it was filed on a legal holiday,<sup>24</sup> furnishes no ground for equitable relief from the judgment subsequently rendered in the proceedings. Nor do mere defects and irregularities in the pleadings generally form a basis for a suit to annul the judgment.<sup>25</sup>

(IV.) **Errors as to the Evidence.** — A bill will not lie in equity to enjoin the enforcement of a judgment on the ground of errors in the admission or rejection of evidence.<sup>26</sup> Nor will equity grant a new trial at law on the ground that the evidence does not support the judgment at law or is insufficient.<sup>27</sup> And the mere fact that the evidence offered is not such as the appellate court would have found sufficient on an appeal from the judgment or decree is not determinative of an equity suit to set it aside.<sup>28</sup>

(V.) **Errors and Irregularities as to the Jury.**<sup>29</sup> — Misconduct of the

22. Cal.—*Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91. Ind.—*Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748. Ia.—*Charles C. Taft Co. v. B. Bounani*, 110 Iowa 739, 81 N. W. 469. But see *Hall v. Melvin*, 62 Ark. 439, 35 S. W. 1109, 54 Am. St. Rep. 301.

**Failure to present cause of action or defense at law as ground for equitable relief**, see *infra*, XV, E, 5.

23. *Terry v. Dickinson*, 75 Va. 475.

24. *Peterson v. Weissbein*, 65 Cal. 42, 2 Pac. 730.

25. Ala.—*Mayer v. Calera Land Co.*, 133 Ala. 554, 31 So. 938. Ark.—*Church v. Gallie*, 75 Ark. 507, 88 S. W. 307, nonjoinder of the husband of defendant. Ind.—*McCormick v. Webster*, 89 Ind. 105, pleading improperly signed. Ia.—*Charles C. Taft Co. v. Bounani*, 110 Iowa 739, 81 N. W. 469, improper description of defendant as a co-partnership. Mo.—*Hunter v. Kansas City Safe Deposit, etc. Bank*, 158 Mo. 262, 58 S. W. 1053, where insane defendant was not named in the caption. Neb.—*Johnson v. Jones*, 2 Neb. 126. Tenn.—*Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781. Tex.—*Moore v. Britton*, 15 Tex. Civ. App. 237, 38 S. W. 528, absence of a prayer for relief. Wis.—*John V. Farwell v. Hilbert*, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235, where the answer of confession on which judgment is rendered is signed by the attorney for the plaintiff. Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687.

26. Ala.—*Thomas v. Hearn*, 2 Port. 262. Ga.—*Gibson v. Cohen*, 85 Ga. 850, 11 S. E. 141. Ind.—*Edgerton v. Com-*

*stock*, 3 Ind. 383. N. J.—*Vaughn v. Johnson*, 9 N. J. Eq. 173. N. C.—*Stockton v. Briggs*, 58 N. C. 309. S. C.—*Hunt v. Coachman*, 6 Rich. Eq. 286. Tenn.—*Hembree v. White*, 2 Overt. 202. Tex.—*Long v. Smith*, 39 Tex. 160; *Rotzein v. Cox*, 22 Tex. 62. Va.—*Ambler v. Wyld*, 2 Wash. (2 Va.) 36. Wis.—*Merritt v. Baldwin*, 6 Wis. 439.

27. Ala.—*Powell v. Stewart*, 17 Ala. 719. Cal.—*Pico v. Sunol*, 6 Cal. 294. Colo.—*Williams v. Carr*, 4 Colo. App. 368, 36 Pac. 646. Ill.—*West Chicago Park Comrs. v. Riddle*, 151 Ill. App. 487. Ind.—*Martin v. Pifer*, 96 Ind. 245. Ia.—*Geyer v. Douglass*, 85 Iowa 93, 52 N. W. 111. Kan.—*Burke v. Wheat*, 22 Kan. 722. Ky.—*Nashville C. & St. L. R. Co. v. Mattingly*, 101 Ky. 219, 40 S. W. 673. La.—*Miller v. Bearb*, 134 La. 893, 64 So. 822; *Landry v. Bertrand*, 48 La. Ann. 48, 19 So. 126; *Howell v. New Orleans*, 28 La. Ann. 681. Mo.—*Mesker v. Cornwell*, 145 Mo. App. 646, 123 S. W. 488. Neb.—*Tootle-Weakley M. Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85. Tenn.—*Martin v. Porter*, 4 Heisk. 407; *Hembree v. White*, 2 Overt. 202. Tex.—*Robinson v. Sanders*, 33 Tex. 774. Wash.—*Turner v. Turner*, 33 Wash. 118, 74 Pac. 55.

28. Ala.—*Norman v. Burns*, 67 Ala. 248. Ia.—*Harris v. Bigley*, 136 Iowa 307, 111 N. W. 432. La.—*Miller v. Bearb*, 134 La. 893, 64 So. 822; *Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 So. 641; *Taliaferro v. Steele*, 14 La. Ann. 656; *Maskell v. Horner*, 10 La. Ann. 641.

29. See generally the title "**Juries and Jurors.**"

jurors, discovered too late to move for a new trial, sometimes furnishes ground for the granting of a new trial on bill in equity.<sup>30</sup> But an interference with the deliberation of the jury, though an irregularity in the proceeding, does not justify equitable interference with the judgment.<sup>31</sup> Nor will equity enjoin a judgment because the jury disregarded certain evidence in the case,<sup>32</sup> or for errors in impaneling,<sup>33</sup> and instructing a jury.<sup>34</sup>

The incapacity of a juror is not good ground for an action of nullity.<sup>35</sup>

c. *Defects or Errors in the Judgment, or Its Rendition and Entry.*<sup>36</sup> Mere defects or errors in the judgment,<sup>37</sup> or irregularities or errors

30. A new trial at law was granted in *Lawless v. Reese*, 3 Bibb (Ky.) 486, because the sheriff had without the approbation of the court counselled with the jury as to the right of the parties, after they had retired, and read to them a paper not used on trial, which facts were not known to the complainant until after the term at which the judgment was rendered.

31. *Crafts v. Hall*, 4 Ill. 131.

32. *Edgerton v. Comstock*, 3 Ind. 383.

33. *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560.

34. *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560.

Methods of objecting to errors in instructing jury, see 13 STANDARD PROC. 986, et seq.

35. *Cressap v. Winchester*, 6 Rob. (La.) 458.

36. Form and sufficiency of judgments generally, see *supra*, XI.

Rendition and entry of judgments generally, see 14 STANDARD PROC. 971, (i) seq.

37. U. S.—*North Star Lumb. Co. v. Johnson*, 196 Fed. 56. Ala.—*Hendley v. Chabert*, 189 Ala. 258, 65 So. 993 (a judgment by default instead of nil dict is a mere matter of form); *Norman v. Burns*, 67 Ala. 248. Ark.—*West v. Waddill*, 33 Ark. 575. Cal.—*Hunter v. Hoole*, 17 Cal. 418; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639. Colo.—*Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623. Fla.—*Order of United Commercial Travelers v. Bell*, 62 Fla. 565, 56 So. 910; *Peacock v. Feaster*, 52 Fla. 565, 42 So. 889. Ga.—*Irvin v. Sanders*, 52 Ga. 350. Ill.—*Chicago Waifs Mission v. Excelsior Electric Co.*, 44 Ill. App. 425. Ind.—*Meyer v. Wilson*, 166 Ind. 651, 76 N.

E. 748 (Christian names of defendants omitted); *Boos v. Morgan*, 140 Ind. 206, 39 N. E. 919; *De Haven v. Covalt*, 83 Ind. 344. Ia.—*Durand v. Northwestern L. & S. Co.*, 112 Iowa 296, 83 N. W. 972; *Fulliam v. Drake*, 105 Iowa 615, 75 N. W. 479; *York v. Boardman*, 40 Iowa 57. Ky.—*Reynolds v. Horine*, 13 B. Mon. 234. La.—*Boudreaux v. Lower Terrebonne Ref. & Mfg. Co.*, 127 La. 98, 53 So. 456; *Conery v. His Creditors*, 118 La. 864, 43 So. 530; *Gilmore v. Gilmore*, 9 La. Ann. 197. Minn.—*Johnson v. Vaule*, 61 Minn. 401, 63 N. W. 1039. Miss.—*A. B. Smith Co. v. Bank of Holmes County*, 18 So. 847; *Robb v. Halsey*, 11 Smed. & M. 140; *Thomas v. Tappan*, *Freem. Ch.* 472. Mo.—*Baldwin v. Dalton*, 168 Mo. 20, 30, 67 S. W. 599. Ohio.—*Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991. Ore.—*Miller v. Shute*, 55 Ore. 603, 107 Pac. 467; *Froebrich v. Lane*, 45 Ore. 13, 22, 76 Pac. 351, 106 Am. St. Rep. 634. Tenn.—*Berdanatti v. Sexton*, 2 Tenn. Ch. 699; *Randall v. Payne*, 1 Tenn. Ch. 137. Tex.—*Roller v. Wooldridge*, 46 Tex. 485; *Kalmans v. Baumbush* (Tex. Civ. App.), 187 S. W. 697; *Lester v. Gatewood* (Tex. Civ. App.), 166 S. W. 389; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63. Va.—*Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697; *Turpin v. Thomas*, 2 Hen. & M. (12 Va.) 139, 3 Am. Dec. 615. Wash.—*Davis v. Fields*, 9 Wash. 78, 37 Pac. 281, erroneous setting aside of verdict. W. Va.—*Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245. Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687.

[a] Want of finality as to the issues between the parties is not ground for annulling a judgment. *Smith v. Barke* (Tex. Civ. App.), 187 S. W. 697.

[b] Absence of Direction as to Manner of Partition.—That a judgment or-

in its rendition and entry,<sup>38</sup> are not grounds for setting aside or enjoining it. So too, neither errors in decisions upon questions of fact,<sup>39</sup> nor points of law,<sup>40</sup> no matter how plain or obvious they may be, furnish ground for review of a judgment in equity. Nor will equity vacate or enjoin a judgment on the ground that it is not warranted by the pleadings.<sup>41</sup> That the court rendering the judgment referred to no law and adduced no reasons for his decision is not ground for annulling the judgment.<sup>42</sup>

The mere fact that a judgment is rendered for an excessive amount will not warrant equitable relief;<sup>43</sup> but where a judgment is rendered

dering a partition did not direct the manner in which the partition was to be made, or appoint a notary to make it are irregularities which are the subject of appeal rather than of the action of nullity. *Gilmore v. Gilmore*, 9 La. Ann. 197.

[c] **When Appeal Will Not Lie.** The fact that an erroneous judgment is for an amount so small that an appeal does not lie does not alter the rule. *Kalmans v. Baumbush* (Tex. Civ. App.), 187 S. W. 697.

38. **U. S.**—*Skirving v. National Life Ins. Co.*, 59 Fed. 742, 8 C. C. A. 241, where record fails to show citizenship of parties. **Cal.**—*Hunter v. Hoole*, 17 Cal. 418; *Logan v. Hillegass*, 16 Cal. 200. **Ind.**—*Pittsburgh, C. & St. L. R. Co. v. Elwood*, 79 Ind. 306, where amount of costs omitted. **Miss.**—*McRaney v. Coulter*, 39 Miss. 390, where clerk omitted to enter judgment on the minutes. **Mo.**—*Davis v. Staples*, 45 Mo. 567; *Engler v. Knoblauch*, 131 Mo. App. 481, 110 S. W. 16. **N. J.**—*Cutter v. Kline*, 35 N. J. Eq. 534. **Okla.** *Missouri, O. & G. R. Co. v. Riley*, 34 Okla. 760, 127 Pac. 391; *Ellis v. Akers*, 32 Okla. 96, 121 Pac. 258.

[a] **Where the clerk does not correctly record the judgment, relief cannot be had in equity.** Equity cannot examine and determine if the judicial determination is other than that shown by the record. *Cutter v. Kline*, 35 N. J. Eq. 534.

[b] **Rendition of judgment before the expiration of time in which to appear is an irregularity; but the judgment will not be set aside at the instance of a party who did not take advantage of the defect in the manner provided for by statute, and who did not show any defense to the action.** *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am.

St. Rep. 573; *McNeill v. Hallmark*, 28 Tex. 157.

[c] **A judgment rendered at a time not designated by law is void and may be enjoined in equity.** *Cain v. Goda*, 84 Ind. 209.

[d] **The entry of a personal judgment in a foreclosure suit, although not prayed for, is erroneous but not a fraud, and the judgment will not be set aside in equity.** *York v. Boardman*, 40 Iowa 57.

[e] **That a judgment was rendered against a wife on a contract entered into jointly by the husband and wife is not ground for annulling a judgment.** *Chiasson v. Duplantier*, 10 La. 570.

39. **West Chicago Park Comrs. v. Riddle, 151 Ill. App. 487; *Ludwig v. Walker*, 138 App. Div. 850, 123 N. Y. Supp. 468.**

40. **U. S.**—*Allen v. Allen*, 97 Fed. 525, 38 C. C. A. 336. **Ark.**—*Clopton v. Carlross*, 42 Ark. 560. **Ill.**—*West Chicago Park Comrs. v. Riddle*, 151 Ill. App. 487. **Minn.**—*Leighton v. Bruce*, 156 N. W. 285. **N. Y.**—*Stilwell v. Carpenter*, 59 N. Y. 414; *Ludwig v. Walker*, 138 App. Div. 850, 123 N. Y. Supp. 468. **Tex.**—*Hockwald v. American Sur. Co.* (Tex. Civ. App.), 102 S. W. 181. **Wash.**—*Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061.

41. **U. S.**—*Allen v. Allen*, 97 Fed. 525, 38 C. C. A. 336. **Cal.**—*Holmes v. Rogers*, 13 Cal. 191. **Ga.**—*Lenoard v. Collier*, 53 Ga. 387. **Tex.**—*Reast v. Hughes* (Tex. Civ. App.), 33 S. W. 1003. **Va.**—*Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

**Necessity for judgment conforming to pleadings, see supra, XI, D, 2, b.**

42. *Chiasson v. Duplantier*, 10 La. 570.

**Necessity for judgment to state reason therefor, see supra, XI, E, 1.**

43. **Ga.**—*Booth & Co. v. Mohr &*



for an amount which is not intended by or which is inconsistent with the pleadings through fraud, accident, mistake, or miscalculation, equity will afford relief, if there is no adequate remedy at law.<sup>44</sup>

**5. Failure To Present Cause of Action or Defense at Law. — a. In General.**—It is the duty of the parties to an action at law to set up in that action their claims and defenses.<sup>45</sup> A defendant who fails to set up his legal defenses in the action at law cannot ordinarily set up the matters constituting such defenses afterwards in equity as grounds for annulling, setting aside or enjoining the judgment recovered at law.<sup>46</sup> If, however, without fault or negligence on his own

Sons, 125 Ga. 472, 54 S. E. 147. Ill. *Walker v. Shreve*, 87 Ill. 474. Ind. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700. Ia.—*Ebersole v. Latimer*, 65 Iowa 164, 21 N. W. 500. Ky. *Reed v. Clarke*, 4 Mon. 18; *Morrison's Exr. v. Hart*, 2 Bibb 4, 4 Am. Dec. 663. Mo.—*Sumner v. Whitley*, 1 Mo. 703. Ore.—*George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. Tex.—*Lester v. Gatewood* (Tex. Civ. App.), 166 S. W. 389. Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687, 122 Pac. 900.

[a] Rendering a judgment for a greater amount than that authorized by the pleadings is an error or irregularity which equity will not relieve against unless, perhaps its enforcement as to the excess may be enjoined when the judgment debtor does equity by paying or tendering the amount actually due. *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1.

[b] **Excessive Interest.**—An error of law whereby the court rendered judgment for an excessive amount of interest will not be relieved in equity. *Rogers v. Stokes*, 87 Tenn. 294, 11 S. W. 215.

44. Ala.—*Norris v. Cottrell*, 20 Ala. 304. Cal.—*Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267. Colo.—*Van Buren v. Posteraro*, 45 Colo. 588, 102 Pac. 1067, 132 Am. St. Rep. 199, fraudulent alteration of judgment. Conn.—*Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 79 Am. Dec. 250. Me.—*Cunningham v. Gushee*, 73 Me. 417. Md.—*Katz v. Moore*, 13 Md. 566. Mo.—*Case v. Cunningham*, 61 Mo. 434. S. C.—*Cohen v. Dubose*, Harp. Eq. 102, 14 Am. Dec. 709. Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687, 122 Pac. 900.

Fraud in procuring judgment as ground generally for equitable relief,

see *infra*, XV, E, 6, b, (II).

**Mistake** generally as ground for relief, see *infra*, XV, E, 7.

**Effect of adequacy or inadequacy of remedy at law**, see *supra*, XV, C, 6.

45. Ga.—*Graham v. Graham*, 137 Ga. 668, 74 S. E. 426; *Brown v. Boynton*, 69 Ga. 754. Ill.—*Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507; *Shinkle v. Letcher*, 47 Ill. 216; *Vennum v. Davis*, 35 Ill. 568; *Fillmore v. Hodgman*, 71 Ill. App. 554. Miss.—*Miller v. Palmer*, 55 Miss. 323; *Smith v. Walker*, 8 Smed. & M. 131. N. Y.—*Stilwell v. Carpenter*, 59 N. Y. 414; *Paterson v. Banks*, 9 Paige Ch. 627. Tenn.—*Evans v. International Trust Co.*, 59 S. W. 373. W. Va.—*Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

**Insufficiency of declaration or complaint** as ground for equitable relief, see *supra*, XV, E, 4, b, (III).

46. U. S.—*Kibbe v. Benson*, 17 Wall. 624, 21 L. ed. 741; *Creath's Admr. v. Sims*, 5 How. 192, 204, 12 L. ed. 110. Ala.—*Hightower v. Coalson*, 151 Ala. 147, 44 So. 53; *Roebeling Sons Co. v. Stevens Elec. Co.*, 93 Ala. 39, 9 So. 369; *Norman v. Burns*, 67 Ala. 248 (payment); *Dunklin v. Wilson*, 64 Ala. 162 (an action to impeach a judgment on the ground of false return); *Powell v. Stewart*, 17 Ala. 719. Ark.—*Bently v. Dillard*, 6 Ark. 79. Fla.—*Hoey v. Jackson*, 31 Fla. 541, 13 So. 459. Ga.—*Graham v. Graham*, 137 Ga. 668, 74 S. E. 426; *Griffin v. Smyly*, 105 Ga. 475, 30 S. E. 416; *Owens v. Van Winkle*, 61 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; *York v. Clopton*, 32 Ga. 362; *Ponder v. Cox*, 26 Ga. 485. Ill.—*Mushbaugh v. East Peoria*, 260 Ill. 27, 102 N. E. 1027; *Haugan v. Chicago*, 259 Ill. 249, 102 N. E. 185; *Martin v. McCall*, 247 Ill. 484, 93 N. E. 418; *Boddie v. Brewer*, etc. Brew. Co., 204 Ill. 352, 68 N. E. 394; *Cairo & St. L. R. Co. v. Holbrook*, 92 Ill. 297; *Gold*

part, a defendant had no reasonable opportunity for or was prevented from interposing a meritorious defense by reason of some fact recog-

*r. Bailey*, 44 Ill. 491, 92 Am. Dec. 190; *Owens v. Ranstead*, 22 Ill. 161. **Ind.** *Center Tp. v. Board of Commissioners*, 110 Ind. 579, 10 N. E. 291; *Murphy v. Blair*, 12 Ind. 184; *Brown v. Wyncoop*, 2 Blackf. 230. **Ia.**—*Ulber v. Dunn*, 143 Iowa 260, 119 N. W. 269; *Murphy v. Cuddihy*, 111 Iowa 645, 82 N. W. 999; *Steiner v. Lenz*, 110 Iowa 49, 81 N. W. 190; *Wilsey v. Maynard*, 21 Iowa 107. **Ky.**—*Hughes v. McCoun's Admr.*, 3 Bibb 254; *Clay v. Fry*, 3 Bibb 248, 6 Am. Dec. 654; *Morrison's Exr. v. Hart*, 2 Bibb 4, 4 Am. Dec. 663; *Carpenter v. Hackley*, 1 A. K. Marsh. 155. **La.**—*Boudreaux v. Lower Terrebonne Ref. & Mfg. Co.*, 127 La. 98, 53 So. 456; *Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 So. 641; *Robichaud v. Nelson*, 28 La. Ann. 578; *Lafon's Exrs. v. Desessart*, 1 Mart. (N. S.) 71; *Kouns v. Waggaman*, Man. Unrep. Cas. 318. **Mass.**—*Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570. **Me.** *Aetna Life Ins. Co. v. Tremblay*, 101 Me. 585, 65 Atl. 22; *Milliken v. Dockray*, 80 Me. 82, 13 Atl. 127. **Md.** *Twigg v. Hopkins*, 85 Md. 301, 37 Atl. 24. **Mich.**—*Weisman v. Newton Beef Co.*, 154 Mich. 511, 118 N. W. 2; *McGraw v. Pettibone*, 10 Mich. 530; *Wright v. King*, Har. Ch. 12; *Barrows v. Doty*, Har. Ch. 1. **Minn.**—*Miller v. First Nat. Bank*, 157 N. W. 1069; *Clark v. Lee*, 58 Minn. 410, 59 N. W. 970; *Sargeant v. Bigelow*, 24 Minn. 370. **Miss.**—*Love v. Pass*, 14 Smed. & M. 158; *Robb v. Halsey*, 11 Smed. & M. 140; *Smith v. Walker*, 8 Smed. & M. 131; *Benton v. Crowder*, 7 Smed. & M. 185; *Sinking Fund Comrs. v. Patrick*, Smed. & M. Ch. 110 (payment). **Mo.**—*Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481, 161 Mo. 673, 684, 61 S. W. 854, 84 Am. St. Rep. 738; *Hamilton v. McLean*, 169 Mo. 51, 68 S. W. 930, 139 Mo. 678, 41 S. W. 224. **Mont.**—*Schilling v. Reagan*, 19 Mont. 508, 48 Pac. 1109. **Neb.**—*Dorwart v. Troyer*, 2 Neb. (Unof.) 22, 96 N. W. 116; *McHale v. Metz*, 70 Neb. 106, 96 N. W. 1004; *Miller v. Miller's Est.*, 69 Neb. 441, 95 N. W. 1010. **Nev.**—*Dalton v. Libby*, 9 Nev. 192. **N. J.**—*Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486 (invalidity of instrument sued on); *Stratton v. Allen*, 16 N. J. Eq. 229.

**N. Y.**—*Stilwell v. Carpenter*, 59 N. Y. 414; *Schroepf v. Shaw*, 3 N. Y. 446; *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926; *Ingalls v. Merchants' Nat. Bank*, 51 App. Div. 305, 64 N. Y. Supp. 911; *Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114; *Hewlett v. Hewlett*, 4 Edw. Ch. 7, 16; *Le Guen v. Gouverneur*, 1 John. Cas. 502. **N. C.**—*Peace v. Nailing*, 16 N. C. 289. **Ohio.**—*Allen v. Medill*, 14 Ohio 445; *Abbot v. Hughes*, 3 Ohio 278. **Okla.**—*Guthrie v. McKennon*, 91 Pac. 851; *Crist v. Cosby*, 11 Okla. 635, 69 Pac. 885. **Ore.**—*Galbraith v. Barnard*, 21 Ore. 67, 26 Pac. 1110. **S. C.**—*McDowall v. McDowall*, Bailey Eq. 324. **Tenn.**—*Evans v. International Trust Co.*, 59 S. W. 373; *McClanahan v. Stovall*, 6 Lea 505; *Chester v. Apperson*, 4 Heisk. 639; *Newman v. Thomas*, 5 Hayw. 77; *Peyton v. Rawlens*, 4 Hayw. 77; *Winchester v. Jackson*, 3 Hayw. 305, 309; *Reeves v. Hogan*, Cooke 175 (payment). **Tex.**—*O'Connor v. Lucio*, 14 Tex. Civ. App. 682, 39 S. W. 139; *Byars v. Justin*, 2 Wills. Civ. Cas., §686. **Va.**—*Richmond Enquirer Co. v. Robinson*, 24 Gratt. (65 Va.) 548; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136. **Vt.**—*Day v. Cummings*, 19 Vt. 496. **Wash.**—*Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165. **W. Va.**—*Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321. **Wis.**—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

[a] **Application of Rule.**—The general rule applies only in cases where such a defense would authorize a court of law to render the party full relief, in the case presented by the evidence. *Murphy v. Blair*, 12 Ind. 184.

[b] **Set-Off.**—The rule applies only to those defenses which the defendant is required to make and hence is not applicable to set-off. *Chicago D. & V. R. Co. v. Field*, 86 Ill. 270.

[c] **Where service is made on the wrong person**, and such person makes no defense at law, but suffers judgment to go against him by default, and then, execution having issued, gives a forthcoming bond and appeals, upon which appeal the judgment is affirmed, he can-

nized in equity as a ground for assuming jurisdiction, equity will relieve him from the judgment and grant him an opportunity to take advantage of his defense.<sup>47</sup>

b. *Defense of Illegality*.<sup>48</sup>—Equity will not usually grant relief from a judgment on the sole ground that the claim represented by the judgment is illegal.<sup>49</sup>

**Usury.**—The fact that the claim upon which the judgment is based is tainted with usury, is not ordinarily a ground for equitable relief.<sup>50</sup>

not obtain relief in equity from the judgment. *Christiana v. Anthony*, 2 Hon. & M. (12 Va.) 13.

[d] **Where There Is No Diversity of Citizenship.**—Though jurisdiction of a federal court be dependent on diversity of citizenship its judgment cannot be annulled because both parties are shown to be residents of the same state. *Pearce v. Winter Iron-Works*, 32 Ala. 68.

47. **U. S.**—*North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 715, 38 L. ed. 565. **Ala.**—*Stubbs v. Leavitt*, 30 Ala. 352. **Conn.**—*Tyler v. Hammersley*, 44 Conn. 419, 26 Am. Rep. 479; *Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. **Ga.**—*Clark v. Hargrave*, 143 Ga. 729, 85 S. E. 869. **Ill.**—*Hoffman v. Burris*, 210 Ill. 587, 71 N. E. 584; *Walker v. Kretsinger*, 48 Ill. 502; *Ballance v. Loomis*, 22 Ill. 82; *Beveridge v. Hewitt*, 8 Ill. App. 467. **Ia.**—*Hoskins v. Hattenback*, 14 Iowa 314. **Ky.**—*Cummings v. Kennedy*, 4 J. J. Marsh. 642; *Saunders v. Jennings*, 2 J. J. Marsh. 513. **Miss.**—*Hamilton v. Moore*, 32 Miss. 625. **Neb.**—*Bankers Union v. Landis*, 75 Neb. 625, 106 N. W. 973; *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. **N. J.**—*Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Moore v. Gamble*, 9 N. J. Eq. 246. **N. Y.**—*Foster v. Wood*, 6 Johns. Ch. 87. **Ore.**—*George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. **Tenn.**—*Reeves v. Hogan*, Cooke 175, 5 Am. Dec. 684. **Tex.**—*Alexander v. San Antonio Lumb. Co. (Tex.)*, 13 S. W. 1025; *Slayden-Kirksey Woolen Mill v. Robinson (Tex. Civ. App.)*, 143 S. W. 294; *Byars v. Justin*, 2 Wills. Civ. Cas., §686. **Va.**—*Hudson v. Kline*, 9 Gratt. (50 Va.) 379.

**Party seeking relief must not have been at fault, see *supra*, XV, C, 3.**

**Party must have meritorious defense, see *supra*, XV, C, 4.**

**Excuses for failure to present defense, see *infra*, XV, E, 5, e.**

**Fraud preventing presentation of party's case or defense as ground for relief, see generally *infra*, XV, E, 6, b, (11).**

48. **How pleaded, see generally the title "Illegality, How Pleased."**

49. *Donovan v. Miller*, 12 Idaho 600, 88 Pac. 82, 10 Ann. Cas. 444; *Young v. Beardsley*, 11 Paige (N. Y.) 93. But see, *Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795.

[a] **A judgment on a bond to compromise a prosecution for seduction will not be vacated in equity, although it appears that the defendant is innocent of the charge.** *Meredith v. Knox (Del. Ch.)*, 83 Atl. 703.

[b] **Where Consideration Was Sale of a Slave.**—That the consideration for the note upon which judgment was rendered was a slave was a matter of defense which should have been interposed at law; and equity will not grant relief therefrom. *Thomas v. Phillips*, 4 Smed. & M. (Miss.) 358, 423; *Miller v. Gaskins, Smed. & M. Ch. (Miss.)* 524. See also *Sample v. Barnes*, 14 How. 70, 14 L. ed. 330, denying relief as the complainant was in pari delicto with the other party. *Hardeman v. Harris*, 7 How. (U. S.) 726, 12 L. ed. 889; *Renfroe v. McDaniel*, 40 Ga. 131. *Contra*, *Lindstrum v. Ewing*, 25 La. Ann. 520.

50. **Ala.**—*McCollum v. Prewitt*, 37 Ala. 573; *Royster v. Watkins*, 3 Port. 436; *Teague v. Russell*, 2 Stew. 420. **Ga.**—*Owens v. Van Winkle Gin & Mach. Co.*, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; *Owen v. Gibson*, 74 Ga. 465; *Gatewood v. City Bank*, 49 Ga. 45. **Ill.**—*Lucas v. Spencer*, 27 Ill. 15. **Ky.**—*Chinn v. Mitchell*, 2 Mete. 92. *Contra*, *Pearce v. Hedrick*, 3 Litt. 109; *Isaacke v. Ficklin*, 5 B. Mon. 18. **Miss.**—*Robb v. Halsey*, 11 Smed. & M. 140; *Smith v. Walker*, 8 Smed. & M. 131; *Yelver v. Burke, Watt & Co.*, 3 Smed. & M. 439. **N. Y.**—*Berry v. Thompson*, 17 Johns. 436; *Thompson v. Berry*, 3 Johns. Ch.



for this is a matter of defense, which must be interposed in the original action, unless there exists sufficient excuse for not doing so.<sup>51</sup> Some courts have granted relief on the ground of usury, however.<sup>52</sup>

**Judgment Upon Gambling Contract.**—While it has been held that equity will not relieve against a judgment because based upon a gambling contract<sup>53</sup> where statutes declare that judgments on gaming contracts are void, equity will relieve against their enforcement,<sup>54</sup> although no reason is given why the defense was not interposed at law,<sup>55</sup> and although the judgment was recovered by a bona fide as-

395; *Lansing v. Eddy*, 1 Johns. Ch. 49. **N. C.**—*Walker v. Gurley*, 83 N. C. 429; *Branton v. Dixon*, 5 N. C. 225. **Ohio.** *Rains v. Scott*, 13 Ohio 107; *Morgan v. England*, Wright 112. **S. C.**—*Jones v. Kilgore*, 2 Rich. Eq. 63. **Tenn.** *Parham v. Pulliam*, 5 Coldw. 497; *Lindsley v. James*, 3 Coldw. 477; *Frierson v. Moody*, 3 Humph. 561; *McKoin & Wilkinson v. Cooley*, 3 Humph. 559; *Buchanan v. Nolin*, 3 Humph. 63; *Nance v. Gregory*, 1 Tenn. Ch. 636. **Vt.**—*Day v. Cummings*, 19 Vt. 496. **W. Va.**—*Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143.

[a] But equity will relieve against judgments by confession rendered on a usurious contract. *Thompson v. Berry*, 3 Johns. Ch. (N. Y.) 395. See also *Gatewood v. City Bank*, 49 Ga. 45.

**As to recovery back of money paid as usury generally**, see the title "Usury."

**51. Where Defense Embarrassed.** Where (1) a debtor in the hands of a usurer has been induced to change the securities from time to time, and add in the usurious interest, and the transaction has become so complicated and intricate as to make it difficult for a jury to detect the contrivance and separate the usury from the sum due, equity will relieve against a judgment against the debtor. *Huff v. Miller* (Tenn.), 58 S. W. 876; *Chester v. Apperson*, 4 Heisk. (Tenn.) 639; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; *Lindsley v. James*, 3 Coldw. (Tenn.) 477; *Frierson v. Moody*, 3 Humph. (Tenn.) 561; *McKoin & Wilkinson v. Cooley*, 3 Humph. (Tenn.) 559; *Buchanan v. Nolin*, 3 Humph. (Tenn.) 63; *Nance v. Gregory*, 1 Tenn. Ch. 636. (2) This rule applies, perhaps, whether or not any defense at all was made. *Nance v. Gregory*, 1 Tenn. Ch. 636.

**Excuses for failure to present defense**, see *infra*, XV, E, 5, e.

**52. Del.**—*Ennis v. Ginn*, 5 Del. Ch.

**180. Md.**—*Hill v. Reifsnider*, 46 Md. 555. **Va.**—*Greer v. Hale*, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814; *Brown v. Toell*, 5 Rand. (26 Va.) 543, 16 Am. Dec. 759; *Young v. Scott*, 4 Rand. (25 Va.) 415. See also *Neurath v. Hecht*, 62 Md. 221; *Exchange & D. Bank v. Fugate*, 93 Va. 821, 23 S. E. 884; *Terry v. Dickinson*, 75 Va. 475 (holding the bill insufficient); and generally the title "Usury."

[a] The change in the statute declaring that usurious contracts shall be deemed for an illegal consideration instead of void, as formerly, furnishes no warrant for departing from the long established doctrine that a court of equity will go behind a judgment to relieve against usury. *Greer v. Hale*, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814.

**53. Owens v. Van Winkle Gin & Mach. Co.**, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; *Dunn v. Holloway*, 16 N. C. 322.

**54. Del.**—*Ennis v. Ginn*, 5 Del. Ch. 180. **Ky.**—*Gill v. Webb's Admr.*, 4 Mon. 299; *Moffett v. White*, 1 Litt. 324; *Clay v. Fry*, 3 Bibb 248. **Md.** *Gough v. Pratt*, 9 Md. 526. **Miss.**—*Lucas v. Waul*, 12 Smed. & M. 157; *Thomas v. Phillips*, 4 Smed. & M. 358, 427. **Va.**—*Greer v. Hale*, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814; *Skipwith v. Strother*, 3 Rand. (24 Va.) 214; *Woodson v. Barrett & Co.*, 2 Hen. & M. (12 Va.) 80, 3 Am. Dec. 612. *Compare Elliott v. Smock*, 1 Wash. (1 Va.) 389. See also *Goolsby v. St. John*, 25 Gratt. (66 Va.) 146; *White v. Washington*, 5 Gratt. (46 Va.) 645. holding a gaming consideration forms an exception to the general rule requiring a defendant at law to avail himself there of a good legal defense to an action. He may in such case suffer judgment to go against him and obtain relief by bill in equity.

**55. Md.**—*Gough v. Pratt*, 9 Md. 526. **Miss.**—*Lucas v. Waul*, 12 Smed. & M.

signed.<sup>57</sup> Some statutes prohibiting gaming specifically provide for vacation by courts of equity of judgments obtained contrary to their provisions.<sup>57</sup>

Where the party seeking relief is in *pari delicto* with the adversary, equity will not grant relief.<sup>58</sup>

*c. Defense of Want or Failure of Consideration.*—An absence or failure of consideration is a matter of defense which must be interposed in the action at law; equity will not grant relief on this ground in the absence of equitable grounds excusing its presentation.<sup>59</sup> But it has been held that where, in a sale of real estate, there is a total or partial failure of consideration, as where the vendor failed to give possession of all or a part of the property sold,<sup>60</sup> or where he fails to

157. Va.—*Gouldby v. St. John*, 25 Gratt. 400 Va. 116; *White v. Washington*, 5 Gratt. (46 Va.) 645; *Skipwith v. Strother*, 3 Rand. 121 Va. 214.

[a] Where an abortive attempt to defend is made at law, equity will deny relief. *Moffett v. White*, 1 Litt. (Ky.) 341. See *infra*, XV, E, 2.

58. *Gough v. Pratt*, 9 Md. 526; *Larson v. Waul*, 12 Smul. & M. (Miss.) 157.

[a] Where Note Is Assigned and New Note Given.—Where a note founded upon a gaming consideration has passed into the hands of a bona fide assignee and has been taken up by a new note, equity will not enjoin a judgment recovered on the new note. *Wooldridge v. Cates*, 2 J. J. Marsh. (Ky.) 222.

57. *Harris v. McDonald*, 194 Ill. 75, 62 N. E. 310; *West v. Carter*, 129 Ill. 249, 21 N. E. 782; *Boddie v. Brewer & H. Brew. Co.*, 107 Ill. App. 357; *Collins v. Lee*, 2 Mo. 16.

[a] Necessity For Defense at Law. This statute takes cases of this character out of the general rule that a defense must be made at law. A failure to interpose the defense of gaming at law, even where the party appeared and defended, is no bar to relief in equity. *Harris v. McDonald*, 194 Ill. 75, 62 N. E. 310; *West v. Carter*, 129 Ill. 249, 21 N. E. 782; *Boddie v. Brewer & H. Brew. Co.*, 107 Ill. App. 357.

58. U. S.—*Sample v. Barnes*, 14 How. 70, 14 L. ed. 330; *Creath's Admr. v. Sims*, 5 How. 192, 12 L. ed. 110. Cal.—*Pacific Debenture Co. v. Caldwell*, 147 Cal. 106, 81 Pac. 314. Tenn.—As to money this rule would not apply. See *Lindsley v. James*, 3 Coldw. 477, citing 1 Story's Eq. Jur. §302. Va.—*Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

59. Ala.—*Howell v. Motes*, 54 Ala.

1; *White v. Ross*, 5 Stew. & P. 123; *Isbell v. Morris*, 1 Stew. & P. 41. Ark.—*Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727. See *Dickson v. Richardson*, 16 Ark. 114. Del.—*Whitaker v. Wickersham*, 5 Del. Ch. 187. Ga.—*Reynolds & Hamby Est. Mort. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Allen v. Thornton*, 51 Ga. 594; *Wright v. McDonald*, 44 Ga. 452. Idaho.—*Donovan v. Miller*, 12 Idaho 600, 88 Pac. 82, 10 Ann. Cas. 444. Ind.—*Pichon v. McHenry*, 6 Blackf. 517; *Raburn v. Shortridge*, 2 Blackf. 480. Ky.—*Allen v. Philips*, 2 Litt. 1. Compare *McKee v. Hoover*, 1 Mon. 32; *Harper v. Coleman*, 4 Litt. 156. La.—*Butman v. Forshay*, 21 La. Ann. 165. Miss.—*Williams v. Jones*, 10 Smed. & M. 108. N. J.—*Stratton v. Allen*, 16 N. J. Eq. 229. N. C.—*Waldrop v. Green*, 63 N. C. 344, denying relief where the title to personal property sold had failed, and where there was a showing of the insolvency of the defendant. Wis.—*Marsh v. Edgerton*, 2 Pin. 230.

*Contra.*—U. S.—*Skilern's Exrs. v. May's Exrs.*, 4 Cranch 137, 2 L. ed. 574. Tenn.—*Irwin v. Burnett*, 6 Humph. 342. W. Va.—*Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321 (by statute).

[a] A bill in equity will not lie to restrain a judgment on a note given for work, on the ground that the work was unskillfully done, where there is no showing of special circumstances, such as insolvency, to give equity jurisdiction, as the party has a remedy at law. *Thompson v. Sansberry*, 2 J. J. Marsh. (Ky.) 362.

Excuses for failure to present defense, see *infra*, XV, E, 5, e.

60. Ind.—*Shelby v. Marshall*, 1 Blackf. 384. Md.—*Hilleary v. Crow*, 1

convey a good title,<sup>61</sup> and the vendor, who is insolvent, has recovered and is seeking to enforce a judgment for the purchase money of the property, equity will enjoin the enforcement of the judgment pro tanto.<sup>62</sup> If, however, this defense was available in the action for the purchase money and was not interposed therein, equity will not grant relief.<sup>63</sup>

d. *Defense of Want of Capacity To Sue.*—The want of capacity of a party to sue is a defense which must be pleaded in limine and is not a ground for annulment of the judgment in equity.<sup>64</sup>

e. *Excuses for Failure To Present Defense.*—(I.) **General Rule.** If a defendant has a good and meritorious legal defense to an action, but has no opportunity to present it,<sup>65</sup> or is prevented from interposing it by fraud,<sup>66</sup> mistake,<sup>67</sup> collusion,<sup>68</sup> surprise,<sup>69</sup> accident,<sup>70</sup> or wrongful act of the adverse party,<sup>71</sup> or some adventitious circumstance

Har. & J. 542. **N. C.**—Cox v. Jerman, 41 N. C. 526. **Tenn.**—Hamlin's Exrx. v. Berry, 1 Overt. 39.

61. **Ky.**—See Gorman v. Young, 13 Ky. L. Rep. 785, 18 S. W. 369, denying relief where there was no evidence as to insolvency. **Va.**—Jaynes v. Brock, 10 Gratt. (51 Va.) 211. **W. Va.**—See Vanscoy v. Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

[a] But where the vendor informed the vendee there were doubts as to the title, but that he being a man of undoubted ability, would give a warranty deed, the purchaser has no right to an injunction against a judgment for the purchase money, on the ground that the title proved defective. He must pursue his legal remedy upon the warranty. Merritt v. Hunt, 39 N. C. 406. To same effect, see Henry v. Elliott, 59 N. C. 175.

62. **Party must offer to return the land.** Jackson v. Norton, 6 Cal. 187. See *supra*, XV, C, 5.

63. **Ala.**—Howell v. Motes, 54 Ala. 1. **Ga.**—Allen v. Thornton, 51 Ga. 594. **Ind.**—Ricker v. Pratt, 48 Ind. 73.

64. *Maraist v. Caillier*, 30 La. Ann. 1087 (administrator).

65. **Ariz.**—San Pedro Cattle Co. v. Williams, 4 Ariz. 166, 36 Pac. 34. **Mich.** Miller v. Morse, 23 Mich. 365. **N. Y.** Schroeppell v. Shaw, 3 N. Y. 446.

[a] Where a party to a foreign judgment did not have a reasonable opportunity to be present at the trial, equity will impeach the judgment. *Glasgow v. Lowther's Admx.*, Cooke (Tenn.) 464.

[b] When the regular term failed, and the defendant being out of the

county had no notice of the special term at which his cause was tried and, in consequence thereof, failed to make his defense, equity on a showing of merits and that the judgment was unjust will relieve him from the judgment. *Joslin v. Coffin*, 5 How. (Miss.) 539.

**Party must have meritorious defense,** see *supra*, XV, C, 4.

66. See *infra* XV, E, 6, b, (III).

67. See *infra*, XV, E, 7.

68. *Fussell v. Short*, 96 Ga. 524, 23 S. E. 506.

69. **Ark.**—*Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696. **Cal.**—*Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 983. **Conn.**—*Lithuanian Bro. Soc. v. Tunila*, 80 Conn. 642, 70 Atl. 25. **Md.** *Hill v. Reifsnider*, 46 Md. 555. **Miss.** *Miller v. Palmer*, 55 Miss. 323. **S. C.** *McDowall v. McDowall*, Bailey Eq. 324. **Va.**—*Thomas v. Boyd*, 108 Va. 584, 62 S. E. 346; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136. **W. Va.**—*Newton v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Braden v. Reitzenberger*, 18 W. Va. 286; *Black v. Smith*, 13 W. Va. 780. **Wis.**—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896; *Rogan v. Walker*, 1 Wis. 631, 635.

But see *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581, decided under statute and *Grantham v. Kennedy*, 91 N. C. 148, 153.

70. See *infra*, XV, E, 5, e, (III).

71. **Ala.**—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Noble v. Moses*, 74 Ala. 604, 616; *French v. Garner*, 7 Port. 549. **Ark.**—*Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224. **Conn.**—*Carrington v. Holabird*, 17 Conn.



beyond the control of the party.<sup>72</sup> equity will award a new trial in an action at law after a judgment rendered therein, provided that the party or his agents have not been guilty of fault,<sup>73</sup> fraud,<sup>74</sup>

530, 19 Conn. 84. Fla.—*Peacock v. Feaster*, 52 Fla. 505, 42 So. 880. Ga. Code 1911, §4585; *Graham v. Graham*, 137 Ga. 908, 74 S. E. 423; *Capital Bank v. Rutherford*, 70 Ga. 57; *Dew v. Hamilton*, 23 Ga. 414; *Booth v. Stamper*, 6 Ga. 172. Ill.—*Telford v. Brinkerhoff*, 108 Ill. 439, 45 N. E. 156; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Galená & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762; *Clark v. Ewing*, 93 Ill. 572; *Fillmore v. Hodgman*, 71 Ill. App. 554. Md.—*Prather v. Prather*, 10 Gill & J. 110. Mich.—*Valley City Desk Co. v. Travelers' Ins. Co.*, 143 Mich. 468, 106 N. W. 1125; *Gray v. Barton*, 62 Mich. 186, 196, 28 N. W. 813; *Miller v. Morse*, 23 Mich. 365; *Mack & Davis v. Doty*, Har. Ch. 366. Miss.—*Miller v. Palmer*, 55 Miss. 323. N. H.—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. N. J.—*Herbert v. Herbert*, 47 N. J. Eq. 11, 20 Atl. 290. N. Y.—*Vilas v. Jones*, 1 N. Y. 274; *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494; *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926. Tenn.—*Maddox v. Apperson*, 14 Lea 596; *Gwinn v. Newton*, 8 Humph. 710. Tex.—*Merrill v. Roberts*, 78 Tex. 23, 14 S. W. 254; *Harn v. Phelps*, 65 Tex. 592; *Johnson v. Templeton*, 60 Tex. 238; *Anderson v. Zorn* (Tex. Civ. App.), 131 S. W. 835; *White v. Powell*, 38 Tex. Civ. App. 38, 84 S. W. 836; *Ayres v. Parrish*, 15 Tex. Civ. App. 541, 40 S. W. 435. W. Va.—*Bloss v. Hull*, 27 W. Va. 503, 508.

[a] Where a defendant was prevented from making an available defense by the assurance of the plaintiff that the case had been settled by the principal debtor, a new trial will be ordered by a court of equity. *Dew v. Hamilton*, 23 Ga. 414.

72. *Winchester v. Jackson*, 3 Hayw. (Tenn.) 305, 309; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Block v. Smith*, 13 W. Va. 780.

73. U. S.—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240; *Marine Insurance Co. v. Hodgson*, 7 Cranch 332, 336, 3 L. ed. 362. Ala.—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Noble v. Moses*, 74 Ala. 604, 616; *French v. Garner*, 7 Port. 519.

Ariz.—*MacRitchie v. Stevens*, 8 Ariz. 410, 76 Pac. 478. Cal.—*Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988. Conn.—*Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. Fla.—*Peacock v. Feaster*, 52 Fla. 505, 42 So. 889; *Hoey v. Jackson*, 31 Fla. 541, 13 So. 459. Ill.—*Miller v. Barto*, 247 Ill. 104, 93 N. E. 140; *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Galená & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762; *Clark v. Ewing*, 93 Ill. 572 (laches); *Fillmore v. Hodgman*, 71 Ill. App. 554. Ia.—*Bellows v. Tod*, 52 Iowa 359, 3 N. W. 102; *Johnson v. Lyon*, 14 Iowa 431; *Shricker v. Field*, 9 Iowa 366. Md.—*Hill v. Reifsnider*, 46 Md. 555; *Kearney v. Saseer*, 37 Md. 264, 276. Mich.—*Valley City Desk Co. v. Travelers' Ins. Co.*, 143 Mich. 468, 106 N. W. 1125; *Gray v. Barton*, 62 Mich. 186, 196, 28 N. W. 813; *Miller v. Morse*, 23 Mich. 365; *Mack & Davis v. Doty*, Har. Ch. 366. Miss.—*Miller v. Palmer*, 55 Miss. 323; *Love v. Pass*, 14 Smed. & M. 158; *Herring v. Winans*, Smed. & M. Ch. 466. Mo.—*Jackson v. Chestnut*, 151 Mo. App. 275, 131 S. W. 747. Mont.—*Boley v. Griswold*, 2 Mont. 447. Neb.—*Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679. N. H.—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. N. Y.—*Stilwell v. Carpenter*, 59 N. Y. 414; *Vilas v. Jones*, 1 N. Y. 274; *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494; *Foster v. Wood*, 6 Johns. Ch. 87. N. D.—*Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491. Tenn.—*Maddox v. Apperson*, 14 Lea 596. Tex.—*Johnson v. Templeton*, 60 Tex. 238; *Gilbert v. Cooper*, 43 Tex. Civ. App. 328, 95 S. W. 753; *Ayres v. Parrish*, 15 Tex. Civ. App. 541, 40 S. W. 435. Va.—*Green & Suttle v. Massie*, 21 Gratt. (62 Va.) 356. Wash.—*Spokane Coop. Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165. W. Va.—*Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Party must not have been at fault, see generally *supra*, XV, C, 3.

74. U. S.—*Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870. Ga.—*Code*, 1910, §4985; *Capital Bank v. Rutherford*, 70 Ga. 57. N. J.—*Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; 47 N. J. Eq. 11, 20 Atl. 290;

laches,<sup>75</sup> or negligence,<sup>76</sup> and that the rights of third persons

*Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486. **N. Y.**—*Pater-son v. Bangs*, 9 Paige Ch. 627; *Foster v. Wood*, 6 Johns. Ch. 87. **Tex.**—*Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254.

See also *supra*, XV, C, 3.

75. *Christy v. Atchison T. & S. F. R. Co.*, 214 Fed. 1016; *Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896. See also *supra* XV, C, 3.

[a] Laches of counsel is imputed to the party. *Clark v. Ewing*, 93 Ill. 572.

76. **U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Knox Co. v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586; *Interurban Gen. Con. Co. v. United States*, 229 Fed. 588; *Whitcomb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 116 Fed. 1, 53 C. C. A. 513; *Christy v. Atchison T. & S. F. R. Co.*, 214 Fed. 1016. **Ala.**—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Noble v. Moses*, 74 Ala. 604, 616; *French v. Garner*, 7 Port. 549. **Ariz.**—*MacRitchie v. Stevens*, 8 Ariz. 410, 76 Pac. 478. **Ark.**—*Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696. **Conn.**—*Lithuanian Bro. Society v. Tunila*, 80 Conn. 642, 70 Atl. 25. **Fla.**—*Peacock v. Feaster*, 52 Fla. 565, 42 So. 889. **Ga.**—*Code*, 1910, §4585; *Graham v. Graham*, 137 Ga. 668, 74 S. E. 426; *Howell v. Ware*, 133 Ga. 674, 66 S. E. 884. **Ill.**—*Miller v. Barto*, 247 Ill. 104, 93 N. E. 140. **Ia.**—*Johnson v. Lyon*, 14 Iowa 431; *Shricker v. Field*, 9 Iowa 366. **Md.**—*Twigg v. Hopkins*, 85 Md. 301, 37 Atl. 24; *Hill v. Reifsnider*, 46 Md. 555. **Mich.**—*Valley City Desk Co. v. Travelers' Ins. Co.*, 143 Mich. 468, 106 N. W. 1125; *Gray v. Barton*, 62 Mich. 186, 196, 28 N. W. 813; *Miller v. Morse*, 23 Mich. 365; *Mack & Davis v. Doty*, Har. Ch. 366. **Miss.**—*Miller v. Palmer*, 55 Miss. 323; *Love v. Pass*, 14 Smed. & M. 158. **Mo.**—*Wright v. Salisbury*, 46 Mo. 26; *Jack-son v. Chestnut*, 151 Mo. App. 275, 131 S. W. 747; *Mesker v. Cornwell*, 145 Mo. App. 646, 123 S. W. 483. **Mont.**—*Boley v. Griswold*, 2 Mont. 447. **Neb.**—*Radzweit v. Watkins*, 53 Neb. 412, 73 N. W. 679. **N. H.**—*Hibbard v. East-man*, 47 N. H. 507, 93 Am. Dec. 467.

**N. J.**—*Hayes v. United States Phono-graph Co.*, 65 N. J. Eq. 5, 55 Atl. 84; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; 47 N. J. Eq. 11, 20 Atl. 290; *Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486. **N. Y.**—*Stilwell v. Carpenter*, 59 N. Y. 414; *Vilas v. Jones*, 1 N. Y. 274; *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494; *Pater-son v. Bangs*, 9 Paige Ch. 627. **Okla.**—*Ashton v. Board of Comrs.*, 158 Pac. 901. **Tenn.**—*Maddox v. Apperson*, 14 Lea 596; *Chester v. Apperson*, 4 Heisk. 639. **Tex.**—*Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Johnson v. Templeton*, 60 Tex. 238; *Anderson v. Zorn* (Tex. Civ. App.), 131 S. W. 835; *Gilbert v. Cooper*, 43 Tex. Civ. App. 328, 95 S. W. 753; *Ayres v. Parrish*, 15 Tex. Civ. App. 541, 40 S. W. 435. **Va.**—*Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; *Ayres v. Morehead's Admr.*, 77 Va. 586; *Green & Suttle v. Massie*, 21 Gratt. (62 Va.) 356. **Wash.**—*Spokane Co-op. Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165. **W. Va.**—*Farm-ers, etc., Warehouse Co. v. Pridemore*, 55 W. Va. 451, 47 S. E. 258; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Bloss v. Hull*, 27 W. Va. 503, 508. **Wis.**—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896. See also *supra*, XV, C, 3.

[a] Character of Diligence Required.

"A court of equity cannot grant relief against a verdict obtained against a party by his own negligence, where his defense was not prevented by fraud or fault of the other party. It is not enough that the circumstances constitu-ting the obstacle, were beyond the con-trol of the party at the time; it must be shown that no reasonable degree of care and diligence could have pre-vented their occurrence. The party would not, therefore, be entitled to re-lief, unless he has used every reason-able effort to ascertain the nature and bearing of his defense before the trial, and has taken the proper steps to make his defense effectual at the time the case is tried. . . . The principle that runs through all the modern cases, and is now the settled doctrine of a court of equity is, that when a party is sued at law, he has notice of the plaintiff's purpose to obtain a judgment against him on the claim, or demand, the sub-ject of the litigation, and if he fails,

have not intervened under such circumstances as to bar the right to relief.<sup>77</sup>

(II.) Where Defense Is Unavailable.—If the character of the defendant's defense is such that it could not have been set up at law, equity will set aside the judgment.<sup>78</sup> Thus where by the rules of law one cannot avail himself of a defense, relief from the judgment may be had in equity.<sup>79</sup> So also where a party has a defense which has oc-

with the active diligence of a prudent man, thus notified of the purpose of his opponent, to take all the necessary steps demanded, to make good whatever defense he may have against such claim, he cannot ask the aid of another court to relieve him from the consequences of his neglect." *Chester v. Apperson*, 4 Heisk. (Tenn.) 639.

[b] "The circumstances which are relied upon to excuse the failure to defend at law, must have been such that no exercise of diligence on his part could have guarded against." The highest degree of diligence is exacted from the party and if it is not exhibited, the court will not intervene. *Norman v. Burns*, 67 Ala. 248.

[c] If after it has become apparent that a party must fail in his suit, he must avail himself of all means at his disposal to arrest the judgment and exhaust every legal remedy to vacate it after it is rendered, or he will be denied relief in equity. *Dick v. Collins*, 30 Tex. Civ. App. 12, 68 S. W. 1015.

[d] **Not Negligent To Rely On Court's Announcements.**—The oral announcement of the judge that the case would be dismissed may be relied upon by the attorney. He is not negligent in failing to see that the clerk enters the order directed, and if later a judgment is rendered against the client, he may have relief in equity. *Henry v. Seager*, 80 Ill. App. 172. See also *Beveridge v. Hewitt*, 8 Ill. App. 467.

77. *Miller v. Barto*, 247 Ill. 104, 93 N. E. 140.

Effect of rights of third parties generally on right to equitable relief, see *supra*, XV, C, 7.

78. **U. S.**—*Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Knox County v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586; *Phillips v. Negley*, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. ed. 1013; *Kibbe v. Benson*, 17 Wall. 624, 21 L. ed. 741; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L. ed. 262; *Whit-*

*comb v. Shultz*, 223 Fed. 268, 133 C. C. A. 510. **Ala.**—*French v. Garner*, 7 Port. 549; *Royster v. Watkins*, 3 Port. 436. **Ariz.**—*MacRitchie v. Stevens*, 8 Ariz. 410, 76 Pac. 478. **Fla.**—*Peacock v. Feaster*, 52 Fla. 565, 42 So. 889. **Ill.**—*Hofmann v. Burris*, 210 Ill. 587, 71 N. E. 584; *Winchester v. Grosvenor*, 48 Ill. 517. **Ind.**—*Walker v. Heller*, 90 Ind. 198. **Ia.**—*Shrieker v. Field*, 9 Iowa 366. **La.**—*Perry v. Rue*, 31 La. Ann. 287; *Swain v. Sampson*, 6 La. Ann. 799; *Norris v. Fristoe*, 3 La. Ann. 646; *Smith v. Barkemeyer*, 1 McGloin 139. **Md.**—*Hill v. Reifsnider*, 46 Md. 555; *Kearney v. Saseer*, 37 Md. 264. **Mich.**—*Valley City Desk Co. v. Travelers' Ins. Co.*, 143 Mich. 468, 106 N. W. 1125; *Gray v. Barton*, 62 Mich. 186, 28 N. W. 813; *Mack & Davis v. Doty*, How. Ch. 366. **Miss.**—*Miller v. Palmer*, 55 Miss. 323. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. **N. J.**—*Isham v. Cooper*, 56 N. J. Eq. 398, 37 Atl. 462; *Herbert v. Herbert*, 47 N. J. Eq. 11, 20 Atl. 290; *Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486; *Moore v. Gamble*, 9 N. J. Eq. 246. **N. Y.**—*Vilas v. Jones*, 1 N. Y. 274; *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494; *Paterson v. Bangs*, 9 Paige Ch. 627; *Foster v. Wood*, 6 Johns. Ch. 87; *Lansing v. Eddy*, 1 Johns. Ch. 49. **N. C.**—*Peace v. Nailing*, 16 N. C. 289. **Tenn.**—*Chester v. Apperson*, 4 Heisk. 639; *Chester v. Scott's Exrs.*, 4 Hayw. 14; *Reeves v. Hogan*, Cooke 175, 5 Am. Dec. 684. **Va.**—*Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013. 79. *Vennum v. Davis*, 35 Ill. 568.

[a] "There may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law; and therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defense, because it was impossible for him to do it effectually at law." *White v. Cahal*, 2 Swan (Tenn.) 550, quoting *Bateman v. Willoe*, 1 Sch. & Lef. (Irish) 201, 205.

[b] If the defense at law would



curred since the trial in the court at law, whereby it would be a virtual fraud on the party recovering at law to insist upon enforcing the judgment, equity will grant relief.<sup>80</sup>

**Equitable Defense.**—A defense may be unavailable at law because it is purely equitable in its nature, in which event relief from the judgment may be had in equity.<sup>81</sup> But in jurisdictions where statutes permit the interposition of equitable defenses in actions at law, it is sometimes held that a defendant cannot withhold defenses equitable in nature and afterwards obtain relief in equity,<sup>82</sup> though there are

have been so embarrassed or complicated that equity would take jurisdiction because of the embarrassment of the remedy at law, or the complication of the account required in making out the defense and the difficulty of presenting it before a jury, equity will grant relief. *Huff v. Miller* (Tenn.), 53 S. W. 576; *Breeden v. Grigg*, 8 Baxt. (Tenn.) 163; *Chester v. Apperson*, 4 Heisk. (Tenn.) 639; *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497; *Frierson v. Moody*, 3 Humph. (Tenn.) 561.

80. **Ga.**—*Wright v. McDonald*, 44 Ga. 452. **Ill.**—*Chicago Waifs Mission v. Excelsior Electric Co.*, 44 Ill. App. 425. **Ia.**—*Commercial State Bank v. Pierce*, 158 N. W. 481; *Burlington & M. R. Co. v. Hall*, 37 Iowa 620. **Mo.**—*Bassett v. Henry*, 34 Mo. App. 548, 553. [a] A surety, who paid the amount of the bond, after issue joined under judicial compulsion, may maintain an action to annul a money judgment on the bond as he could not plead this defense in his answer or subsequently. *Floratt v. Handy*, 35 La. Ann. 816.

[b] **Payment of the note since the rendition of judgment on it is a defense not cognizable at law, and equity will enjoin the judgment.** *Hawkins v. Harding*, 37 Ill. App. 564, 576.

[c] **But payments made after verdict and before judgment cannot be credited on a judgment by bill in equity, as they should have been credited before rendition of judgment.** The party would no doubt have obtained relief by summary application to the court. The defense should have been set up in the original action. *McGraw v. Pettibone*, 10 Mich. 530.

[d] **Payment and satisfaction of judgment generally as ground for equitable relief, see *infra*, XV, E, 11.**

[e] **Discharge in Bankruptcy.**—(1) A judgment debtor having obtained his discharge as a bankrupt subsequent to the judgment may enjoin its enforce-

ment. *Peatross v. M'Laughlin*, 6 Gratt. (47 Va.) 64. (2) But it is otherwise as to a defense of discharge which is pleadable at law. *Marsh v. Mandeville*, 28 Miss. 122.

81. **U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240; *North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 715, 38 L. ed. 565; *Knox County v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586; *Hendrickson v. Hincley*, 17 How. 443, 15 L. ed. 123; *Massachusetts Benefit Life Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *Interurban Gen. Con. Co. v. United States*, 229 Fed. 588. **Ala.** *Howell v. Motes*, 54 Ala. 1. **Ill.**—*Venum v. Davis*, 35 Ill. 568. **Okla.**—*Ashton v. Board of Comrs.*, 158 Pac. 901. **Tenn.**—*Caldwell v. Palmer*, 6 Lea 652.

82. **Ala.**—*Howell v. Motes*, 54 Ala. 1. **Ga.**—See *Gentle v. Atlas Sav. & Loan Assn.*, 105 Ga. 406, 31 S. E. 544. **Ky.**—*Thomasson v. Townsend*, 10 Bush 114. But see *Dorsey v. Reese*, 14 B. Mon. 157, decided before the statute and characterized in *Emmerson's Admr. v. Herriford*, 8 Bush 229, 235, as "apparently inconsistent dicta;" *Clay v. Fry*, 3 Bibb. 248, 6 Am. Dec. 654; *Morrison's Exr. v. Hart*, 2 Bibb. 4, 4 Am. Dec. 663; *Harlan v. Wingate*, 2 J. J. Marsh. 138; *Moffett v. White*, 1 Litt. 324. **Me.**—*Aetna Life Ins. Co. v. Tremblay*, 101 Me. 585, 65 Atl. 22. **N. Y.** See *Savage v. Allen*, 54 N. Y. 458; *Winfield v. Bacon*, 24 Barb. 154; *Foot v. Sprague*, 12 How. Pr. 355. **Tenn.** *Merriman v. Cannovan*, 7 Coldw. 571; *Galbrath v. Martin*, 5 Humph. 50; *Peyton v. Rawlins*, 4 Hayw. 77.

[a] **In the absence of objection to the jurisdiction of equity, the objection that the defense is available at law is waived and equity can give relief.** *Merriman v. Cannovan*, 7 Coldw. (Tenn.) 571; *Galbrath v. Martin*, 5 Humph. (Tenn.) 50.

authorities to the contrary.<sup>83</sup> If, however, the defendant sets up his defense at law, he cannot again bring in the same defense by application to chancery for relief.<sup>84</sup>

(III.) Accident.—(A.) In general.—A party who is prevented from interposing his defense by accident will be relieved from a judgment against him, on a proper showing of diligence and merits.<sup>85</sup> An ac-

83. Ark.—Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696; Bently v. Dillard, 6 Ark. 79. Cal.—Golson v. Dunlap, 73 Cal. 157, 165, 14 Pac. 576; Lorrane v. Long, 6 Cal. 152. Ga. Fannin v. Thomasson, 45 Ga. 533. Ore. Hill v. Cooper, 6 Ore. 181.
84. See *supra*, XV, E, 2.
85. U. S.—Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; Knox County v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. ed. 1013; Hendrickson v. Hineckley, 17 How. 443, 15 L. ed. 123; Interurban Gen. Con. Co. v. United States, 229 Fed. 588; Whitecomb v. Shultz, 223 Fed. 268, 138 C. C. A. 510; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 116 Fed. 1, 53 C. C. A. 513; Christy v. Atchison T. & S. F. R. Co., 214 Fed. 1016. Ala.—Rittenberry v. Wharton, 176 Ala. 390, 58 So. 293; Roehling Sons Co. v. Stevens Elec. Co., 93 Ala. 39, 9 So. 369; Noble v. Moses, 74 Ala. 604, 616; French v. Garner, 7 Port. 549. Ariz.—MacRitchie v. Stevens, 8 Ariz. 410, 76 Pac. 478. Ark. Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696. Cal.—Le Mesnager v. Variel, 144 Cal. 463, 77 Pac. 988. Conn.—Lithuanian Bro. Society v. Tunila, 80 Conn. 642, 70 Atl. 25; Carrington v. Holabird, 17 Conn. 530, 19 Conn. 84. Fla.—Peacock v. Feaster, 52 Fla. 565, 42 So. 889; Hoey v. Jackson, 31 Fla. 541, 13 So. 459. Ga. Code 1910, §4585; Graham v. Graham, 137 Ga. 668, 74 S. E. 426; Howell v. Ware, 133 Ga. 674, 66 S. E. 884; Capital Bank v. Rutherford, 70 Ga. 57. Ill. Halsted v. Sobra, 204 Ill. 525, 106 N. E. 507; Miller v. Barto, 247 Ill. 104, 93 N. E. 140; Clark v. Ewing, 93 Ill. 572; Chicago D. & V. R. Co. v. Field, 86 Ill. 270; Winchester v. Grosvenor, 48 Ill. 517; Owens v. Ranstead, 22 Ill. 161. Ia.—Ballows v. Tod, 52 Iowa 359, 3 N. W. 102; Shrieker v. Field, 9 Iowa 366. La.—Perry v. Rue, 31 La. Ann. 287; Swain v. Sampson, 6 La. Ann. 799; Norris v. Fristoe, 3 La. Ann. 646; Smith v. Barkemeyer, 1 McGloin 139. Md.—Kearney v. Sascer, 37 Md. 264; Prather v. Prather, 11 Gill & J. 110. Mich.—Valley City Desk Co. v. Travelers' Ins. Co., 143 Mich. 468, 106 N. W. 1125; Gray v. Barton, 62 Mich. 186, 196, 28 N. W. 813; Miller v. Morse, 23 Mich. 365; Mack & Davis v. Doty, Har. Ch. 366. Miss.—Miller v. Palmer, 55 Miss. 323; Hiller & Co. v. Cotton & Co., 48 Miss. 593; Love v. Pass, 14 Smed. & M. 158 ("some occurrence"); Herring v. Winans, Smed. & M. Ch. 466, unavoidable accident. Mo.—Jackson v. Chestnut, 151 Mo. App. 275, 131 S. W. 747. Mont.—Boley v. Griswold, 2 Mont. 447. Neb.—Radzuweit v. Watkins, 53 Neb. 412, 73 N. W. 679. N. H.—Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467. N. J.—Hayes v. United States Phonograph Co., 65 N. J. Eq. 5, 55 Atl. 84; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789; 47 N. J. Eq. 11, 20 Atl. 290; Mechanics Nat. Bank v. Burnet Mfg. Co., 33 N. J. Eq. 486. N. Y. Stilwell v. Carpenter, 59 N. Y. 414; Vilas v. Jones, 1 N. Y. 274; Ludwig v. Walker, 138 App. Div. 850, 123 N. Y. Supp. 468; Barron v. Feist, 122 App. Div. 687, 107 N. Y. Supp. 494; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. Supp. 926; Foster v. Wood, 6 Johns. Ch. 87. N. D.—Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Freeman v. Wood, 14 N. D. 95, 103 N. W. 392. Okla.—Ashton v. Board of Comrs., 158 Pac. 901. Ore.—George v. Nowlan, 38 Ore. 537, 64 Pac. 1, (inevitable accident); Galbraith v. Barnard, 21 Ore. 67, 26 Pac. 1110. S. C.—McDowall v. McDowall, Bailey Eq. 324. Tenn. Maddox v. Apperson, 14 Lea 396; Gwinn v. Newton, 8 Humph. 710; Nicholson v. Patterson, 6 Humph. 394. Tex.—Merrill v. Roberts, 78 Tex. 28, 14 S. W. 254; Hart v. Phelps, 65 Tex. 592; Johnson v. Templeton, 60 Tex. 238; Irvin v. Johnson (Tex. Civ. App.), 170 S. W. 1059; Anderson v. Zorn (Tex. Civ. App.), 131 S. W. 835; Hockwald v. American Suz. Co. (Tex. Civ. App.),

cident in this connection has been defined as an unforeseen occurrence which affects a party injuriously and which is not due to his negligence.<sup>86</sup>

(B.) ABSENCE OF PARTY. — The failure to present a defense because of the mere absence of a party on account of sickness or other cause is not, as a general rule, ground for relief in equity from the judg-

102 S. W. 181. Va.—*Thomas v. Boyd*, 108 Va. 584, 62 S. E. 346; *Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136; *Green & Suttle v. Massie*, 21 Gratt. (62 Va.) 356. Wash. *Spokane Co-op. Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165. W. Va.—*Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Bloss v. Hull*, 27 W. Va. 508; *Braden v. Reitzenberger*, 18 W. Va. 286; *Black v. Smith*, 13 W. Va. 780. Wis.—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896; *Rogan v. Walker*, 1 Wis. 631.

[a] The accident must be that of the losing party.—*Maddox v. Apperson*, 14 Lea (Tenn.) 596.

[b] A defense is not to be deemed lost by accident or mistake if it was or ought to have been within the knowledge of the party when he was called upon for his defense in the action at law. *Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240.

[c] Where an executor mislaid and forgot the receipts for payments made by his testator on the notes in litigation, the unjust judgment was obtained by accident or mistake and equity will grant relief. *Wilday v. McConnell*, 63 Ill. 278.

[d] Refusal of Court to Entertain Plea.—In *Humphreys v. Leggett*, 9 How. (U. S.) 297, 311, 19 L. ed. 145, the court refused to entertain a plea of payment made pending suit because it considered it had no discretion to allow it, in view of a mandate from the supreme court to enter a certain judgment. The mandate was made without regard to the consequences that might flow from it. It was held that this was an accident which prevented the defendant from presenting his defense, and that he was entitled to relief in equity.

Party must have meritorious defense, see *supra*, XV, C, 4.

86. *Engler v. Knoblough*, 131 Mo. App. 481, 110 S. W. 16.

[a] Professor Pomeroy's definition of accident (1) is "an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." (Pom. Eq. Jur. §823). This has been (2) quoted with approval and followed in U. S.—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 116 Fed. 1, 53 C. C. A. 513. Mo.—*Jackson v. Chestnut*, 151 Mo. App. 275, 131 S. W. 747. N. J.—*Herbert v. Herbert*, 49 N. J. Eq., 70, 81, 22 Atl. 789. N. Y.—*Ludwig v. Walker*, 59 Misc. 62, 111 N. Y. Supp. 1102.

[b] "By the term accident is included not merely inevitable casualty or the act of Providence, or what is technically called *vis major* or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions as are not the result of any negligence or misconduct in the party." *Byrne v. Edmonds*, 23 Gratt. (64 Va.) 200, quoting 1 Story's Eq. Jur. §78.

[c] Whether or not the accident must be unavoidable, it "must be of such a kind or nature as would have been prevented by the ordinary care and diligence of a prudent man in the conduct of ordinary business," *Rogan v. Walker*, 1 Wis. 631, 645.

[d] Mistake differs from accident in that it presupposes the action of the will, while in the latter case no such action is implied. *Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896. Mistake as ground for equitable relief, see *infra*, XV, E, 7.



ment.<sup>87</sup> But where it appears that the personal presence of the party is necessary to let in his defense,<sup>88</sup> a court of equity may grant relief on a showing that his absence was caused by sickness or other accident,<sup>89</sup> that he has been guilty of no laches,<sup>90</sup> and that had he been present, there would probably have been a different result more favorable to him.<sup>91</sup>

(C.) ABSENCE, ILLNESS OR DEATH OF COUNSEL.<sup>92</sup> — The mere absence of counsel or his failure to appear at the trial is not sufficient to warrant equitable interference with a judgment.<sup>93</sup> Nor is the mere ab-

87. Ala.—Campbell *v.* White, 77 Ala. 397; Pharr & Beck *v.* Reynolds, 3 Ala. 521. Ark.—Jamison *v.* May, 13 Ark. 600. Mich.—Kelleher *v.* Boden, 55 Mich. 295, 21 N. W. 346. Miss.—McDonald *v.* Myles, 12 Smed. & M. 279; Robb *v.* Halsey, 11 Smed. & M. 140; Cole *v.* Hundley, 8 Smed. & M. 473.

[a] A (1) party in such a case should place his attorney in possession of the means for trying or continuing the case, if the witnesses do not attend, and failing to do so, he is guilty of such negligence as precludes relief in equity. Pharr & Beck *v.* Reynolds, 3 Ala. 521; Aultman, Miller & Co. *v.* Higbee, 32 Tex. Civ. App. 502, 74 S. W. 955. (2) But even if the court should refuse to continue the case equity will refuse to grant relief. The exercise of the power of the court in refusing an application for continuance is discretionary with the court and is not even the subject of review on direct appeal, much less on application for relief in equity. Furthermore, courts of equity uniformly refuse to usurp appellate jurisdiction by granting new trials on grounds already considered and adjudged at law, however erroneous the action of the court may have been. Campbell *v.* White, 77 Ala. 397.

[b] Absence or disability of party as ground for continuance, see 5 STANDARD PROC. 448 et seq.

[c] Voluntary absence from the country is an insufficient excuse. Burnley *v.* Rice, 21 Tex. 171.

88. Jamison *v.* May, 13 Ark. 600; Watson *v.* Palmer, 5 Ark. 501; McDonald *v.* Myles, 12 Smed. & M. (Mis.) 279.

[a] If a defendant is taken sick on his way to the trial of a cause, and is thereby prevented from making an affidavit of the loss of certain deeds, and for want of such affidavit the court refuses to receive copies of the deeds in evidence, chancery will relieve against a judgment obtained by the plaintiff.

Hord *v.* Dishman, 5 Call (9 Va.) 279.

[b] The arrest and detention of a party from the court room at the time when his presence and testimony were needed may be regarded as an accident excusing the failure to present his evidence upon the trial although represented by counsel. McGloin *v.* McGloin, 70 Tex. 634, 8 S. W. 305.

89. McCall *v.* Miller, 120 Ga. 262, 47 S. E. 920.

[a] The death of the defendant's wife, and high water which rendered the roads impassable, and that an attorney, a friend of the defendant at law who was desirous of entering a plea in the case was prevented from doing so by the assignor of the plaintiff are sufficient to excuse a failure to present a defense. Brooks *v.* Whitson, 7 Smed. & M. (Miss.) 513.

90. Ark.—Jamison *v.* May, 13 Ark. 600; Watson *v.* Palmer, 5 Ark. 501. Ga. Woodward *v.* Dromgoole, 71 Ga. 523. Miss.—Robb *v.* Halsey, 11 Smed. & M. 140. Tex.—Roller *v.* Ried (Tex. Civ. App.), 24 S. W. 655.

Party must not have been at fault, see *supra*, XV, C, 3.

91. McCall *v.* Miller, 120 Ga. 262, 47 S. E. 920.

[a] An illness of the party, where it is not shown how it caused him to lose his case, or where it is not shown how long before trial he was confined by sickness, is insufficient to warrant equitable interference with the judgment. Doubleday *v.* Makepeace, 4 Blackf. (Ind.) 9, 28 Am. Dec. 33.

92. Neglect of counsel as ground for equitable relief, see *infra*, XV, E, 5, c, (VIII).

Act of counsel as ground for relief, see *infra*, XV, E, 9.

93. Ga.—Morris *v.* Morris, 76 Ga. 733. Ill.—Kern *v.* Strausberger, 71 Ill. 413. La.—See Easterbrook *v.* Gauche, 27 La. Ann. 36. Tex.—Woolley *v.* Sullivan (Tex. Civ. App.), 43 S. W. 919.

sence of counsel on account of illness generally sufficient, for by proper steps in the law court, the party might obtain a continuance or a new trial.<sup>94</sup> Nor will the death of the original counsel and want of familiarity with the case of the succeeding counsel warrant equitable relief.<sup>95</sup>

(IV.) Ignorance.<sup>96</sup> — Although it has been stated broadly that chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact creating such equity pending the suit,<sup>97</sup> it is generally held that equity will not interfere and set aside a judgment merely because a party failed to present a defense because of his ignorance thereof,<sup>98</sup> unless he shows that he could not have acquired the informa-

W. Va.—*Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487.

[a] Absence of counsel to attend to business in another court does not of itself furnish any ground for opening a judgment. *Randall v. Payne*, 1 Tenn. Ch. 137; *Power v. Gillespie*, 27 Tex. 370.

[b] Abandonment of a cause by the attorney at a trial, where other counsel has been employed and a trial had, is not an accident affording ground for equitable relief. *Winchester v. Grosvenor*, 48 Ill. 517.

94. Ala.—*French v. Garner*, 7 Port. 549; *Mock v. Cundiff*, 6 Port. 24. Compare *McBroom v. Sommerville*, 2 Stew. 515. Miss.—*Yeizer v. Burke*, 3 Smed. & M. 439. Tenn.—*Kearney v. Smith*, 3 Yerg. 127, 24 Am. Dec. 550. W. Va. *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487.

[a] Illness of one of defendant's counsel is not sufficient excuse for failure to make defense at law. *Yeizer v. Burke, Watt & Co.*, 3 Smed. & M. (Miss.) 439.

[b] Counsel of Non-resident Client. Illness of counsel is an accident which absolves a non-resident client from all blame if he is not advised of it, and equity will relieve against the judgment thus taken against him as a result of accident. *Hiller & Co. v. Cotton & Co.*, 48 Miss. 593.

[c] Where it is sought to set aside a judgment on the ground of the absence, at the rendition of judgment, of the defendant and his counsel on account of the illness of the latter who had agreed to notify the defendant when it would be necessary to appear, but who was prevented from so doing because of his illness, it must appear, to authorize setting aside of the judgment, that the counsel was unable to

notify the court of his condition. *Sims v. Sims*, 135 Ga. 439, 69 S. E. 545. See also *Jones v. Patterson*, 138 Ga. 862, 76 S. E. 373; *Howell v. Ware & Harper*, 133 Ga. 674, 66 S. E. 884.

Absence or disability of counsel as ground for continuance, see 5 STANDARD PROC. 444 et seq.

95. *Powell v. Stewart*, 17 Ala. 719, for it must be presumed that the law court would have granted a continuance had it been desired.

96. Ignorance of counsel as grounds for relief, see *infra*, XV, E, 9.

97. Ala.—*Royster v. Watkins*, 3 Port. 436. Ill.—*Smith v. Allen*, 63 Ill. 474. Ky.—*Pearce v. Hedrick*, 3 Litt. 109. Md.—See *Kearney v. Sascor*, 37 Md. 264, 278. Miss.—See *Crisman v. Beasley*, Smed. & M. Ch. 561. N. H. *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. N. Y.—*Foster v. Wood*, 6 Johns. Ch. 87; *Simpson v. Hart*, 1 Johns. Ch. 91; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Hamel v. Grimm*, 10 Abb. Pr. 150. N. C.—*Peace v. Nailing*, 16 N. C. 289. Tenn.—*Turley v. Taylor*, 6 Baxt. 376. Wis.—*Stowell v. Eldred*, 26 Wis. 504. Eng.—See *Williams v. Lee*, 3 Atk. 223, 26 Eng. Reprint 930. [a] Equity "will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant was ignorant of the fact creating such equity pending the trial," *Kibbe v. Benson*, 17 Wall. (U. S.) 624, 23 L. ed. 741.

Newly discovered evidence as a ground for relief, see *infra*, XV, E, 12.

98. Miss.—*Rosenbaum v. Scott*, 40 So. 485; *Love v. Pass*, 14 Smed. & M. 158; *Miller v. Gaskins*, Smed. & M. Ch. 524. N. Y.—*Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114. N. C.—*Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Grantham v. Ken-*

tion by diligent and careful labor in preparing the cause for trial,<sup>32</sup> or that he was prevented from employing such diligence by fraud,<sup>1</sup> accident,<sup>2</sup> or the act of the adverse party,<sup>3</sup> unmixed with fault or negligence on his part,<sup>4</sup> or unless he shows that his ignorance is caused by the wrongful acts of his adversaries,<sup>5</sup> or by his own misfortune which reasonable prudence would not have guarded against.<sup>6</sup> Statutes sometimes authorize equitable relief against judgments where a party has a good defense of which he was entirely ignorant.<sup>7</sup>

Ignorance of the law is insufficient as an excuse for a party's failure to present his defense.<sup>8</sup>

nedy, 91 N. C. 148, 153. S. C.—Jones v. Kilgore, 2 Rich. Eq. 63. Tenn.—Hubbard v. Ewing, 4 Baxt. 404. Tex. Goss v. McClaren, 17 Tex. 107, 67 Am. Dec. 646.

But see Ga.—Dozier v. Wilkerson & Hatcher, 76 Ga. 835. Ill. Vennum v. Davis, 35 Ill. 568 (a party sued at law having a defense of which he does not know may obtain relief against the judgment in equity). Mich. Valley City Desk Co. v. Travelers' Ins. Co., 143 Mich. 468, 106 N. W. 1125; Gray v. Barton, 62 Mich. 186, 28 N. W. 813; Mack & Davis v. Doty, Har. Ch. 366.

[a] Ignorance of a defense goes far sometimes to repel negligence, though standing alone it may not be a sufficient ground for equitable relief. Davis v. Tileston, 6 How. (U. S.) 111, 12 L. ed. 366.

99. U. S.—Foster v. Mansfield, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. ed. 899. Ala.—Garrett v. Lynch, 45 Ala. 204. Ark.—Texas & P. R. Co. v. Smith, 91 Ark. 362, 121 S. W. 282; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696. Ill.—Chapman v. Salfisberg, 111 Ill. App. 102. Miss.—Miller v. Palmer, 55 Miss. 323; Leggett v. Morris, 6 Smed. & M. 723; Miller v. Gaskins, Smed. & M. Ch. 524. N. J.—Herbert v. Herbert, 47 N. J. Eq. 11, 20 Atl. 290; Mechanics Nat. Bank v. Burnet Mfg. Co., 33 N. J. Eq. 486. N. Y.—Gardiner v. Van Alstyne, 22 App. Div. 579, 48 N. Y. Supp. 114; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. Supp. 926 (pardonable ignorance). N. C.—Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581; Grantham v. Kennedy, 91 N. C. 148, 153. N. D. Freeman v. Wood, 14 N. D. 95, 103 N. W. 392. S. C.—Jones v. Kilgore, 2 Rich. Eq. 63. Tenn.—Winchester v. Jackson, 3 Hayw. 305, 309. Wash. Spokane Co-op. Min. Co. v. Pearson, 28

Wash. 118, 68 Pac. 165. W. Va.—Farmers, etc., Warehouse Co. v. Pridemore, 55 W. Va. 451, 47 S. E. 258; Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245. See Harner v. Price, 17 W. Va. 523, 548.

[a] Where by the exercise of reasonable diligence, a party could not have discovered, in time to set it up at law, a meritorious defense of which he was ignorant, equity will relieve against a judgment at law. Chapman v. Salfisberg, 111 Ill. App. 102; Perry v. Rue, 31 La. Ann. 287; Norris v. Fris-toe, 3 La. Ann. 646.

[b] Where it is affirmatively shown that without fault or neglect on his part, a defendant was ignorant of his defense at the time of judgment and during all the time allowed him for applying for a new trial, equity will relieve him from a judgment against him. Roebeling Sons Co. v. Stevens Elec. Co., 93 Ala. 39, 9 So. 369.

1. Garrett v. Lynch, 45 Ala. 204.

Fraud preventing presentation of party's defense, see *infra*, XV, E, 6, b, (III).

2. Garrett v. Lynch, 45 Ala. 204.

3. Garrett v. Lynch, 45 Ala. 204.

4. Garrett v. Lynch, 45 Ala. 204.

Party must not have been at fault, see *supra*, XV, C, 3.

5. Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908.

6. Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908.

7. Georgia Code, 1910, §4585; Gentle v. Atlas Sav. & Loan Assn., 105 Ga. 406, 31 S. E. 544; Capital Bank v. Ruth-erford, 70 Ga. 57.

8. Slayden-Kirksey Woolen Mill v. Robinson (Tex. Civ. App.), 143 S. W. 294.

[a] It is no ground for relief in equity that the defendant did not know, at the time of the trial at law,



(V.) Poverty. — Poverty of a party is insufficient as an excuse for failure to present his defense.<sup>9</sup>

(VI.) Forgetfulness. — Sheer forgetfulness is not within the rule allowing relief in equity where a party is prevented from interposing his defense by fraud, accident, and mistake.<sup>10</sup>

(VII.) Act of Judge. — A party who, relying on a statement of the judge as to the time the case will be heard, does not present his defense, will be relieved in equity from a judgment rendered contrary to the judge's assurance in this respect.<sup>11</sup>

(VIII.) Neglect of Counsel.<sup>12</sup> — The fact that the defendant's attorney neglected to interpose a defense is no ground for equitable relief against a judgment,<sup>13</sup> unless it is shown that the plaintiff in some manner caused the neglect of duty.<sup>14</sup> Equity will not, as a general

the legal criterion of damages. *McKean v. Read*, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

9. *Rosenbaum v. Scott* (Miss.), 40 So. 485; *Harn v. Phelps*, 65 Tex. 592.

10. The fact that a defendant, who has a good defense to an action, missed the train so that he could not be present at the trial and forgot all about the action and necessity of appealing until too late, furnishes no ground for equitable relief against the judgment, although such forgetfulness was caused by extensive and dangerous forest fires and the constant and unusual exertions required of the defendant in fighting such fires and protecting his property. *Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

Party must not have been at fault, see *supra*, XV, C, 3.

11. *Davis v. Terry*, 33 Tex. 426. See also *Miles v. Jones*, 28 Mo. 87. *Contra*, *Johnson v. Driver*, 108 Ga. 595, 34 S. E. 158.

12. Act of counsel as ground for relief, see *infra*, XV, E, 9.

Absence, illness or death of counsel as ground for relief, see *supra*, XV, E, 5, e, (III), (C).

13. *U. S.—Rogers v. Parker*, 1 Hughes 148, 20 Fed. Cas. No. 12,018. *Ariz.—MacRitchie v. Stevens*, 8 Ariz. 410, 76 Pac. 478. *Ga.—Odell v. Mundy*, 59 Ga. 641. *Idaho.—Donovan v. Miller*, 12 Idaho 600, 88 Pac. 82, 10 Ann. Cas. 444. *Ill.—Fuller v. Little*, 69 Ill. 229; *Calman v. Stuckart*, 70 Ill. App. 310. *Ky.—Payton v. McQuown*, 97 Ky. 757, 31 S. W. 874, 53 Am. St. Rep. 437, 31 L. R. A. 33. *Mass.—Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570. *Mich.—Weis-*

*man v. Newton Beef Co.*, 154 Mich. 511, 118 N. W. 2. *Neb.—Tootle-Weakley M. Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85; *Klabunde v. Byron-Reed Co.*, 69 Neb. 120, 95 N. W. 4, 98 N. W. 182; *Funk v. Kansas Mfg. Co.*, 53 Neb. 450, 73 N. W. 931. *N. Y.—Reich v. Cochran*, 102 App. Div. 615, 105 App. Div. 542, 94 N. Y. Supp. 404. *S. C.—Ruff v. Doty*, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709. *Tenn.—Shepard v. Akers*, 3 Tenn. Ch. 215. *Tex.—Browning v. Pumphrey*, 81 Tex. 163, 16 S. W. 870; *Vardeman v. Edwards*, 21 Tex. 737; *Stringer v. Robertson* (Tex. Civ. App.), 140 S. W. 502. *Va.—Ayres v. Morehead's Admr.*, 77 Va. 586. *Wis. Hiles v. Mosher*, 44 Wis. 601. *Compare Rogan v. Walker*, 1 Wis. 631, 644.

[a] In order to justify relief on account of the failure of an attorney to make a defense, a plain breach of duty or something in the nature of an unavoidable calamity must be made to appear. The mere failure of the attorney to do what he was under no obligation to do, or his lack of good judgment as to the steps which should be taken in his client's behalf is not sufficient. *Hedrich v. Smith*, 137 Iowa 625, 115 N. W. 226.

[b] But a misunderstanding of the home attorneys of a defendant sued in a distant county and the attorneys at the place of suit as to the nature of the latter's employment whereby a valid defense is not interposed and judgment is rendered *ex parte*, is sufficient ground for setting aside the judgment. *McCall v. Looney*, 4 Neb. (Unof.) 715, 96 N. W. 238.

14. *Stringer v. Robertson* (Tex. Civ. App.), 140 S. W. 502.

rule, relieve against misleading due to counsel's ignorance or neglect.<sup>15</sup>

(IX.) *Reliance on Strangers.*—Where a party fails to present his defenses because of his reliance for information upon persons not connected with the case, equity will not relieve him from a judgment against him.<sup>16</sup>

6. *Fraud.*—a. *In General.*—Applying the maxim of the common law that fraud vitiates whatever it touches, equity will grant relief against a judgment on the ground of fraud.<sup>17</sup> But equity will not

15. *Owens v. Ranstead*, 22 Ill. 161.

[a] *But if through some mistake of counsel*, the pleadings have not been calculated to bring forth the defense equity will grant relief. *Click v. Gillespie*, 4 Hayw. (Tenn.) 4.

16. *Ark.*—*Jackson v. Woodruff*, 57 Ark. 599, 22 S. W. 566 (an attorney); *Hanna v. Morrow*, 43 Ark. 107 (clerk). *Ga.*—*Dozier v. Wilkerson & Hatcher*, 76 Ga. 835, husband. *Ill.*—*Walker v. Shreve*, 87 Ill. 474; *Higgins v. Bullock*, 73 Ill. 205; *Fillmore v. Hodgman*, 71 Ill. App. 554. *Ind.*—*English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; *Birch v. Frantz*, 77 Ind. 199 (plaintiff's assignor). *Ia.*—*Seddon v. State*, 108 Iowa 378, 69 N. W. 671 (sheriff). *Ky.*—*Hayden v. Moore*, 4 Bush. 107; *Harrison v. Lee*, 7 J. J. Marsh. 171. *Mo.*—*Dunn v. Hansard*, 37 Mo. 199. *Neb.*—*Young v. Morgan*, 13 Neb. 48, 13 N. W. 1. *N. J.*—*Amey v. Calkins* (N. J. Eq.), 19 Atl. 388. *Tenn.*—*Collins v. Knight*, 3 Tenn. Ch. 183 (clerk and sheriff). *Compare Rowland v. Jones*, 2 Heisk. 321. *Tex.*—*Canon v. Hemphill*, 7 Tex. 184. *Va.*—*Lee v. Baird*, 4 Hen. & M. (14 Va.) 453.

[a] *Reliance Upon Clerk.*—An omission to defend in consequence of being misled by the clerk of the court that there is no suit pending such as is described in the process is inexcusable negligence. *Hanna v. Morrow*, 43 Ark. 107.

[b] *Where the sheriff and defendant are in doubt if the defendant is the person intended, and the sheriff promises to notify the defendant before making return of summons as to result of his inquiry, and he fails to do so and the defendant relies on the statements of the sheriff and fails to defend, the defendant is guilty of negligence and is not entitled to equitable relief.* *Higgins v. Bullock*, 73 Ill. 205.

[c] *The failure of the defendant's husband to call her attention to the action and the service of summons upon*

him for her, is not attributable to the plaintiff at law and equity will not set aside the judgment. *Miller v. First Nat. Bank* (Minn.), 157 N. W. 1069.

*Party must not have been at fault, see supra*, XV, C, 3.

17. *U. S.*—*Brown v. Buena Vista Co.*, 95 U. S. 157, 24 L. ed. 422; *Denton v. Baker*, 93 Fed. 46, 35 C. C. A. 187. *Ala.*—*McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *Cromelin v. McCauley*, 67 Ala. 542. *Ark.*—*Citizen's Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102. *Cal.*—*American Surety Co. v. City Street Imp. Co.*, 169 Cal. 172, 146 Pac. 428; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. *Conn.*—*Kelly v. Wiard*, 49 Conn. 443. *Del.*—*Whitaker v. Wickersham*, 5 Del. Ch. 187. *Ga.*—*Code* 1910, §§5965, 4584. *Idaho.*—*Jones v. Vane*, 11 Idaho 353, 82 Pac. 110. *Ill.*—*Nelson v. Rockwell*, 14 Ill. 375; *Follansbee v. Scottish Am. Mort. Co.*, 7 Ill. App. 486. *Ind.*—*Doubleday v. Makepeace*, 4 Blackf. 9, 28 Am. Dec. 33; *Gorman v. Johnson*, 46 Ind. App. 672, 91 N. E. 971. *Ia.*—*Stewart Lumber Co. v. Downs*, 142 Iowa 420, 120 N. W. 1067, 29 L. R. A. (N. S.) 1190 note, 19 Ann. Cas. 1100; *Ebersole v. Lattimer*, 65 Iowa 164, 21 N. W. 500; *Belows v. Tod*, 52 Iowa 359, 3 N. W. 102. *Ky.*—*Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864. *Me.*—*Cunningham v. Gushee*, 73 Me. 417. *Md.*—*Ellicott v. Welch*, 2 Bland 242. *Mich.*—*Scriven v. Hursh*, 39 Mich. 98. *Mo.*—*Einstein v. Strother* (Mo. App.), 182 S. W. 122; *Curtiss v. Bell*, 131 Mo. App. 245, 111 S. W. 131. *Neb.*—*Bankers Union v. Landis*, 75 Neb. 625, 106 N. W. 973. *N. H.*—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. *N. J.*—*Second Workingmen's B. & L. Assn. v. Wickers*, 83 N. J. Eq. 397, 91 Atl. 897; *Tomkins v. Tomkins*, 11 N. J. Eq. 512. *N. Y.*

interfere because of fraud alone.<sup>18</sup> The party aggrieved must show that the judgment is unjust,<sup>19</sup> that he has a meritorious cause of action or defense,<sup>20</sup> that he has no adequate remedy at law,<sup>21</sup> and that he is not guilty of negligence or other fault.<sup>22</sup>

b. *Character of Fraud.*—(I.) *In General.*—The fraud may consist of a fraudulent representation,<sup>23</sup> a fraudulent affirmative act,<sup>24</sup> or a fraudulent concealment of a fact.<sup>25</sup>

It has been held that the term fraud as used here is to be taken in its common and direct sense,<sup>26</sup> and that it means the perpetration of an intentional wrong, or the breach of a duty arising out of a fiduciary capacity.<sup>27</sup> The fraud for which equity will set aside a judgment must be extrinsic or collateral<sup>28</sup> to the matter which was tried and determined

Crouse v. McVickar, 207 N. Y. 213, 100 N. E. 697, 45 L. R. A. N. S. 1159; Matthews v. Carman, 122 App. Div. 582, 107 N. Y. Supp. 694; Harris v. Treu, 14 Misc. 172, 35 N. Y. Supp. 379, 25 Civ. Proc. 92, 2 N. Y. Ann. Cas. 380; Davoue v. Fanning, 4 Johns. Ch. 199. N. C. North Carolina M. & P. Assn. v. Edwards, 168 N. C. 378, 84 S. E. 359; Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520. Pa.—Cochran v. Eldridge, 49 Pa. 365. S. C.—Southern Porcelain Mfg. Co. v. Thew, 5 S. C. 5. Tenn. Cox v. Bank of Hartsville, 63 S. W. 237; Frazer v. Sybert, 5 Sneed 100; Walker v. Day, 8 Baxt. 77, 82; Powell v. Cyfers, 1 Heisk. 526; Randall v. Payne, 1 Tenn. Ch. 137. Tex.—Kalmans v. Baumbush (Tex. Civ. App.), 187 S. W. 697; De Garcia v. San Antonio & A. P. R. Co. (Tex. Civ. App.), 77 S. W. 275; McLane v. San Antonio Nat. Bank (Tex. Civ. App.), 68 S. W. 63. Va.—Thomas v. Jones, 98 Va. 323, 36 S. E. 382; Holland v. Trotter, 22 Gratt. (63 Va.) 136, 141. W. Va. Farmers' etc., Warehouse Co. v. Pride-more, 55 W. Va. 451, 47 S. E. 258; Graham v. Citizen's Nat. Bank, 45 W. Va. 701, 32 S. E. 245. Eng.—Patch v. Ward, L. R. 3 Ch. App. 203.

18. Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747.

19. See *supra*, XV, C, 2.

20. See *supra*, XV, C, 4.

21. See *supra*, XV, C, 6.

22. See *supra*, XV, C, 3.

23. Ward v. Southfield, 102 N. Y. 287, 6 N. E. 660.

Fraud in procuring judgment, see *infra*, XV, E, 6, b, (II).

Fraud preventing presentation of

party's case or defense, see *infra*, XV, E, 6, b, (III).

24. Ward v. Southfield, 102 N. Y. 287, 6 N. E. 660.

25. Mass.—Currier v. Esty, 110 Mass. 536. N. J.—Tomkins v. Tomkins, 11 N. J. Eq. 512; Glover v. Hedges, 1 N. J. Eq. 113. N. Y.—Ward v. Southfield, 102 N. Y. 287, 6 N. E. 660. Tenn. Hickerson v. Raiguel & Co., 2 Heisk. 329.

Character of concealment warranting relief, see *infra*, XV, E, 6, b, (V).

26. Lumpkin v. Snook, 63 Iowa 515, 19 N. W. 333; Bowsman v. Anderson, 62 Ore. 431, 123 Pac. 1092, 125 Pac. 270.

27. Bowsman v. Anderson, 62 Ore. 431, 123 Pac. 1092, 125 Pac. 270.

[a] "What is meant by fraud, as a ground for enjoining and setting aside a judgment, is not mere falsity of claim or proof, but fraud outside of them, perpetrated by some artifice or contrivance of the party or person benefited, or by some collusion of both parties, whereby in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention and deceived." Furbush v. Collingwood, 13 R. I. 720, quoted in Dowell v. Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873.

[b] The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud. Stilwell v. Carpenter, 2 Abb. N. C. (N. Y.) 238, 263.

28. U. S.—Hilton v. Gayot, 159 U. S. 113, 207, 16 Sup. Ct. 139, 40 L. ed. 95; United States v. Throckmorton, 98



in the action at law, and not a fraud that is intrinsic,<sup>29</sup> or that inheres

- U. S. 61, 25 L. ed. 93; *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 136; *Buehler v. Black*, 213 Fed. 880; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *Jackson v. Wilkerson*, 160 Fed. 623, 87 C. C. A. 525; *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50. Ala.—*De Sota Coal M. & D. Co. v. Hill*, 69 So. 948; *Hogan v. Scott*, 186 Ala. 310, 65 So. 209; *Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293. Ark.—*Hall v. Cox*, 104 Ark. 303, 149 S. W. 80; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250. Ala.—*De Sota Coal Min. & Dev. Co. v. Hill*, 69 So. 948. Cal.—*Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184; *Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579; *Steen v. March*, 132 Cal. 616, 64 Pac. 994; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; *Davis v. Hibernia Sav. & L. Soc.*, 21 Cal. App. 444, 132 Pac. 462; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. Colo.—*La Fitte v. Salisbury*, 43 Colo. 248, 95 Pac. 1065; *Boldenweck v. Bailis*, 40 Colo. 253, 90 Pac. 634. Ga.—*Thompson v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536. Ind.—*Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151. Ia.—*Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899; *Richards v. Moran*, 137 Iowa 220, 114 N. W. 1035; *Hedrick v. Smith*, 115 N. W. 226; *Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544. Kan.—*Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 551; *Garrett Biblical Inst. v. Minard*, 82 Kan. 338, 108 Pac. 80; *Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 106 Pac. 1079. Mass.—*Nesson v. Gorton*, 112 N. E. 870. Mo.—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Springfield Traction Co. v. Dent*, 139 Mo. App. 220, 140 S. W. 606; *Walther v. Null*, 134 S. W. 993; *Wabash Railroad Co. v. Mirrieles*, 182 Mo. 126, 81 S. W. 437. N. Y.—*Gitler v. Russian Co.*, 124 App. Div. 273, 108 N. Y. Supp. 708; *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926. Ohio.—*Michael v. American Nat. Bank*, 84 Ohio St. 370, 95 N. E. 905. Okla.—*Elrod v. Adair*, 153 Pac. 660; *Brown v. Trent*, 36 Okla. 239, 128 Pac. 895; *Estes v. Timmons*, 12 Okla. 537, 73 Pac. 303. Tenn.—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71; *Cox v. Bank of Hartsville*, 63 S. W. 237. Tex.—*McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63. Vt.—*French v. Raymond*, 82 Vt. 156, 72 Atl. 224; *Camp v. Ward*, 69 Vt. 236, 37 Atl. 747, 60 Am. St. Rep. 929. Wash.—*Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5.
- [a] *Compare*, *Johnston v. Barkley*, 10 Ont. L. Rep. 724, in which the court coming to its conclusion drew no distinction between the fraud consisting in presenting perjured testimony and fraud collateral to the merits of the case.
- [b] The extrinsic fraud for which a judgment may be set aside is defined by Lord Cairns in *Patch v. Ward*, Law Rep. 3 Ch. App. 203, 207, to be "actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him," quoted in Ala.—*McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *Noble v. Moses*, 74 Ala. 604, 616. Cal.—*Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. Tenn.—*Cox v. Bank of Hartsville*, 63 S. W. 237; *Smith v. Miller*, 42 S. W. 182; *McDowell v. Morrell*, 5 Lea 278; *Randall v. Payne*, 1 Tenn. Ch. 137.
- [c] "By the expression 'extrinsic or collateral fraud' is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy." *Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 735, 106 Pac. 1079.
- [d] Fraud practiced upon a party by reason of something done outside of the main case, by which he was prevented from presenting his case to the court is extrinsic fraud. *Maddox v. Apperson*, 14 Lea (Tenn.) 596.
- [e] Extrinsic fraud consists in the failure to give legal notice to the adversary, the prevention of him or his witnesses from attending the trial and the like. *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98.
29. *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Sohler v. Sohler*, 135 Cal.

in or is involved in the issues of the prior suit.<sup>30</sup> It must be an actual<sup>31</sup> and positive,<sup>32</sup> not merely a constructive<sup>33</sup> fraud. It must have been at the foundation of the decision attacked or, as it has frequently been expressed, it must have been practiced in the very act of obtaining the judgment.<sup>34</sup> The fraud must go to the whole<sup>35</sup>

323, 67 Pac. 282, 87 Am. St. Rep. 98; *Cox v. Bank of Hartsville* (Tenn.), 63 S. W. 237.

[a] Fraud perpetrated in the effort to sustain or refute an issue already in existence at the time of its perpetration is intrinsic. *Cox v. Bank of Hartsville* (Tenn.), 63 S. W. 237.

30. **U. S.**—*Jackson v. Wilkerson*, 160 Fed. 623, 87 C. C. A. 525; *Buchler v. Black*, 213 Fed. 880. **Ala.**—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209. **N. Y.** *Gitler v. Russian Co.*, 124 App. Div. 273, 108 N. Y. Supp. 793. **Okla.**—*Estes v. Timmons*, 12 Okla. 537, 73 Pac. 303. **Vt.** *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

31. **Ala.**—*Hardeman v. Donaghey*, 170 Ala. 362, 367, 54 So. 172; *Noble v. Moses*, 74 Ala. 604, 616; *Cromelin v. McCauley*, 67 Ala. 542. **Kan.**—*Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 859. **Mo.**—*Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Nichols v. Stevens*, 123 Mo. 96, 116, 25 S. W. 578, 45 Am. St. Rep. 514. **N. Y.**—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Ross v. Wood*, 70 N. Y. 8; *Parham v. Burns*, 135 App. Div. 884, 120 N. Y. Supp. 142. **Tex.**—*Cayce v. Powell*, 20 Tex. 767, 73 Am. Dec. 211; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63. **Eng.**—*Patch v. Ward*, L. R. 3 Ch. App. 203.

[a] The fraud must be an actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining that decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead, without any such intention or contrivance would not be sufficient, at least after a considerable delay. *Patch v. Ward*, L. R. 3 Ch. App. (Eng.) 203. To same effect, *Smith v. Miller* (Tenn.), 42 S. W. 182.

[b] Mere surmise or suspicion of fraud is insufficient to obtain equitable relief. *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63.

32. *Hardeman v. Donaghey*, 170 Ala.

362, 367, 54 So. 172; *Noble v. Moses Bros.*, 74 Ala. 604, 616; *Cromelin v. McCauley*, 67 Ala. 542; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63.

33. *Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 859; *Patch v. Ward*, L. R. 3 Ch. App. (Eng.) 203, 212.

[a] **Must Not Be Merely a Legal and Technical Fraud.**—*Cayce v. Powell*, 20 Tex. 767, 73 Am. Dec. 211.

[b] The fraud for which a judgment may be set aside must be actual fraud, involving intentional wrong, as distinguished from legal or constructive fraud. *Wagner v. Beadle*, 82 Kan. 468, 108 Pac. 859.

34. **Ala.**—*De Sota Coal Min. & Dev. Co. v. Hill*, 69 So. 948. **Cal.**—*Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908. **Mo.**—*Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Blass v. Blass* (Mo. App.), 186 S. W. 1094; *Einstein v. Strother* (Mo. App.), 182 S. W. 122. **N. Y.** *Stilwell v. Carpenter*, 2 Abb. N. C. 238. **Can.**—*Johnston v. Barkley*, 10 Ont. L. Rep. 724.

[a] The fraud must have directly induced the rendition of the judgment attacked, not merely have induced or brought about a condition upon the real existence of which the court acted as a basis of its decree. *Uecker v. Thiedt*, 133 Wis. 148, 113 N. W. 447.

35. *Laithe v. M'Donald*, 12 Kan. 340; *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 87; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320. *Compare*, *Stewart Lumber Co. v. Downs*, 142 Iowa 420, 120 N. W. 1067, 29 L. R. A. (N. S.) 1190, note, 19 Ann. Cas. 1100.

[a] **Fraud as to Excess of Damages.** The cases of relief in equity against judgments at law founded in fraud, are, when the fraud goes to the whole judgment, and not to the mere excess of damages in a cause properly sounding in damages. *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320. See *Riddle v. Baker*, 13 Cal. 295; *Provins v. Lovi*, 6 Okla. 94, 50 Pac. 81 (which was a proceeding by petition to vacate a judgment obtained by fraud, holding the correct rule to be: Where it is shown that an

judgment, and must, of course, have been successful.<sup>36</sup> To be defrauded the party must have been ignorant of the fraud at the time it was practiced, for not knowing of the fraud, he is not chargeable with neglect or inattention.<sup>37</sup>

(II.) Fraud in Procuring Judgment.<sup>38</sup>—Where fraud is practiced in the procuring of a judgment, equity will usually set aside or enjoin the judgment.<sup>39</sup> A party who misleads his adversary into the belief

award of damages is grossly excessive, and that a new trial will probably relieve against such excess, and it is also shown that the excessive judgment was obtained by the fraud of the party procuring the same, then the courts should set aside the judgment so obtained; but unless these facts are clearly made to appear a new trial should be refused).

[1] If a judgment is fraudulently excessive, resort to equity is not necessary as the party can make use of this fact to defeat the suits at law upon the judgment. *Cunningham v. Gushee*, 73 Me. 417.

36. *Holton v. Davis*, 108 Fed. 138, 47 C. C. A. 246; *Allen v. Allen*, 97 Fed. 525, 38 C. C. A. 336; *Dringer v. Receiver of Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811.

[a] Where the fraud of the attorney does not affect the result of the trial at law equity will not grant relief against the judgment. *Amory v. Amory*, 6 Biss. 174, 1 Fed. Cas. No. 335.

Party must suffer injury, see *supra*, XV, C, 2.

37. **N. Y.**—*Verplanck v. Van Buren*, 76 N. Y. 247, 258; *Stilwell v. Carpenter*, 2 Abb. N. C. 238, 263. **Tenn.** *Cox v. Bank (Tenn. Ch. App.)*, 63 S. W. 237; *Taylor v. Nashville & C. R. Co.*, 86 Tenn. 228, 6 S. W. 393. **Eng.**—*Patch v. Ward*, L. R. 3 Ch. App. 203.

38. Fraud preventing presentation of party's case or defense as ground for equitable relief, see *infra*, XV, E, 6, b, (III).

Fraud in the cause of action as ground for equitable relief, see *infra*, XV, E, 6, b, (IV).

39. **U. S.**—*United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. ed. 563; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Whitecomb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510; *Christy v. Atchison, etc. R. Co.*, 214 Fed. 1016; *Sanford v. White*, 132 Fed. 531; *Trefz v. Knickerbocker Life Ins. Co.*, 8 Fed. 177. **Ala.**—*De*

*Sota Coal Min. & Dev. Co. v. Hill*, 69 So. 948; *Hendley v. Chabert*, 189 Ala. 258, 65 So. 993; *Hardeman v. Donaghey*, 170 Ala. 362, 54 So. 172; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *Alder v. Van Kirk Land & Con. Co.*, 114 Ala. 551, 562, 21 So. 490; *Noble v. Moses*, 74 Ala. 604, 616. **Ark.**—*Hall v. Cox*, 104 Ark. 303, 149 S. W. 80; *Segers v. Ayers*, 95 Ark. 178, 128 S. W. 1045; *Pattison v. Smith*, 94 Ark. 538, 127 S. W. 983; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485; *Bently v. Dillard*, 6 Ark. 79. **Cal.** *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232. **Colo.** *Pierce v. Hamilton*, 55 Colo. 448, 135 Pac. 796; *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634. **Conn.**—*Tyler v. Hammersley*, 44 Conn. 419, 36 Am. St. Rep. 479. **Fla.**—*Order of United Commercial Travelers v. Bell*, 62 Fla. 565, 56 So. 910. **Ga.**—*Lester v. Reynolds*, 144 Ga. 143, 86 S. E. 321; *Wade v. Watson*, 123 Ga. 608, 66 S. E. 922; *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689; *Tumlin v. O'Bryan*, 68 Ga. 65; *McArthur v. Mathewson*, 67 Ga. 134, 144. **Ill.**—*Simpson v. Simpson*, 273 Ill. 90, 112 N. E. 276; *Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507; *French v. Thomas*, 252 Ill. 65, 96 N. E. 564; *Holmes v. Stateler*, 57 Ill. 209; *How v. Mortell*, 28 Ill. 478; *Hollister v. Sobra*, 171 Ill. App. 616; *West Chicago St. R. Co. v. Stoltzenfeldt*, 100 Ill. App. 142; *Prussian National Ins. Co. v. Chiochocky*, 94 Ill. App. 168. **Ind.**—*Vivian Collieries Co. v. Cahall*, 110 N. E. 672; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Miedreich v. Lauenstein*, 172 Ind. 110, 86 N. E. 963, 87 N. E. 1029; *Nealis v. Dicks*, 72 Ind. 374; *Graham v. Loh*, 32 Ind. App. 183, 69 N. E. 474; *Tereba v. Standard Cabinet Mfg. Co.*, 32 Ind. App. 9, 68 N. E. 1033. **Ia.**—*Frisbie v. Chase*, 161 Iowa 133,



that he will not prosecute or resist the claim, as the case may be, and then recovers a judgment, when the adversary acting on that belief fails to appear and prosecute or defend, is guilty of a fraud from

- 140 N. W. 842; *Richards v. Moran*, 137 Iowa 220, 114 N. W. 1035; *Clark v. Ellsworth*, 84 Iowa 525, 51 N. W. 31; *Brownell v. Storm Lake Bank*, 63 Iowa 754, 19 N. W. 788; *Harshey v. Blackmarr*, 20 Iowa 161; *Johnson v. Lyon*, 14 Iowa 431; *Powell v. Spaulding*, 3 Greene 443, 468. **Kan.**—*Garrett Biblical Inst. v. Minard*, 82 Kan. 338, 108 Pac. 80; *Publishing House v. Hevl*, 61 Kan. 634, 60 Pac. 317; *Laithe v. M'Donald*, 12 Kan. 340; *Adams v. Secor*, 6 Kan. 542. **La.**—*Boudreaux v. Lower Terrebonne Ref. & Mfg. Co.*, 127 La. 98, 53 So. 456; *State ex rel. Pelletier v. Sommerville*, 112 La. 1091, 36 So. 864; *Noyes v. Loeb*, 24 La. Ann. 48; *Garlick v. Reece*, 8 La. 101. **Md.**—*Hill v. Reifsnider*, 46 Md. 555. **Mass.**—*Nesson v. Gilson*, 112 N. E. 870. **Mich.** *Steele v. Bliss*, 170 Mich. 175, 134 N. W. 1013, 135 N. W. 931; *Ewing v. Lamphere*, 147 Mich. 659, 111 N. W. 187. **Minn.**—*Leighton v. Bruce*, 156 N. W. 285; *Dart v. Richardson*, 96 Minn. 249, 104 N. W. 1094; *Geisberg v. O'Laughlin*, 88 Minn. 431, 93 N. W. 310; *State v. Bachelder*, 5 Minn. 223, 80 Am. Dec. 410. **Miss.**—*Germain v. Harwell*, 66 So. 396; *Newman v. Taylor*, 69 Miss. 670, 13 So. 831. **Mo.**—*Wolf v. Brooks*, 177 S. W. 337; *Covington v. Chamberlin*, 156 Mo. 574, 588, 57 S. W. 728; *Wonderly v. Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Moody v. Peyton*, 135 Mo. 482, 489, 36 S. W. 621, 58 Am. St. Rep. 604; *Nichols v. Stevens*, 123 Mo. 96, 116, 25 S. W. 578, 583, 45 Am. St. Rep. 514; *Murphy v. De France*, 105 Mo. 53, 101 Mo. 151, 13 S. W. 756; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Tapana v. Shaffray*, 97 Mo. App. 337, 71 S. W. 119; *Missouri, etc. R. Co. v. Warden*, 73 Mo. App. 117. **Neb.**—*Schneider v. Lobingier*, 82 Neb. 174, 117 N. W. 473; *In re James' Est.*, 97 N. W. 22; *McHale v. Metz*, 70 Neb. 106, 96 N. W. 1004; *Cleland v. Hamilton L. & T. Co.*, 55 Neb. 13, 75 N. W. 239. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Bellows v. Stone*, 14 N. H. 175, 203. **N. J.**—*Clark v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319; *Dringer v. Receiver of Erie Ry.*, 42 N. J. Eq. 573, 8 Atl. 811; *Stratton v. Allen*, 16 N. J. Eq. 229; *Gifford v. Thorn*, 9 N. J. Eq. 702, 722; *Moore v. Gamble*, 9 N. J. Eq. 216. **N. Y.**—*Ross v. Wood*, 70 N. Y. 8; *Stillwell v. Carpenter*, 59 N. Y. 414; *Stillwell v. Carpenter*, 2 Abb. N. C. 238; *Ludwig v. Walker*, 138 App. Div. 850, 123 N. Y. Supp. 468; *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926; *New York & Mt. V. Transp. Co. v. Tyroler*, 25 App. Div. 161, 48 N. Y. Supp. 1095; *Gardiner v. Van Alstyne*, 22 App. Div. 579, 48 N. Y. Supp. 114. **N. C.**—*Moody v. Wike*, 87 S. E. 350; *North Carolina Mut. & P. Assn. v. Edwards*, 168 N. C. 378, 84 S. E. 359; *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435; *Moore v. Gulley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242. **Ohio.**—*Johnson v. Pomeroy*, 31 Ohio St. 247; *Cooch v. Cooch*, 18 Ohio 146; *Woodward v. Curtis*, 19 Ohio Cir. Ct. 15; *Howenstine v. Sweet*, 13 Ohio Cir. Ct. 239. **Okla.**—*Elrod v. Adair*, 153 Pac. 660; *Johnson v. Filtsch*, 37 Okla. 510, 138 Pac. 165; *Brown v. Trent*, 36 Okla. 239, 128 Pac. 895. **Ore.** *Froebich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634; *George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. **Tenn.** *Cox v. Bank of Hartsville*, 63 S. W. 237; *Smith v. Miller*, 42 S. W. 182; *Maddox v. Apperson*, 14 Lea 596, 604; *McDowell v. Morrell*, 5 Lea 278; *Jones v. Williamson*, 5 Coldw. 371; *Drake v. Drake*, 12 Heisk. 704; *Evans v. International Trust Co. (Tenn. Ch.)*, 59 S. W. 373. **Tex.**—*McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357; *Medlin v. Com. Bond & Cas. Ins. Co. (Tex. Civ. App.)*, 180 S. W. 899; *Crosby v. Di Palma (Tex. Civ. App.)*, 141 S. W. 321; *Bradford v. Malone*, 49 Tex. Civ. App. 440, 130 S. W. 1013; *Cowan v. Brett*, 43 Tex. Civ. App. 569, 97 S. W. 330; *Cetti v. Dunman*, 26 Tex. Civ. App. 433, 64 S. W. 787. **Utah.**—*Mosby v. Gisborn*, 17 Utah 257, 281, 54 Pac. 121; *Benson v. Anderson*, 10 Utah 135, 37 Pac. 256. **Vt.**—*Seoville v. Brock*, 79 Vt. 449, 65 Atl. 577. **Va.**—*Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697. **Wash.**—*Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5. **Wis.**—*Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

which equity will relieve.<sup>40</sup> And the presentation of a false affidavit to the court for the purpose of obtaining an order for service of summons by publication is a fraud on the court as well as upon the

Wyo.—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 687. **Eng.**—*Loyd v. Mansel*, 2 P. Wms. 73, 21 Eng. Reprint 645; *Richmond v. Tayleur*, 1 P. Wms. 734, 24 Eng. Reprint 591. **Can.**—*Charlebois v. Delap*, 26 Can. Sup. 221, 249; *Johnston v. Barkley*, 10 Ont. L. Rep. 724.

[a] **Time Fraud Must Exist.**—It matters not when the fraud in procuring an attorney's signature to a consent judgment was committed, if it caused the plaintiff's attorney to sign the judgment in ignorance of its existence. The fraud need not be repeated when the judgment was actually signed for it is to be taken as having continued from the date of its origin down to the time of the signing. *Moody v. Wike* (N. C.), 87 S. E. 350.

[b] **Illustrations.**—To come within the rule, the fraud must relate to the proceedings, such as falsifying the entries, improperly influencing the court, jury, witnesses, etc. It must be such misconduct as has some direct bearing on the rendition of the judgment. *Hardeman v. Donaghey*, 170 Ala. 362, 54 So. 172.

[c] Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93; *United States v. Aakervik*, 180 Fed. 137. **Ala.**—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209. **Cal.**—*Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970,

27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965. **Fla.**—*Purviance v. Edwards*, 17 Fla. 140. **Minn.**—*Street v. Alden*, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632. **S. D.**—*Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346. **Tenn.**—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71. **Wash.**—*Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5.

[a] A party who obtains a judgment by changing and mutilating the evidence filed of record, thereby depriving his opponent of a part of his evidence, will not be allowed in equity to enjoy the fruits of his fraud. *Cox v. Bank of Hartsville* (Tenn.), 63 S. W. 237.

As to fraudulent alteration of judgments, see *infra*, XV, E, 6, b, (VI).

[b] A false statement as to the truth of the complaint, made out of court and not affecting the conduct of the case cannot be shown for the purpose of impeaching a judgment. *Andes v. Millard*, 70 Fed. 515.

[c] Though no representation be made to a defendant inducing him not to make his defense, yet if a plaintiff bring on his action without the knowledge of the defendant, and at a time when he knows the defendant has reason to expect the trial of it will not be had, equity will relieve against it. *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382.

40. **U. S.**—*Cage's Exrs. v. Cassidy*, 23 How. 109, 16 L. ed. 430. **Ark.**—*Womack v. Womack*, 73 Ark. 281, 83 S. W. 937. **Ga.**—*Beverly v. Flesenthall Bros.*, 142 Ga. 834, 83 S. E. 942; *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303 (defendant guilty of fraud). **Ia.**—*Baker v. Redd*, 44 Iowa 179; *Humphrey v. Darlington*, 15 Iowa 207. **Kan.**—*Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 106 Pac. 1079, defendant guilty of fraud. **Ky.**—*Lawrence v. Lawrence*, 145 Ky. 61, 140 S. W. 36; *Broadus v. Broadus*, 3 Dana 536; *Gill v. Carter*, 6 J. J. Marsh. 484; *Williams v. Fowler*, 2 J. J. Marsh. 405. **La.**—*Lazarus v. McGuirk*, 42 La. Ann. 194, 8 So. 253. **N. Y.**—*Hinckley v. Miles*, 15 Hun 170. **Va.**—*Moore v. Lipscombe*, 82

defendant, and equity will set aside a judgment thus obtained,<sup>41</sup> where no rights of innocent third persons claiming thereunder are involved.<sup>42</sup> But equity will not usually vacate a judgment merely because it was obtained by forged documents,<sup>43</sup> or perjured or false testimony alone.<sup>44</sup>

(III.) **Fraud Preventing Presentation of Party's Case or Defense.**<sup>45</sup> — (A.) **IN GENERAL.** — Equity will give relief against a judgment where the fraud practised by the prevailing party prevented the losing party from presenting his cause of action,<sup>46</sup> or interposing his defense,<sup>47</sup> if

Va. 546; *Dey v. Martin*, 78 Va. 1; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136, 144.

41. *Stern v. Judson*, 163 Cal. 726, 127 Pac. 38; *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361; *Smith v. Collis*, 42 Mont. 350, 112 Pac. 1070. See also *Loyd v. Mansel*, 2 P. Wms. 73, 24 Eng. Reprint 645, where the plaintiff got a common bailiff to make a false affidavit that the defendant had gone beyond the seas, upon which affidavit the cause was heard ex parte.

42. *Stern v. Judson*, 163 Cal. 726, 127 Pac. 38.

**Effect of rights of third parties on right to relief**, see *supra*, XV, C, 7.

43. **U. S.**—*Hilton v. Guyot*, 159 U. S. 113, 207, 16 Sup. Ct. 139, 40 L. ed. 95; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463. *Compare*, *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870. **Ala.**—*De Soto Coal M. & D. Co. v. Hill*, 69 So. 948; *Hogan v. Scott*, 186 Ala. 310, 65 So. 209. **Cal.**—*Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965. **Ia.**—*Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899. **Mo.**—*Hamilton v. McLean*, 169 Mo. 51, 68 S.—W. 930; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 583, 27 S. W. 613, 45 Am. St. Rep. 514. **N. Y.**—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. **Tenn.**—*Cox v. Bank of Hartsville*, 63 S. W. 237, 243. **Vt.**—*Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929. **W. Va.** *Farmers & Shippers L. T. Warehouse Co. v. Pridemore*, 55 W. Va. 451, 47 S. E. 258.

[a] **In Georgia** *Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L.

R. A. (N. S.) 536, construed *Griffin v. Sketoe*, 30 Ga. 300, to hold at the furthest only that a judgment will be set aside when the prevailing party practises a fraud on the court in proving his case by means of a forged or fraudulent instrument.

[b] **In Louisiana** the code authorizes an action of nullity of a judgment procured by means of forged documents. Code of Practice, art. 607. This was construed in *Beauchamp v. McMicken*, 7 Mart. N. S. (La.) 605, to apply to judgments obtained by producing false documents. To same effect, *Perry v. Rue*, 31 La. Ann. 287; *Noyes v. Loeb*, 24 La. Ann. 48.

[c] Where the indorsements of payment of a part of a note were erased, and judgment recovered for the whole amount, the document was falsified and the judgment will be annulled. *Noyes v. Loeb*, 24 La. Ann. 48.

44. See 4 STANDARD PROC. 476.

45. **Fraud in procuring judgment as ground for equitable relief**, see *supra*, XV, E, 6, b, (II).

**Fraud in the cause of action as ground for equitable relief**, see *infra*, XV, E, 6, b, (IV).

46. **Ill.**—*Owens v. Ranstead*, 22 Ill. 161. **Ia.**—*Lumpkin v. Snook*, 63 Iowa 515, 19 N. W. 333. **Tex.**—*Hester v. Baskin* (Tex. Civ. App.), 184 S. W. 726; *McLane v. San Antonio Nat. Bank* (Tex. Civ. App.), 68 S. W. 63; *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815. **Can.**—*Charlebois v. Delap*, 26 Can. Sup. 221, 249.

47. **U. S.**—*Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; *Phillips v. Negley*, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. ed. 1013; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123; *Truly v. Wanzer*, 5 How. 141, 12 L. ed. 88; *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156; *Whitcomb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510; *Christy v. Atchison*, etc. R. Co., 214 Fed. 1016; *United*



- State v. Mani*, 100 Fed. 160; *United States v. Aakervick*, 180 Fed. 137. **Ala.**—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Noble v. Moses*, 74 Ala. 604, 616; *French v. Garner*, 7 Port. 549. **Ariz.**—*MacRitchie v. Stevenson*, 8 Ariz. 410, 76 Pac. 478; *San Pedro Cattle Co. v. Williams*, 4 Ariz. 386, 36 Pac. 34. **Ark.**—*Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Hempstead & Conway v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696. **Cal.**—*Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Riddle v. Baker*, 13 Cal. 295. **Colo.**—*La Fitte v. Salisbury*, 43 Colo. 248, 95 Pac. 1065; *Venner v. Denver Union Water Co.*, 40 Colo. 212, 93 Pac. 629, 632. **Conn.**—*Lithuanian Brotherhood Soc. v. Tunila*, 80 Conn. 642, 70 Atl. 25; *Carrington v. Holabird*, 17 Conn. 530, 19 Conn. 84. **Fla.**—*Day v. Hurchman*, 65 Fla. 186, 61 So. 445; *Peacock v. Feaster*, 52 Fla. 565, 42 So. 889; *Hoey v. Jackson*, 31 Fla. 541, 13 So. 459. **Ga.**—*Code*, 1910, §4585; *Clark v. Ramsey*, 143 Ga. 729, 85 S. E. 869; *Phillips v. James*, 115 Ga. 425, 41 S. E. 663; *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303; *Dodge v. Williams*, 107 Ga. 410, 33 S. E. 468; *Capital Bank v. Rutherford*, 70 Ga. 57. **Ill.**—*Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507; *Miller v. Barto*, 247 Ill. 104, 93 N. E. 310; *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156; *Clark v. Ewing*, 93 Ill. 572; *Owens v. Ranstead*, 22 Ill. 161; *Hilt v. Heimberger*, 140 Ill. App. 129. **Ind.**—*Adams School Tp. v. Irwin*, 150 Ind. 12, 49 N. E. 806. **Ia.**—*Lumpkin v. Smith*, 63 Iowa 515, 19 N. W. 333; *Stricker v. Field*, 9 Iowa 366. **La.**—*Perry v. Rue*, 31 La. Ann. 287; *Swain v. Sampson*, 6 La. Ann. 799; *Norris v. Fristoe*, 3 La. Ann. 646; *Smith v. Barke-meyer*, 1 McGloin 139; *Kouns v. Wag-gaman*, Man. Unrep. Cas. 318. **Md.**—*Twigg v. Hopkins*, 85 Md. 301, 37 Atl. 21; *Hill v. Reister*, 46 Md. 555; *Kearney v. Sasser*, 37 Md. 264; *Prather v. Prather*, 11 Gill & J. 110. **Mich.**—*Weisman v. Newton Beef Co.*, 154 Mich. 511, 118 N. W. 2; *Valley City Desk Co. v. Travelers' Ins. Co.*, 143 Mich. 468, 106 N. W. 1125; *Gray v. Barton*, 62 Mich. 186, 196, 28 N. W. 813; *Mil-lar v. Morse*, 23 Mich. 365; *Burpee v. Smith*, Walk. Ch. 327; *Mack & Davis v. Doty*, Har. Ch. 366. **Minn.**—*Street v. Alden*, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632. **Miss.**—*Miller v. Palmer*, 55 Miss. 323; *Hiller & Co. v. Cotton & Co.*, 48 Miss. 593; *Love v. Pass*, 14 Smed. & M. 158; *Deaton v. Crowder*, 7 Smed. & M. 185; *Herring v. Winans*, Smed. & M. Ch. 466. **Mo.**—*Wonderly v. Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386; *Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Payne v. O'Shea*, 84 Mo. 130; *Tapana v. Shaffray*, 97 Mo. App. 337, 71 S. W. 119. **Mont.**—*Boley v. Griswold*, 2 Mont. 447. **Neb.**—*Manro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366. **N. H.**—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. **N. J.**—*Hayes v. United States Phonograph Co.*, 65 N. J. Eq. 5, 55 Atl. 81; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789, 47 N. J. Eq. 11, 20 Atl. 290; *Mechanics Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486. **N. Y.**—*Stilwell v. Carpenter*, 59 N. Y. 414; *Vilas v. Jones*, 1 N. Y. 274; *Poster v. Wood*, 6 Johns. Ch. 87; *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494; *Everett v. Everett*, 89 App. Div. 619, 85 N. Y. Supp. 922; *Hoskins v. Nichols*, 48 Misc. 465, 96 N. Y. Supp. 926. **N. C.**—*Grantham v. Ken-nedy*, 91 N. C. 148, 153. **N. D.**—*Brueg-ger v. Cartier*, 20 N. D. 72, 126 N. W. 491; *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392. **Okla.**—*Ashton v. Board of Comrs.*, 158 Pac. 901; *Guthrie v. Mc-Kennon*, 91 Pac. 851. **Ore.**—*George v. Nowlan*, 38 Ore. 537, 64 Pac. 1. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000. **Tenn.**—*Maddox v. Apper-son*, 14 Lea 596; *Chester v. Apperson*, 4 Heisk. 639; *Gwinn v. Newton*, 8 Humph. 710; *Nicholson v. Patterson*, 6 Humph. 394; *Reeves v. Hogan*, Cooke 175, 5 Am. Dec. 684. **Tex.**—*Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Johnson v. Templeton*, 60 Tex. 238; *Hester v. Baskin* (Tex. Civ. App.), 184 S. W. 726; *Anderson v. Zorn* (Tex. Civ. App.), 131 S. W. 835; *Hockwald v. American Sur. Co.* (Tex. Civ. App.), 102 S. W. 181; *Jordan v. Brown* (Tex. Civ. App.), 94 S. W. 338. **Utah.**—*Mosby v. Gisborn*, 17 Utah 257, 54 Pac. 121. **Va.**—*Thomas v. Boyd*, 108 Va. 584, 62 S. E. 346; *Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; *Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697; *Holland v. Trotter*, 22 Gratt. (63 Va.) 136; *Green & Suttle v. Massie*, 21 Gratt. (62 Va.) 356. **Wash.**—*Spok-ane Co-operative Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165. **W. Va.**—*Hall v. McGregor*, 65 W. Va. 74, 64

the party shows that the judgment is unjust,<sup>48</sup> that he has not been guilty of negligence or other fault,<sup>49</sup> and that he has no adequate remedy at law.<sup>50</sup> The defense which he was prevented from interposing must, of course, be a good defense.<sup>51</sup>

(B.) BY VIOLATING AGREEMENT. — If a party relying upon an agreement between the parties to the action,<sup>52</sup> such as an agreement as to notice of trial,<sup>53</sup> or for a continuance,<sup>54</sup> an agreement of compromise,<sup>55</sup> or dismissal or discontinuance,<sup>56</sup> or an agreement as to the judgment to

S. E. 736; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Braden v. Reitzenberger*, 18 W. Va. 286; *Black v. Smith*, 13 W. Va. 780. Wis.—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 52 Am. St. Rep. 896.

**Fraud in procuring judgment**, see *supra*, XV, E, 6, b, (II).

48. See *supra*, XV, C, 2.

49. See *supra*, XV, C, 3.

50. See *supra*, XV, C, 6.

51. U. S.—*Phillips v. Negley*, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. ed. 1013; *Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123. Ga.—*Roberts v. Moore*, 113 Ga. 170, 38 S. E. 402. Ky.—See *Crutchers v. Wolf*, 1 Mon. 88. Tex.—*Johnson v. Templeton*, 60 Tex. 238.

**Party must have meritorious cause of action or defense**, see generally *supra*, XV, C, 4.

52. U. S.—*Whitcomb v. Gandy*, 37 Fed. 735. See *Brown v. Arnold*, 127 Fed. 387, denying relief as the party has an adequate remedy by action on the stipulation that judgment should abide the result of a proceeding on error. Ind.—*Nealis v. Dicks*, 72 Ind. 374, 380. Ia.—*Bennett v. Carey*, 72 Iowa 476, 34 N. W. 291. Md.—*Kent v. Ricards*, 3 Md. Ch. 392. Mass.—*Brooks v. Twitchell*, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662. Miss.—*Anderson v. Cameron*, 63 Miss. 114. N. H.—*Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467. Tenn.—*Fidelity & Deposit Co. v. Crenshaw*, 120 Tenn. 606, 110 S. W. 1017; *Newnan v. Stuart*, 5 Hayw. 78.

[a] **Understanding as To Crediting Payments.**—(1) Where it is understood that a payment made pending suit will be credited, a judgment, in violation of the understanding and in the absence of the defendant, will be enjoined in equity. *Hentig v. Sweet*, 27 Kan. 172; *Dickenson v. McDermott's Exrs.*, 13

Tex. 248. See *Newman v. Meek*, Smed. & M. Ch. (Miss.) 331. (2) But a petition which shows that the party did not set up his credits because he supposed that the adversary would allow his claim after judgment, is without equity. *Coleman v. Goynes*, 37 Tex. 552.

53. Where, in disregard of a stipulation to give ten days' notice of trial, the party brings the case on for trial, equity will grant relief from the judgment and award a new trial. *Foote v. Despain*, 87 Ill. 28; *How v. Mortell*, 28 Ill. 478.

54. Ill.—*Beams v. Denham*, 3 Ill. 58. See *Saltsman v. Bissell*, 75 Ill. 67, denying relief as the party was in court when judgment was rendered. Mo.—*Sanderson v. Voelcker*, 51 Mo. App. 328. Tex.—*Medlin v. Commonwealth B. & C. Ins. Co.* (Tex. Civ. App.), 180 S. W. 899.

55. U. S.—*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *United States v. Aakervik*, 180 Fed. 137. Ala.—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209. Cal.—*Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. Ind.—*Brake v. Payne*, 137 Ind. 479, 37 N. E. 140; *Nealis v. Dicks*, 72 Ind. 374. Minn.—*Street v. Alden*, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632. Mo.—*Murphy v. Smith*, 86 Mo. 333. S. D.—*Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346. Tenn.—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71.

56. Cal.—*California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *McGregor v. Shaw*, 11 Cal. 47. Conn.—*Chambers v. Robbins*, 28 Conn. 552, agreement for discontinuance. Ia.—*Searl v. Fairbanks, Morse & Co.*, 80 Iowa 307, 45 N. W. 571. Neb.—*Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496. Tenn.—*Butler v. Peyton*, 4 Hayw. 88.

be rendered.<sup>57</sup> does not present his defense, equity may relieve him from a judgment taken in violation of the agreement, where the party is without fault or negligence,<sup>58</sup> and has no adequate remedy at law.<sup>59</sup> And where a party has confessed judgment, or the action was compromised, upon an agreement as to the manner of the enforcement of the judgment, equity will enjoin an attempted enforcement in violation of the agreement.<sup>60</sup> But if the promise of the party is a nudum pactum, equity will not grant relief.<sup>61</sup>

Where it is required that the agreement be in writing, equity will not aid the party for violation of an oral agreement.<sup>62</sup>

(IV.) **Fraud in the Cause of Action.**<sup>63</sup> — Equity will not set aside or enjoin the enforcement of a judgment on the ground of fraud in the cause of action itself,<sup>64</sup> for this is a defense which should have been

57. *Gillett v. Booth*, 6 Ill. App. 423. Judgment not in accordance with agreement as ground for equitable relief, see *infra*, XV, E, 13.

58. *Saltsman v. Bissell*, 75 Ill. 67.

Party must not have been at fault, see *supra*, XV, C, 3.

59. *Brown v. Arnold*, 127 Fed. 387; *Saltsman v. Bissell*, 75 Ill. 67.

Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6.

60. *Moore v. Barclay*, 16 Ala. 158.

[a] If the party is without adequate legal remedy. *Mays v. Taylor*, 7 Ga. 238. Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6.

[b] An enforcement of a judgment so as to have an effect different from that stipulated will be enjoined in equity. *Newnan v. Stuart*, 5 Hayw. (Tenn.) 78.

61. See *Crutchers v. Wolf*, 1 Mon. (Ky.) 88.

[a] A deficiency judgment taken contrary to a promise not to take such a judgment will not be enjoined if there is no consideration for the promise. The fact that the party suffered a default is not a sufficient consideration where he has no defense to the action. *Heim v. Butin*, 109 Cal. 500, 42 Pac. 138, 50 Am. St. Rep. 54.

62. *Norman v. Burns*, 67 Ala. 248; *Collier v. Falk*, 66 Ala. 223.

63. **Fraud in procuring judgment as ground for equitable relief**, see *supra*, XV, E, 6, b, (II).

**Fraud preventing presentation of party's case or defense as ground for equitable relief**, see *supra*, XV, E, 6, b, (III).

64. **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Whit-*

*comb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510. *Contra*, *Trefz v. Knickerbocker Life Ins. Co.*, 8 Fed. 177. Ala.—*Rittenberry v. Wharton*, 176 Ala. 390, 58 So. 293; *Adler v. Van Kirk Land & Con. Co.*, 114 Ala. 551, 562, 21 So. 490, 62 Am. St. Rep. 133. Ark.—*Segers v. Ayers*, 95 Ark. 178, 128 S. W. 1045; *Davis v. Rhea*, 90 Ark. 261, 119 S. W. 271; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485. Cal.—*Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579; *Davis v. Hibernia S. & L. Soc.*, 21 Cal. App. 444, 132 Pac. 462. Colo.—*Boldenweek v. Bullis*, 40 Colo. 253, 90 Pac. 634. Ga.—*Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536. Ill.—*Hollister v. Sobra*, 264 Ill. 535, 106 N. E. 507. Ind.—*Adams School Tp. v. Irwin*, 150 Ind. 12, 49 N. E. 806; *Nealis v. Dicks*, 72 Ind. 374; *Graham v. Loh*, 32 Ind. App. 183, 69 N. E. 474; *Tereba v. Standard Cabinet Mfg. Co.*, 32 Ind. App. 9, 68 N. E. 1033. Ia.—*Ulber v. Dunn*, 143 Iowa 260, 119 N. W. 269. Kan.—*Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 735, 106 Pac. 1079. La.—*Mercantants' Mutual Ins. Co. v. Pointer*, 22 La. Ann. 620. Mo.—*Wolf v. Brooks*, 177 S. W. 337; *Covington v. Chamblin*, 156 Mo. 574, 588, 57 S. W. 728; *Wonderly v. Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Payne v. O'Shea*, 84 Mo. 130; *Einstein v. Strother* (Mo. App.), 182 S. W. 122. N. J.—*Gifford v. Thorn*, 9 N. J. Eq. 702, 722. N. Y.—*Crouse v. McVickar*, 207 N. Y. 213, 100 N. E. 697, 45 L. R. A. (N. S.) 1159; *Sanders v. Soutter*, 126 N. Y. 193,



raised in the original action.<sup>65</sup> If, however, the party was prevented by fraud or some adventitious circumstance from setting up the fraud, equity will grant relief;<sup>66</sup> but this is on the ground of fraud preventing the interposition of a defense, not on the ground of fraud in the cause of action.<sup>67</sup>

(V.) **Fraud by Concealment.**—A judgment will not usually be set aside in equity because of the suppression of facts by a party.<sup>68</sup> But if the suppression of facts is made under such circumstances that it amounts to a fraud upon the party, equity will grant relief against a judgment so obtained.<sup>69</sup> In an adversary proceeding where there is

27 N. E. 263. N. C.—North Carolina Mut. & P. Assn. v. Edwards, 168 N. C. 378, 84 S. E. 359. Tex.—Hatch v. Garza's Exr., 22 Tex. 176; Fox v. Robbins (Tex. Civ. App.), 62 S. W. 815. Utah.—Mosby v. Gisborn, 17 Utah 257, 282, 54 Pac. 121. Can.—Charlebois v. Delap, 26 Can. Sup. 221, 249.

[a] **Fraud in an antecedent transaction** not connected with a judgment is not sufficient as a basis for equitable relief; it must have intervened in the action or proceeding in which the judgment was obtained. Klabunde v. Byron Reed Co., 69 Neb. 120, 95 N. W. 4, 98 N. W. 182; Shufeldt v. Gandy, 34 Neb. 32, 51 N. W. 302.

[b] **Fraud as an Equitable Defense.** In Boyce's Exrs. v. Grundy, 3 Peters (U. S.) 210, 7 L. ed. 655, it was held proper to rescind a contract on the ground of fraud although a judgment had been obtained on the contract. Although the fraud might have been resorted to, it is not an adequate remedy because it is in the instant case only a partial remedy. The complainant would still have been left to renew the contest upon a series of suits. But see Peyton v. Rawlens, 4 Hayw. (Tenn.) 77, holding that as fraud is available at law, it must be interposed there and relief cannot afterwards be had in equity on the ground that the defendant has an equitable defense. To same effect, see Brown v. Wyncoop, 2 Blackf. (Ind.) 230. As to relief where the defense not interposed is equitable, see *supra*, XV, E, 5, b, (II).

[c] **Where a defendant has had no notice of the pendency of an action** against him founded on a false and fraudulent claim, he may successfully maintain an equity suit to set aside a judgment against him in that action. Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A.

261; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789. See also Wagner v. Beadle, 82 Kan. 468, 108 Pac. 859; Tompkins v. Tompkins, 11 N. J. Eq. 512.

65. Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507.

66. U. S.—Ocean Ins. Co. v. Fields, 2 Story 59, 75, 18 Fed. Cas. No. 10,406. Ala.—Rittenberry v. Wharton, 176 Ala. 390, 58 So. 293. Ill.—Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507. Mo. Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Murphy v. De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; Fears v. Riley, 148 Mo. 49, 49 S. W. 839. N. C.—North Carolina Mut. & P. Assn. v. Edwards, 168 N. C. 378, 84 S. E. 359.

67. **Fraud preventing presentation of party's case or defense**, see *supra*, XV, E, 6, b, (III).

68. Ala.—De Sota Coal Min. & Dev. Co. v. Hill, 69 So. 948. N. C.—Moore v. Gulley, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. (N. S.) 242. Tenn.—Long v. Gilbert, 59 S. W. 414. Wis.—Nye v. Sochor, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

[a] A judgment of a probate court allowing a claim against an estate will not be set aside on the ground that the executrix suppressed the fact that the claim was barred by the statute of limitations and released by a discharge of the decedent in bankruptcy. Durham v. Field, 30 Ill. App. 121.

[b] **Concealment of a fact material for the defense** which is known to the defendant is not sufficient to warrant equitable interference. Reeves v. Hogan, Cooke (Tenn.) 175, 5 Am. Dec. 684. 69. U. S.—Guild v. Phillips, 44 Fed. 461, wherein there was not a mere concealment of a fact, but a misstatement wilfully, knowingly and falsely made, under oath. Cal.—Curtis v. Schell, 129

no relation of trust and confidence, neither party is bound to make

Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *Spencer v. Vigneaux*, 20 Cal. 442. **Ill.**—*Shinkle v. Letcher*, 47 Ill. 216. **Ky.**—*Taylor v. Bradshaw*, 6 Mon. 145. **La.**—*Noyes v. Loeb*, 23 La. Ann. 13. **Can.**—*Johnston v. Barkley*, 10 Ont. L. Rep. 724, setting aside a judgment obtained by suppression of evidence and perjured testimony.

[a] **The rule is that where a judgment has been procured by artifice or concealment on the part of the plaintiff, a court of equity will grant appropriate relief.** *Phillips v. Kuhn*, 35 Neb. 187, 52 N. W. 881; *Stilwell v. Carpenter*, 2 Abb. N. C. (N. Y.) 238-264. Fraud in procuring judgment as ground of relief, see *supra*, XV, E, 6, b, (II).

[b] **What Suppression Constitutes Fraud.**—"Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circumstances of the case." *Capital Bank v. Rutherford*, 70 Ga. 57.

[c] **Character of Facts Suppressed.** Before equity will set aside a judgment on the ground of fraud by suppression of evidence, it must appear, especially after a lapse of a long period of time, that the evidence was material, and would unquestionably have changed the result. Where the evidence is in the possession of the adverse party, the facts withheld must be such, as under the circumstances of the case, that party was under a legal obligation to have revealed or furnished, or he must have used some artifice by which they were concealed from the other party and he thereby prevented from obtaining that which, without such artifice, he would have had, and thus have been able to have changed the result. The facts suppressed must be specifically stated in the bill, verified by affidavit. *Maddox v. Apperson*, 14 Lea (Tenn.) 596.

[d] **Intentional Concealment.**—Where fraudulent concealment of a fact is relied on for the purpose of impeaching and setting aside a judgment regularly

obtained, it must be an intentional concealment of a material and controlling fact for the purpose of misleading and taking an undue advantage of the opposite party. *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660.

[e] **When a defense rests in the peculiar knowledge of the plaintiff and he conceals it from the defendant, fraud attaches to and vitiates the judgment, and it may be set aside in equity.** *Wonderly v. Lafayette Co.*, 150 Mo. 635, 650, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386.

[f] **If one party who alone has knowledge of the fact conceals such fact from his adversary, by which means an unjust verdict is obtained, equity will grant relief.** *Reeves v. Hogan, Cooke (Tenn.)* 172, 5 Am. Dec. 684.

[g] **In Equity Suits.**—It is not true of a complainant in equity that he must come prepared to sustain his bill and meet any defense that may be interposed. He may search the conscience of his adversary by requiring him to answer under oath, and if possessed of no other competent evidence or means of obtaining it he must accept or at least yield to the answer as true. In such a case, it is imperative upon the defendants to make a full disclosure and not, by concealing anything which good faith and common honesty required confession, to mislead the complainant into abandonment of his suit. A false answer under such circumstances is a positive and actual fraud justifying the annulment of the decree. The complainant having failed to reply and the case being submitted under a statute which made the answer conclusive proof, there was no conflict or weighing of testimony to bring the case within the rule that equity would not annul a decree founded on forged documents, perjured evidence or any matter actually presented and considered in the judgment assailed. Technically the answers were evidence at the hearing, but before the hearing they served the distinct purpose of denying the plaintiff information which they were bound to furnish which is an extrinsic and collateral fraud. *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156.

any revelation of his case to his adversary,<sup>70</sup> and therefore, the bare omission,<sup>71</sup> perversion,<sup>72</sup> or misrepresentation,<sup>73</sup> of facts in a pleading will not constitute fraud or subject the judgment to impeachment on that ground. But if a defendant, without fault or laches is ignorant of a material matter of defense which is known to the complainant and artfully concealed by him from the defendant when it is his moral duty to communicate it to him by reason of the confidential relationship between them, such concealment is a fraud upon the defendant which will be relieved in equity.<sup>74</sup> In an *ex parte* pro-

70. *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660.

[a] "Where there is no relation of confidence between the plaintiff and the defendant the parties stand at arm's length. They come into court as adversaries, and neither party is bound to make any revelation of his case to the other. The plaintiff must be prepared to prove all the facts constituting his cause of action and to meet any defense which the defendant may interpose; and the defendant must be prepared to establish any defense which he may have. Neither party can mislead the other by any positive or actual fraud. Nor can he, for the purpose of perpetrating a fraud upon the other party, conceal such facts as good faith and common honesty require him to reveal." *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. This rule is not strictly true in equity. *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156, cited in preceding note.

[b] The presentation of a claim without disclosing a defense which exists to it is not ground for setting aside a judgment. *Kretschmar v. Ruprecht*, 230 Ill. 492, 82 N. E. 836; *Evans v. International Trust Co.* (Tenn.), 59 S. W. 373.

[c] If the means of a defense are only available in equity by bill of discovery or bill of relief and the party knows of the existence of those means before a trial at law and neglects to use them and goes to trial upon other proofs and other questions, equity will not grant him relief. *Paterson v. Bangs*, 9 Paige Ch. (N. Y.) 627.

Effect of adequacy or inadequacy of remedy at law, see generally *supra*, XV, C, 6.

71. *Talbott v. Todd*, 5 Dana (Ky.) 190.

72. *Talbott v. Todd*, 5 Dana (Ky.) 190.

[a] Insisting upon rights which

upon a due investigation thereof, might be found to be overstated or overestimated is not the kind of fraud authorizing a court to set aside a judgment or decree. *Patch v. Ward*, L. R. 3 Ch. App. (Eng.) 203. To same effect see III.—*Kretschmar v. Ruprecht*, 230 Ill. 492, 82 N. E. 836. Ia.—*Hedrick v. Smith & Reed*, 137 Iowa 625, 115 N. W. 226. N. Y.—*Stilwell v. Carpenter*, 59 N. Y. 414.

73. *Talbott v. Todd*, 5 Dana (Ky.) 190.

[a] A false answer is a positive fraud justifying equitable relief against a decree thereon where the plaintiff in an equity suit, without knowledge as to certain facts, required an answer under oath, and finding himself without evidence to maintain his suit failed to reply. *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156.

74. Ala.—*De Sota Coal Min. & Dev. Co. v. Hill*, 69 So. 948; *Humphreys v. Burleson*, 72 Ala. 1. Cal.—*Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98. Ky.—*Talbott v. Todd*, 5 Dana 190. N. Y.—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. Utah.—*Mosby v. Gisborn*, 17 Utah 257, 287, 54 Pac. 121.

[a] Collusion of Complainant and Defendant.—Where a plaintiff and a defendant sued in a representative capacity collude to suppress material evidence, equity will vacate the judgment at the instance of an injured complainant. *First Baptist Church v. Syms*, 52 N. J. Eq. 545, 31 Atl. 717. Enjoining judgments obtained by collusion see *supra*, XV, E, 1.

[b] Where Defendant Is Widow of Cotenant.—In an action for partition against the widow and heirs of his deceased cotenant, the suppression by the plaintiff of the fact, unknown to the defendants, that he had procured from such cotenant a conveyance of a part of the common property under an agree-



ceeding, too, a concealment of facts tending to show the invalidity of the claim will sometimes afford ground for equitable relief to the absent party.<sup>75</sup> Of course, if a party fraudulently keeps his adversary in ignorance of the action, equity will not permit him to take advantage of his own wrong.<sup>76</sup>

(VI.) **Fraudulent Alteration of Judgment.**<sup>77</sup>—Equity has jurisdiction to vacate a judgment fraudulently altered after its entry.<sup>78</sup>

c. *By Whom and on Whom Practiced.*—The fraud must have been practiced upon the unsuccessful party,<sup>79</sup> by the prevailing party,<sup>80</sup>

ment to convey to him other parts of equal value, is a fraud which will avoid the judgment. *Tucker v. Whittlesey*, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

75. *Curtis v. Schell*, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107.

[a] Where on ex parte motion for judgment against the sheriff for the amount due on execution because of his failure to make return of the execution, the plaintiff conceals the fact of payment and takes a judgment for more than is due, it is a fraud in the plaintiff against which equity will relieve. *Smith v. Van Bolder*, 1 Swan (Tenn.) 110. See also *McTeer v. Briscoe* (Tenn.), 61 S. W. 561; *Kinzer v. Helm*, 7 Heisk. (Tenn.) 672.

[b] In case of foreign attachments auditors are appointed before whom the claims are proved and from whose decision there is no appeal. If a plaintiff imposes a fictitious claim upon the auditors or a claim which has been satisfied and for which the defendant has a receipt, the proceeding being ex parte—in fine, if he conceals from the auditors any fact which tends to show that his claim is not a valid one, he commits a fraud upon the absent party, from the consequences of which equity will grant relief. *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

76. U. S.—*United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93; *Ocean Ins. Co. v. Fields*, 2 Story 59, 75, 18 Fed. Cas. No. 10,406; *United States v. Aakervik*, 180 Fed. 137. Ala.—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209. Cal.—*Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. Kan.—*Electric Plaster Co. v. Blue Rapids Tp.*, 81 Kan. 730, 106 Pac. 1079. Minn.—*Street v. Alden*, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632. S. D.—*Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

Tenn.—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71.

Fraud in obtaining judgment as ground for relief, see *supra*, XV, E, 6, b, (II).

77. Fraud in procuring judgment as ground of equitable relief, see *supra*, XV, E, 6, b, (II).

78. Ala.—*Cromelin v. McCauley*, 67 Ala. 542. Cal.—*Chester v. Miller*, 13 Cal. 558. Colo.—*Van Buren v. Posteraro*, 45 Colo. 588, 102 Pac. 1067, 132 Am. St. Rep. 199. Ill.—*Babcock v. McCamant*, 53 Ill. 214. Ind.—*Smith v. Chandler*, 13 Ind. 513, where the justice erased a judgment obtained on new trial and issued execution on the first judgment. Tex.—*Hardy v. Broadus*, 35 Tex. 668.

[a] If a judgment has been fraudulently altered so as to increase the amount thereof, or to include some person other than the identical person sued, or changed in any other manner so as to affect the substantial rights of a party, an injunction will lie, if there be no remedy at law. *Van Buren v. Posteraro*, 45 Colo. 588, 102 Pac. 1067, 132 Am. St. Rep. 199. Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6.

[b] A judgment properly entered in effect for a person which is subsequently without authority altered so as to appear as a judgment against him will be set aside in equity. *Chester v. Miller*, 13 Cal. 558.

79. *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Stilwell v. Carpenter*, 2 Abb. N. C. (N. Y.) 238, 263.

Fraud of a plaintiff practiced upon a co-plaintiff is not ground for setting aside a judgment where the defendant had no knowledge thereof. *Taylor v. San Antonio Gas & Elec. Co.* (Tex. Civ. App.), 93 S. W. 674.

80. Cal.—*Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604. Colo.—*Venner v.*

his counsel,<sup>81</sup> or agents.<sup>82</sup> Equity will not relieve against fraud practiced by a stranger to the action;<sup>83</sup> but it will relieve against fraud and collusion practiced by the judge of the trial court and by the prevailing party.<sup>84</sup> A fraud upon the court,<sup>85</sup> as in acquiring jurisdiction,<sup>86</sup> is sufficient to warrant equitable interference with a judgment at law.

7. **Mistake.**—Equity will, in a proper case, relieve against a judgment obtained as a result of mistake.<sup>87</sup> But a mistake of law

Denver Union Water Co., 40 Colo. 212, 90 Pac. 623. **Ga.**—*Lanier v. Monroe Guano Co.*, 128 Ga. 360, 57 S. E. 691; *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689; *Morris v. Morris*, 76 Ga. 733. **Ill.**—*Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745. **Ind.**—*Adams School Tp. v. Irwin*, 150 Ind. 12, 49 N. E. 806; *Gorman v. Johnson*, 46 Ind. App. 672, 91 N. E. 971; *Graham v. Loh*, 32 Ind. App. 183, 69 N. E. 474. **Minn.**—*Geisberg v. O'Laughlin*, 88 Minn. 431, 93 N. W. 310; *Spooner v. Spooner*, 26 Minn. 137, 1 N. W. 838. **Ohio.**—*Woodward v. Curtis*, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400. **Ore.**—*Bowsman v. Anderson*, 62 Ore. 431, 123 Pac. 1092, 125 Pac. 270. **Tenn.**—*Powell v. Cyfers*, 1 Heisk. 526. **Tex.**—*Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815. **Can.**—*Johnston v. Barkley*, 10 Ont. L. Rep. 724.

81. **Cal.**—*Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752. **Ga.**—*Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689; *Morris v. Morris*, 76 Ga. 733. **Ia.**—*Powell v. Spaulding*, 3 Gr. 443, 467.

82. *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689; *Morris v. Morris*, 76 Ga. 733.

83. *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689. See *Mesker v. Cornwell*, 145 Mo. App. 646, 123 S. W. 488.

[a] The remedy of the party who is the victim of fraud at the hand of a stranger to the plaintiff is not by resort to a court of equity to have the judgment set aside, but by seeking proper redress against him who perpetrated the fraud. *Lanier v. Nunnally & Co.*, 128 Ga. 358, 57 S. E. 689.

84. See *Newton v. Joslin*, 30 Fed. 891 (no corruption of the judge shown); *Sanford v. Head & Merritt*, 5 Cal. 297.

85. **Ind.**—*Miedreich v. Lauenstein*, 172 Ind. 140, 86 N. E. 963; *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464; *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270. **Mo.**—*Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599; *State ex rel. Bates v. Shaw*, 163 Mo. 191, 63 S. W. 371. **N. J.**—*First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461. **N. Y.**—*Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660. **Pa.**—*Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000.

[a] Taking judgment while a motion for security for costs is pending is not a fraud upon the court, for a court takes judicial notice of the state of the case as shown by its own records. *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836.

86. **Ill.**—*Evans v. Woodworth*, 213 Ill. 404, 72 N. E. 1082. **Ind.**—*Vivian Collieries Co. v. Cahal*, 110 N. E. 672; *Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151; *Adams School Tp. v. Irwin*, 150 Ind. 12, 49 N. E. 806. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Hamilton v. McLean*, 169 Mo. 51, 68 S. W. 930.

[a] A judgment of a court of ordinary appointing an administrator on the estate of a non-resident decedent may be vacated in equity on the ground that the party obtaining the same falsely and fraudulently represented to the court that the decedent had assets within the county where the application was made. *Neal v. Boykin*, 129 Ga. 676, 59 S. E. 912.

As to setting aside a judgment on the ground of want of jurisdiction see *supra*, XV, E, 3, b.

As to setting aside judgment on the ground of false return, see *supra*, XV, E, 3, b, (II), (B).

87. **U. S.**—*Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *The Hiram*, 1 Wheat. 440, 4 L. ed. 131; *Christy v. Atchison*, etc., R. Co., 214 Fed. 1016; *United States v. Mani*, 196 Fed. 160;

which is not induced by the successful party is not ground for setting aside a judgment in equity;<sup>88</sup> the mistake must be one of fact<sup>89</sup> which does not arise from want of diligence.<sup>90</sup>

Sanford v. White, 132 Fed. 531; Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co., 71 Fed. 826. **Ala.**—Norris v. Cottrell, 20 Ala. 304. **Ark.**—Bently v. Dilford, 11 Ark. 79. **Cal.**—American Sav. Co. v. City Street Imp. Co., 169 Cal. 172, 146 Pac. 428; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Le Mesnager v. Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91; Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777; Mastick v. Thorp, 29 Cal. 444. **Conn.**—Kelly v. Wiard, 49 Conn. 443; Carrington v. Holabird, 17 Conn. 530, 19 Conn. 84. **Del.**—Whitaker v. Wickersham, 5 Del. Ch. 187. **Ga.**—Code, 1910, §§5965; 4584; Tumlin v. O'Bryan Bros., 68 Ga. 65. **Ill.**—Simpson v. Simpson, 273 Ill. 90, 112 N. E. 276; Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507; Foote v. Despain, 87 Ill. 28; Holmes v. Stateler, 57 Ill. 209; How v. Mortell, 28 Ill. 478; West Chicago St. R. Co. v. Stoltzenfeldt, 100 Ill. App. 142; Prussian National Ins. Co. v. Chiechocky, 94 Ill. App. 168. **Ia.**—Harris v. Bigley, 111 N. W. 432; Hendron v. Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; Bellows v. Tod, 52 Iowa 359, 3 N. W. 102. **Me.**—Bailey v. Merchant's Ins. Co., 110 Me. 348, 86 Atl. 328; Cunningham v. Gushee, 73 Me. 417. **Md.**—Ellicott v. Welch, 2 Bland 242. **Minn.**—Leighton v. Bruce, 156 N. W. 285, mistake of fact. **Miss.**—Germain v. Harwell, 66 So. 396; Newman v. Taylor, 69 Miss. 670, 13 So. 831. **Mo.**—Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Murphy v. De France, 101 Mo. 151, 13 S. W. 756; Payne v. O'Shea, 84 Mo. 130; Einstein v. Strother (Mo. App.), 182 S. W. 122; Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131; Smith v. Taylor, 78 Mo. App. 630. **Neb.**—McHale v. Metz, 70 Neb. 106, 96 N. W. 1004; Cleland v. Hamilton L. & T. Co., 55 Neb. 18, 75 N. W. 239. **N. J.**—Clark v. Board of Education, 76 N. J. Eq. 326, 74 Atl. 319. **Ohio.**—Gill v. Pelkey, 54 Ohio St. 348, 43 N. E. 991, mistakes of fact. **Ore.**—Smith v. Butler, 11 Ore. 46, 4 Pac. 517, when the mistake is not judicial. **S. C.**—Southern Porcelain Mfg. Co. v. Thew, 5 S. C. 5; Cohen v. Dubose, Harp. Eq. 102, 14 Am. Dec. 709. **Tex.**—McMurray v. McMurray, 67 Tex. 605, 1 S. W. 357; Kahmas v. Baumbush (Tex. Civ. App.), 187 S. W.

697; Bevil v. Trotti (Tex. Civ. App.), 141 S. W. 287; Bradford v. Malone, 49 Tex. Civ. App. 440, 130 S. W. 1013; McLane v. San Antonio Nat. Bank (Tex. Civ. App.), 68 S. W. 63. **Utah.**—Benson v. Anderson, 10 Utah 135, 37 Pac. 256.

[a] The term mistake is more applicable, in its technical sense, to suits wherein a complainant solicits relief against a mischievous act of his own performed from a misapprehension of some fact. Engler v. Knoblaugh, 131 Mo. App. 481, 110 S. W. 16.

[b] Mistake must be extrinsic and collateral to the cause of action. Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Sullivan v. Lumsden, 118 Cal. 664, 50 Pac. 777.

[c] That a witness was mistaken as to a fact on which the defense turned is not ground for equitable relief against the judgment. Vaughn v. Johnson, 9 N. J. Eq. 173. See *supra*, XV, E, 2.

[d] Mutual Mistake.—The statement is made in some cases that the mistake must be mutual (**Mass.**—Corbett v. Craven, 196 Mass. 319, 82 N. E. 37. **Mo.**—Einstein v. Strother (Mo. App.), 182 S. W. 122. **Ore.**—French v. Goin, 75 Ore. 255, 146 Pac. 91), but this seems to be contrary to the position taken in most of the cases involving relief for mistake.

88. **Idaho.**—Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 10 Ann. Cas. 444. **Ill.**—Paine v. Doughty, 251 Ill. 396, 96 N. E. 212. **Md.**—Kearney v. Sascier, 37 Md. 264. **Mo.**—Einstein v. Strother (Mo. App.), 182 S. W. 122; Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131.

89. **Ill.**—Hilt v. Heimberger, 235 Ill. 235, 85 N. E. 304. **Minn.**—Leighton v. Bruce, 156 N. W. 285. **Ohio.**—Gill v. Pelkey, 54 Ohio St. 348, 43 N. E. 991. **Ore.**—Smith v. Butler, 11 Ore. 46, 4 Pac. 517. **Va.**—Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452.

[a] Mistakes not of a judicial character will be relieved against. Engler v. Knoblaugh, 131 Mo. App. 481, 110 S. W. 16; Clark v. Sayers, 48 W. Va. 33, 35 S. E. 882.

90. Kearney v. Sascier, 37 Md. 264. See McLane v. San Antonio Nat. Bank,



The mistake may be that of the party<sup>91</sup> or his attorney,<sup>92</sup> the court<sup>93</sup> or the clerk.<sup>94</sup> Mistake and miscalculation on the part of the jury sometimes furnish ground for equitable relief.<sup>95</sup>

Where a defendant was prevented from interposing his defense through mistake, unmixed with fault or negligence, equity will grant relief.<sup>96</sup>

96 Tex. 48, 70 S. W. 201 reversing (Tex. Civ. App.), 68 S. W. 63, and holding that under the facts the complainant was not negligent in relying on the adverse party's statements.

**Party must not have been at fault,** see *supra*, XV, C, 3.

91. Cal.—Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317. Ga.—Kohn v. Lovett, 43 Ga. 179. Ia.—Stewart Lumber Co. v. Downs, 142 Iowa 420, 120 N. W. 1067, 29 L. R. A. N. S. 1190, note, 19 Ann. Cas. 1100. Mass.—Currier v. Esty, 110 Mass. 536. Tenn.—Maddox v. Apperson, 14 Lea 596.

[a] **The mistake causing the loss of a defense** must be that of the losing party. Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Ward v. Darham, 134 Ill. 195.

92. Ga.—Kohn v. Lovett, 43 Ga. 179. Ia.—County of Buena Vista v. The I. F. & S. C. R. Co., 49 Iowa 657; Barthell v. Roderick, 34 Iowa 517. Mo. Case v. Cunningham, 61 Mo. 434.

93. U. S.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 343, 63 C. C. A. 73; 116 Fed. 1, 53 C. C. A. 513. Cal.—Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317. Ga.—Kohn v. Lovett, 43 Ga. 179.

[a] A court might make a mistake as to some matter in rendering its judgment de hors the record, which a court of equity would have the power to correct, but there could be no mistake as to the judgment itself. Curtiss v. Bell, 131 Mo. App. 245, 111 S. W. 131.

[b] **Record Must Show Mistake.**—A defendant failing to defend cannot have a judgment at law vacated on account of any mistake or error on the part of the court or jury unless, the record affirmatively shows such mistake or error. Laithe v. McDonald, 12 Kan. 340.

94. Ala.—Norris, Stodder & Co. v. Cottrell, 20 Ala. 304. Ia.—Partridge & Co. v. Harrow, 27 Iowa 96, 99 Am. Dec. 643. Mo.—Engler v. Knoblaugh, 131 Mo. App. 481, 110 S. W. 16.

95. Ky.—Pogue v. Shotwell, 2 Dana 281. S. C.—Cohen v. Dubose, Harp. Eq. 102. Va.—Rust v. Ware, 6 Gratt. (47

Va.) 50, 52 Am. Dec. 100; Picket v. Morris, 2 Wash. (2 Va.) 255, 273.

[a] Where some of the jurors consent to a verdict through mistake, having been persuaded by the others that a majority had agreed upon a verdict and it must prevail, equity will award a new trial. Cochran v. Street, 1 Wash. (1 Va.) 79.

[b] Equity has jurisdiction in a proper case to relieve against a judgment where through unintentional mistake the written evidence of the verdict did not correctly state the conclusion of the jury, (Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283, affirming 71 Fed. 826), as where through mistake the jury gave verdict for the principal of the note omitting the interest. Cohen v. Dubose, Harp. Eq. (S. C.) 102. Compare Laithe v. McDonald, 12 Kan. 340.

[c] **Mistake of the foreman** of the jury in entering amount of verdict, as ground for equitable relief, see Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

96. U. S.—Christy v. Atchison, etc. R. Co., 214 Fed. 1016. Ala.—Noble v. Moses, 74 Ala. 604, 616. Ariz.—MacRitchie v. Stevens, 8 Ariz. 410, 76 Pac. 478. Ark.—Hempstead & Conway v. Watkins, 6 Ark. 317, 42 Am. Dec. 696. Cal.—Le Mesnager v. Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91. Conn.—Lithuanian Bro. Society v. Tunila, 80 Conn. 642, 70 Atl. 25. Fla.—Hoey v. Jackson, 31 Fla. 541, 13 So. 459. Ill.—Hollister v. Sobra, 264 Ill. 535, 106 N. E. 507; Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Ward v. Durham, 134 Ill. 195, 25 N. E. 745; Clark v. Ewing, 93 Ill. 572; Owens v. Ranstead, 22 Ill. 161; Moore v. Cohen, 70 Ill. App. 160. Md.—Hill v. Reifsnider, 46 Md. 555; Kearney v. Saseer, 37 Md. 264. N. J.—Hayes v. United States Phonograph Co., 65 N. J. Eq. 5, 55 Atl. 84. N. Y.—Ludwig v. Walker, 138 App. Div. 850, 123 N. Y. Supp. 468; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. Supp. 926. N. D.—Freeman v. Wood, 14 N. D. 95, 103 N. W. 392. Ore.

**Mistakes in Judgment.**—Equity will correct mistakes in judgments,<sup>97</sup> even after satisfaction entered.<sup>98</sup> If a judgment is wrongfully given by mistake of the court,<sup>99</sup> or clerk,<sup>1</sup> equity will set it aside in a proper case.

**8. Prejudice of Community.**—Equity will not grant a new trial because of prejudice in the community, as this must be availed of by application for change of venue.<sup>2</sup>

**9. Act of Counsel.**<sup>3</sup>—Where an attorney fraudulently pretends to help a party and connives at his defeat,<sup>4</sup> or, being regularly employed, corruptly sells out his client's interest,<sup>5</sup> equity will relieve

*George v. Nowlan*, 38 Ore. 537, 64 Pac. 1, excusable mistake. **Tenn.**—*Maddox v. Apperson*, 14 Lea 596; *Nicholson v. Patterson*, 6 Humph. 394; *Click v. Gillespie*, 4 Hayw. 4. **Tex.**—*Hester v. Baskin* (Tex. Civ. App.), 184 S. W. 726; *Irvin v. Johnson* (Tex. Civ. App.), 170 S. W. 1059; *Hockwald v. American Sur. Co.* (Tex. Civ. App.), 102 S. W. 181. **W. Va.**—*Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736; *Newton v. Wade*, 43 W. Va. 283, 27 S. E. 244. **Wis.**—*Nye v. Sochor*, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896; *Rogan v. Walker*, 1 Wis. 631.

But see *Insurance Co. v. Scott*, 136 N. C. 157, 48 S. E. 581, decided under statute and overruling *Grantham v. Kennedy*, 91 N. C. 148, 153.

[a] Where through mistake of an attorney respecting the time of the term at which the judgment is rendered, which mistake arises from misinformation, judgment is rendered because of a failure to make defense, equity will award a new trial at law. *County of Buena Vista v. The I. F. & S. C. R. Co.*, 49 Iowa 657.

Party must not have been at fault, see *supra*, XV, C, 3.

Excuses generally for failure to present defense, see *supra*, XV, E, 5, e.

**97. U. S.**—*Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.*, 76 Fed. 479, 22 C. C. A. 283. **Ia.**—*Barthell v. Roderick*, 34 Iowa 517. **Ohio.**—*Gill v. Pelkey*, 54 Ohio St. 318, 43 N. E. 991.

[a] A mistake in the calculation of the amount due will be relieved in equity. *Wilson v. Boughton*, 50 Mo. 17; *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061.

[b] Where the clerk who was directed to assess the amount due on the note in litigation by mistake assessed a smaller amount than was actually due, equity relieved against the judg-

ment. *Partridge & Co. v. Harrow*, 27 Iowa 96, 99 Am. Dec. 643.

**98. Barthell v. Roderick**, 34 Iowa 517.

**99. Bacon v. Bacon**, 150 Cal. 477, 486, 89 Pac. 317; *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270.

[a] A default judgment entered when there is a plea on file and undisposed of may be set aside by a bill in equity. *Tumlin v. O'Bryan & Bros.*, 68 Ga. 65. But see *Curtiss v. Bell*, 131 Mo. App. 245, 111 S. W. 131, holding that the rendition of a default judgment when the defendant has an answer on file is not a mistake made in the rendition of judgment.

1. A default judgment entered by mistake of the clerk, the party having a meritorious defense, will be set aside in equity. *Sexton v. Burruss*, 144 Ga. 230, 86 S. E. 1085. Necessity for party having a meritorious defense, see *supra*, XV, C, 4.

2. *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

3. Relief on the ground of failure to present defense because of neglect of counsel, see *supra*, XV, E, 5, e, (VIII).

4. **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93; *United States v. Aakervik*, 180 Fed. 137; *Sanford v. White*, 132 Fed. 531. **Ala.**—*Hogan v. Scott*, 186 Ala. 310, 65 So. 209. **Cal.**—*Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. **Minn.**—*Street v. Alden*, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632. **Tenn.**—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71. **Tex.**—*Buchanan v. Bilger*, 64 Tex. 559.

[a] Collusion with the adverse party as ground for relief, see *Maddox v. Apperson*, 14 Lea (Tenn.) 596.

**5. U. S.**—*United States v. Aakervik*,

the party from a judgment against him. But equity will not relieve merely because an attorney regularly employed exceeded his authority,<sup>6</sup> or departed from his instructions,<sup>7</sup> although a judgment upon an unauthorized agreement of counsel when injurious to the party will be set aside in equity.<sup>8</sup> Nor will equity relieve against a judgment on account of any ignorance or unskillfulness of counsel.<sup>9</sup>

**10. Newly Discovered Evidence.**—Courts of equity sometimes grant new trials on the ground of newly discovered evidence.<sup>10</sup> But before equity will award a new trial on this ground it must appear

180 Fed. 137. **Ala.**—Hogan v. Scott, 186 Ala. 310, 65 So. 209. **Cal.**—Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. **Kan.**—Electric Plaster Co. v. Blue Rapids Tp., 81 Kan. 730, 106 Pac. 1079. **Tenn.**—Keith v. Alger, 114 Tenn. 1, 85 S. W. 71.

[a] Where the attorney unknown to the petitioner is employed by both parties, equity will grant relief against a judgment against the petitioner. Smith v. Quarles (Tenn.), 46 S. W. 1035.

6. Gifford v. Thorn, 9 N. J. Eq. 702, 723.

7. Gifford v. Thorn, 9 N. J. Eq. 702, 723.

8. Williams v. Nolan, 58 Tex. 708. Judgment must work injustice, see *supra*, XV, C, 2.

9. **Ark.**—Burton v. Hynson, 14 Ark. 32. **Cal.**—Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273, 90 Pac. 42. **Fla.**—Peacock v. Feaster, 52 Fla. 565, 42 So. 889. **Idaho.**—Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 10 Ann. Cas. 444. **Md.**—Darling v. Baltimore, 51 Md. 1. **Mo.**—Fears v. Riley, 148 Mo. 49, 49 S. W. 836. **N. Y.**—Reich v. Cochran, 105 App. Div. 542, 94 N. Y. Supp. 404.

[a] 'Bad advice of counsel' whereby a party fails to bring forth his defense, is insufficient ground for equitable relief. **Cal.**—Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273, 90 Pac. 42. **Ky.**—Mouser v. Harmon, 96 Ky. 591, 29 S. W. 448. **N. C.**—Fentress v. Robins, 4 N. C. 610, 7 Am. Dec. 704.

[b] Mistake of counsel in giving advice which is not sustained by the court is not such a mistake as will afford equitable relief. Winchester v. Grosvenor, 48 Ill. 517.

[c] The fact that the attorney did not file an answer because of his erroneous opinion that the defendant was not obliged to answer until the service

of an alias summons upon him, and that he relied on this advice, does not afford ground for equitable relief against the judgment. Fears v. Riley, 148 Mo. 49, 59, 49 S. W. 836.

Ignorance of law generally as ground for equitable relief, see *supra*, XV, E, 5, e, (IV).

**10. Ala.**—De Sota Coal Min. & Dev. Co. v. Hill, 188 Ala. 667, 65 So. 988; Cox v. Mobile & G. R. Co., 44 Ala. 611. **Ill.**—Fuller v. Little, 69 Ill. 229; Cantwell v. Kimmerle, 179 Ill. App. 66. But compare Brown v. Hurd, 56 Ill. 317. **Ind.**—Doubleday v. Makepeace, 4 Blackf. 9, 28 Am. Dec. 33. **La.**—Boudreaux v. Lower Terrebonne Ref. & Mfg. Co., 127 La. 98, 53 So. 456. **Md.**—Gardiner v. Hardey, 12 Gill & J. 365, 381. **Miss.**—Tatum v. Tate, 77 Miss. 684, 27 So. 647. **Neb.**—Bankers Union v. Landis, 74 Neb. 625, 106 N. W. 973; Horn v. Queen, 4 Neb. 108. **N. J.**—Roche v. Hoyt, 71 N. J. Eq. 323, 64 Atl. 174. **S. C.**—Cantey v. Blair, 1 Rich. Eq. 41; Winthrop v. Lane, 3 Desaus. Eq. 310. **Tex.**—Vardeman v. Edwards, 21 Tex. 737; Goss v. McClaren, 17 Tex. 107, 67 Am. Dec. 646. **Va.**—Wynne v. Newman's Admr., 75 Va. 811. Wash. Denny-Renton C. & C. Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088. **W. Va.** Farmers' & Shippers L. T. Warehouse Co. v. Pridemore, 55 W. Va. 451, 47 S. E. 258; Ferrell v. Allen, 5 W. Va. 43.

*Contra*, Powell v. Watson, 41 N. C. 94 (except in a case of fraud). See Peagram v. King, 9 N. C. 295, 11 Am. Dec. 793.

[a] A judgment may be annulled where it is obtained by plaintiff by his denying having received payment of a sum, the receipt for which the defendant had lost or could not find at the time, but has found since the rendition of the judgment. Florat v. Handy, 35 La. Ann. 816, under Code Pr. §§607, 613.



that the evidence was discovered not only since the trial,<sup>11</sup> but also since the ruling on a motion for new trial,<sup>12</sup> that it could not have been discovered before the trial by either party by the exercise of reasonable diligence,<sup>13</sup> or that the party was prevented from discovering it by fraud,<sup>14</sup> that the evidence is material and such that it ought on another trial on the merits to produce a different result,<sup>15</sup> and that

[b] **Newly discovered evidence need not be in writing.** *Cantey v. Blair*, 1 Rich. Eq. (S. C.) 41.

[c] **If the evidence is manifestly insufficient to sustain the defense set up, the bill will be dismissed.** *Ludington v. Handley*, 7 W. Va. 269.

[d] **A defense is not to be deemed "newly discovered" if it was or ought to have been within the knowledge of the party when he was called upon for his defense in the action at law.** *Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240.

**Ignorance of defense as a ground for relief, see *supra*, XV, E, 5, e, IV.**

**Newly discovered evidence as ground for new trial generally, see the title "New Trial."**

11. **Fla.**—*Baltzell and Chapman v. Randolph*, 9 Fla. 366. **Ill.**—*Holmes v. Statelet*, 57 Ill. 209. **S. C.**—*Cantey v. Blair*, 1 Rich. Eq. 41. **Va.**—*Wynne v. Newman's Admr.*, 75 Va. 811. **W. Va.** *Farmers' & Shippers L. T. Warehouse Co. v. Pridemore*, 55 W. Va. 451, 47 S. E. 258; *Harvey v. Seashol*, 4 W. Va. 115.

[a] **In Washington as to any evidence newly discovered within one year from the entry of judgment, an independent suit in equity will not lie.** *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088.

12. *Snider v. Rinehart*, 20 Colo. 448, 39 Pac. 408; *Fuller v. Little*, 69 Ill. 229, for if the discovery had been previous to the motion, full relief could have been had on such motion.

13. **U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240. **Del.**—*Kersey v. Rash*, 3 Del. Ch. 221. **Fla.**—*Baltzell and Chapman v. Randolph*, 9 Fla. 366. **Ill.**—*Brown v. Luehrs*, 95 Ill. 195; *Fuller v. Little*, 69 Ill. 229; *McGehee v. Gold*, 68 Ill. 215. **Ind.**—*Peyton v. Kruger*, 77 Ind. 486. **Ky.**—*Barrow v. Jones*, 1 J. J. Marsh. 470; *Taylor v. Bradshaw*, 6 Mon. 145, 17 Am. Dec. 132. **Me.**—*Titcomb v. Potter*, 11 Me. 218. **Md.**—*Kirby v. Pascault*, 33 Md. 531. **Mich.**—*Morris v.*

*Hadley*, 9 Mich. 278. **Miss.**—*Lee v. Hooker*, 7 Smed. & M. 601. **N. J.**—*Hannon v. Maxwell*, 31 N. J. Eq. 318; *Glover v. Hedges*, 1 N. J. Eq. 113. **N. D.** *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392. **S. C.**—*Cantey v. Blair*, 1 Rich. Eq. 41. **Tex.**—*Power v. Gillespie*, 27 Tex. 370; *Gregg v. Bankhead*, 22 Tex. 245; *Vardeman v. Edwards*, 21 Tex. 737; *Burnley v. Rice, Adams & Co.*, 21 Tex. 171. **Va.**—*Wynne v. Newman's Admr.*, 75 Va. 811; *De Lima v. Glas-sell's Admr.*, 4 Hen. & M. (14 Va.) 369. **W. Va.**—*Bloss v. Hull*, 27 W. Va. 503, 508 (ordinary diligence); *Ludington v. Handley*, 7 W. Va. 269.

[a] **Unless the newly discovered evidence is such that the party could not possibly, by any vigilance or industry of his, have had the benefit of it on the first trial, equity will not grant a new trial.** *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 9, 28 Am. Dec. 33.

[b] **The discovery subsequent to a judgment of evidence tending to establish a fact the existence of which the party was cognizant before judgment is not ground for annulling a judgment in equity.** *French v. French*, 6 Ky. Opin. 739. *Munn v. Worrall*, 16 Barb. (N. Y.) 221. See also *Hevener v. McClung*, 22 W. Va. 81.

14. *Bloss v. Hull*, 27 W. Va. 503, 508.

**Fraud preventing presentation of party's case or defense, see *supra*, XV, E, 6, b, (III).**

15. **U. S.**—*Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240. **Fla.**—*Baltzell & Chapman v. Randolph*, 9 Fla. 366. **Ill.**—*Brown v. Luehrs*, 95 Ill. 195; *Fuller v. Little*, 69 Ill. 229. **Miss.**—*Roots v. Cohen*, 12 So. 593. **N. J.**—*Hannon v. Maxwell*, 31 N. J. Eq. 318; *Cairo and F. R. Co. v. Titus*, 28 N. J. Eq. 269. **N. D.**—*Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392. **Tex.**—*Vardeman v. Edwards*, 21 Tex. 737. **Va.**—*Wynne v. Newman's Admr.*, 75 Va. 811.

[a] **"The newly discovered evidence must appear to be incontrovertible and conclusive."** *Bucklelew v.*

it is not merely cumulative,<sup>16</sup> corroborative,<sup>17</sup> or collateral.<sup>18</sup> A new trial will not be granted on the ground of newly discovered evidence when it goes merely to impeach the testimony of a witness at a former trial.<sup>19</sup>

**11. Payment and Satisfaction of the Judgment.**—Equity will relieve pro tanto against the enforcement of a judgment where the plaintiff in the judgment attempts to or is about to enforce it notwithstanding a payment of all or a part thereof, or a tender of the property described in it, a satisfaction or a release of the judgment.<sup>20</sup> Some

Chipman, 5 Cal. 399. To same effect Sargent Co. v. Ives, 156 Ill. App. 446.

16. **U. S.**—Ocean Ins. Co. v. Fields, 2 Story, 59, 78, 18 Fed. Cas. No. 10,406.

**Ga.**—Scudder v. Puckett, 12 Ga. 337.

**Ill.**—Sargent Co. v. Ives, 156 Ill. App. 446. **Ky.**—Bishop v. Duncan, 3 Dana

15; Daniel v. Daniel, 2 J. J. Marsh. 52.

**Md.**—Briesch v. McCauley, 7 Gill. 189.

**Neb.**—Meyers v. Smith, 59 Neb. 30, 80 N. W. 273. **N. J.**—Hannon v. Maxwell, 31 N. J. Eq. 318. **N. C.**—Pemberton v. Kirk, 39 N. C. 178. **Ore.**—Hilts

v. Ladd, 35 Ore. 237, 58 Pac. 32. **S. C.** Forsythe v. McCreight, 10 Rich. Eq.

308. **Tex.**—Burnley v. Rice, Adams & Co., 21 Tex. 171. **Va.**—Akers v. Akers,

83 Va. 633, 8 S. E. 260; Wynne v. Newman's Admr., 75 Va. 811; Harnsbarger's Admr. v. Kinney, 13 Gratt. (54

Va.) 511. **W. Va.**—Farmers & Shippers L. T. Warehouse Co. v. Pridemore,

55 W. Va. 451, 47 S. E. 258; Bloss v. Hull, 27 W. Va. 508.

[a] Although a court of equity will not ordinarily grant relief against a judgment where mere cumulative evidence of fraud or any other fact is discovered, yet it will, wherever the defense was originally imperfectly made out from the want of distinct proof, which is afterward discovered. Ocean Ins. Co. v. Fields, 2 Story, (U. S.) 59, 18 Fed. Cas. No. 10,406.

17. Wynne v. Newman's Admr., 75 Va. 811.

18. Wynne v. Newman's Admr., 75 Va. 811.

19. **Ill.**—Woodside v. Morgan, 92 Ill. 273; Sargent Co. v. Ives, 156 Ill. App. 446. **Ia.**—Dixon v. Graham, 16 Iowa

310. **Neb.**—Meyers v. Smith, 59 Neb. 36, 80 N. W. 275; Meyers v. Smith, 59

Neb. 30, 80 N. W. 273. **W. Va.**—Farmers' & Shippers L. T. Warehouse Co. v.

Pridemore, 55 W. Va. 451, 47 S. E. 258; Bloss v. Hull, 27 W. Va. 508.

[a] Compare Peagram v. King, 9 N.

C. 295, 11 Am. Dec. 793, retaining a bill where the newly discovered evidence fixed perjury upon the principal witness in the trial at law.

[b] Newly discovered evidence which only goes to contradict the evidence given on the trial on an immaterial point is not ground for new trial in equity. Gray v. Barton, 62 Mich. 186, 197, 28 N. W. 813, 817; Morris v. Hadley, 9 Mich. 278. See 4 STANDARD PROC. 476.

20. **Cal.**—Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752; Meyer v. Tully,

46 Cal. 70. **Ill.**—Edwards v. McCurdy,

13 Ill. 496. But see Pyle v. Crebs, 112 Ill. App. 480, (holding that the remedy

is by motion in the nature of a writ of audita querela). **Ind.**—Johnson v.

Kitch, 100 Ind. 30; Wray v. Chandler,

64 Ind. 146; Rich v. Dessar, 50 Ind. 309;

Bowen v. Clark, 46 Ind. 405 (where an objection was made that party had a

remedy at law). **Ia.**—Harpham v. Worthington, 100 Iowa 313, 69 N. W.

535; Matter v. Phillips, 52 Iowa 232, 3

N. W. 49. **Kan.**—Worden v. Jones, 1

Kan. App. 501, 40 Pac. 1071. **Ky.**

Thomas v. Brashear, 4 Mon. 65. **La.**

Woolfolk v. Degelos, Durrie & Co., 24

La. Ann. 199; Perry v. Kearney, 14 La.

Ann. 400; Todd v. Paton & Co., 12 La.

Ann. 88; Jewell v. Thorn, 6 La. Ann.

95; Cobb v. Hynes, 4 La. Ann. 150.

**Mass.**—See Tompson v. National Bank,

106 Mass. 128, in which there was also

an element of fraud. **Mich.**—Kallander v. Neidhold, 98 Mich. 517, 57 N. W.

571. **Miss.**—Moore v. Red, 22 So. 948;

Newman v. Meek, Smed. & M. Ch. 331.

**Mo.**—Smith v. Taylor, 78 Mo. App. 630;

Winter v. Kansas City Cable R. Co., 73

Mo. App. 173. **Neb.**—Phillips v. Kuhn,

35 Neb. 187, 52 N. W. 881; Frey v.

Drahoo, 10 Neb. 594, 7 N. W. 319. **N. H.**

Hibbard v. Eastman, 47 N. H. 507, 93

Am. Dec. 467. **Ohio.**—Miller v. Long-

acre, 26 Ohio St. 291, jurisdiction has

authorities, however, in harmony with general rules elsewhere discussed, deny relief under such circumstances on the ground that the party has an adequate remedy at law.<sup>21</sup> If the payment of the judgment was pleadable at law in an action upon it, equity following the general rules will not grant relief to the party.<sup>22</sup>

12. Where Judgment Is Set Aside, Reversed or Superseded. — A proceeding to enjoin the collection of a judgment that has been vacated or set aside is held, by some courts, to be a proper remedy,<sup>23</sup> while other courts have denied relief under such circumstances as the party has an adequate remedy at law.<sup>24</sup> Where a judgment has been super-

been maintained although there is an adequate remedy by motion to enter satisfaction of judgment and set aside the execution. **Ore.**—*Marks v. Willis*, 36 Ore. 1, 58 Pac. 526, 78 Am. St. Rep. 752. **Tenn.**—*Greenfield v. Hutton*, 1 Baxt. 216; *Marsh v. Haywood*, 6 Humph. 210, (if the case presents complication and difficulty or the facts are in the knowledge of the other party); *Moore v. Harryman*, 1 Overt. 259. **Tex.** *Love v. Powell*, 67 Tex. 15, 2 S. W. 456; *Heath v. Garrett*, 50 Tex. 264; *Williams v. Bradbury*, 9 Tex. 487; *Texas Land & M. Co. v. Worsham*, 5 Tex. Civ. App. 245, 23 S. W. 938; *Smith v. State*, 26 Tex. App. 49, 9 S. W. 274. **Va.**—*Crawford v. Thurmond*, 3 Leigh (30 Va.) 85, although party has a remedy by motion to quash the execution. **Wis.**—*Johnson v. Huber*, 106 Wis. 282, 82 N. W. 137.

[a] When after notice of an assignment of the judgment, the debtor pays the original judgment creditor, equity will not enjoin the enforcement of the judgment. *Holland v. Dale*, Minor (Ala.) 265.

21. **U. S.**—*United States v. McLemore*, 4 How. 286, 11 L. ed. 977. **Ala.** *Larkin v. Mason*, 71 Ala. 227, (by supersedeas and by quashing execution); *Perrine v. Carlisle*, 19 Ala. 686. **Ark.** *Anthony & Brodie v. Shannon*, 8 Ark. 52. **Ga.**—*Flournoy v. Silman*, 59 Ga. 195. See *Scogin v. Beall*, 50 Ga. 88 (granting relief as the party exhausted his legal remedy). **Md.**—*Gorsuch v. Thomas*, 57 Md. 334. Compare *Gurley v. Hiteshue*, 5 Gill 217; *McClellan v. Crook*, 4 Md. Ch. 398. **N. Y.**—*Roach v. Duckworth*, 95 N. Y. 391; *Lansing v. Eddy*, 1 Johns. Ch. 49. Compare *Malloy v. Norton*, 21 Barb. 424 (granting relief as the party had no adequate remedy at law); *Shaw v. Dwight*, 16 Barb. 536. **N. C.**—*McRae v. Davis*, 58 N. C. 140, a motion in the nature of a

writ of audita querela is the proper remedy. **Va.**—*Coleman's Admx. v. Anderson*, 29 Gratt. (70 Va.) 425 (by motion to quash execution); *Morrison v. Speer*, 10 Gratt. (51 Va.) 228. **W. Va.** *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. 1088; *Hall v. Taylor*, 18 W. Va. 544 (by motion to quash the execution).

Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6.

22. **Ill.**—*Grindol v. Ruby*, 14 Ill. App. 439. **Ind.**—*Hunt v. Lane*, 9 Ind. 248, in action of revivor. **Mo.**—*Yantis v. Burdett*, 3 Mo. 457. **N. C.**—*Armworthy v. Cheshire*, 17 N. C. 234, 34 Am. Dec. 273. **Va.**—*Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733; *Harnsbarger's Admr. v. Kinney*, 13 Gratt. (54 Va.) 511.

23. *Marsh v. Prosser*, 64 Ind. 293; *Ricketts v. Hitchens*, 34 Ind. 348 (where a new trial was granted). See *Smith v. Chandler*, 13 Ind. 513 (where the justice erased a judgment obtained on new trial and issued execution on the first judgment).

[a] A judgment of the forum obtained upon a judgment of a sister state which is subsequently reversed will be enjoined. *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449.

[b] A judgment on an injunction bond will not be enjoined on the ground that the judgment in the action in which the bond was given is reversed on appeal. *Boos v. Morgan*, 140 Ind. 206, 39 N. E. 919.

24. *Fahs v. Roberts*, 54 Ill. 192.

[a] Where an appeal is granted from a judgment of a justice of the peace whose office expired before sending up a transcript, and an execution is issued by the successor, equity will not enjoin the enforcement as the party has an adequate remedy at law by motion to quash the execution. *Scanland v. Mixer*, 34 Ark. 354.



seded, equity, it has been held, will enjoin its enforcement.<sup>25</sup>

**13. Where Judgment Is Not in Accordance with Agreement.** Where a judgment as entered is not in accordance with the agreement of the parties through mutual mistake,<sup>26</sup> or fraud,<sup>27</sup> it may be set aside or enjoined in equity.

**F. COMPELLING SET-OFF. — 1. In General.**<sup>28</sup> — Equity has jurisdiction to set off one judgment against another in a suit brought for that purpose.<sup>29</sup> But it is not necessary that the demand sought to be used as a set-off should be in the form of a judgment: a mere indebtedness may, under some circumstances, be set off against a judgment in an original proceeding in equity for that purpose where grounds for the exercise of equitable jurisdiction exist.<sup>30</sup> But the mere existence

**Effect of adequacy or inadequacy of remedy at law, see generally *supra*, XV, C, 6.**

**25. *Burge v. Burns, Morris* (Iowa) 287.**

**26. *Weir v. W. T. Carter & Bro.* (Tex. Civ. App.), 169 S. W. 1113.**

[a] Where a defendant agrees that the justice shall enter a conditional judgment and the judgment entered is an absolute judgment by confession, the judgment is void and equity has jurisdiction to grant relief. *Gwinn v. Newton*, 8 Humph. (Tenn.) 710.

**27. *McTeer v. Briscoe* (Tenn.), 61 S. W. 564; *Weir v. W. T. Carter & Bro.* (Tex. Civ. App.), 167 S. W. 1113.**

**Violation of agreement as fraud preventing presentation of party's case or defense, furnishing ground for equitable relief, see *supra*, XV, E, 6, b, (III), (B).**

**28. As to set-off of executions, see the title, "Judgments and Decrees, Enforcement of."**

**29. U. S.**—See *Greene v. Darling*, 5 Mason 201, 10 Fed. Cas. No. 5,765. **Ga.** *Wellborn v. Bonner*, 9 Ga. 82. **Ia.** *Hurst v. Sheets*, 14 Iowa 322. **La.** *Muse v. Rogers*, 12 Mart. (O. S.) 350. **Md.**—*Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49. **Md.** *Sumner v. Whitley*, 1 Mo. 708. **Neb.** *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85. **N. J.**—*Jackson v. Bell*, 31 N. J. Eq. 554. **N. Y.**—*Stilwell v. Carpenter*, 59 N. Y. 414; *Simpson v. Hart*, 1 Johns. Ch. 91. **Ore.**—*Whelan v. McMahan*, 47 Ore. 37, 82 Pac. 19, 114 Am. St. Rep. 906; *McDonald v. Mackenzie*, 24 Ore. 573, 14 Pac. 868 (decree set-off against a judgment). **Eng.**—*Williams v. Davies*, 2 Sim. 461, 57 Eng. Reprint 860.

**30. Cal.**—*Hobbs v. Duff*, 23 Cal. 596,

**625. Colo.**—*Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042. **La.**—*Caldwell v. Davis*, 2 Mart. (N. S.) 135. **Miss.** *Posey & Bro. v. Maddox*, 65 Miss. 193. **N. Y.**—*Davidson v. Alfaro*, 16 Hun 353, 54 How. Pr. 481; *Gay v. Gay*, 10 Paige Ch. 369. **N. C.**—*Brittain v. Quiet*, 54 N. C. 328, 62 Am. Dec. 202.

[a] "The remedy by set-off, as enforced in equity, is undoubtedly somewhat broader and more liberal than that given by statute, but it has limits. The mere existence of a cross-demand is not enough to establish a right to it, nor will the existence of an unsettled account, out of which a cross-demand may arise, be sufficient. *Hewett v. Kuhl*, 10 C. E. Gr. 24; *Whyte v. O'Brien*, 1 Sim. and Stu. 551; *Dodd v. Lydall*, 1 Hare 337; *Gordon v. Pym*, 3 Hare 223; 2 Story's Eq. Jur. §1436. Nor will a suitor who has recovered damages at law for a breach of contract, be restrained in their collection, though he be a non-resident and insolvent, merely because he may hereafter be found to be indebted to the defendant on the adjustment of an unsettled account. *Rawson v. Samuel*, *ubi supra* (1 Cr. Ph. 161). And even where the cross-demands are debts of fixed and certain amount, but had their origin in distinct and independent transactions, equity will not set-off one against the other unless such course is made necessary by some peculiar, equitable consideration, as, for example, where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other. *Dade v. Irwin*, 2 How. 389. The ground upon which the remedy is claimed here is, it will be ob-

of a demand in favor of a judgment debtor against his judgment creditor, not connected with the subject-matter represented by the judgment, is not sufficient cause for equitable relief by way of set-off.<sup>31</sup> For as a general rule, equity will not act upon the subject of set-off in respect to distinct and unconnected debts, unless some peculiar equity calling for relief intervenes.<sup>32</sup> This jurisdiction is inherent in equity and exists independently of statute;<sup>33</sup> and the fact that juris-

served, the mere assertion of a right to damages. Not only is the amount unliquidated, but the right itself is unestablished, and, therefore, uncertain. The demand is a matter belonging exclusively to the common law courts; until established there by a judgment, this court can exercise no control over it. Where both demands have been established by the judgment of a competent court, so that the sums recoverable are fixed and certain, it is common practice for the common law courts to set-off one against the other. *Brown ads. Hendrickson*, 10 Vr. 239. And the same practice prevails in equity, regardless of the nature of the demand upon which the judgment is founded, whether it be a debt or a tort. *Williams v. Davies*, 2 Sim. 461; *Simson v. Hart*, 14 Johns. 62. But courts of equity will never set-off a claim for unliquidated damages against an ascertained sum established by a judgment; nor will they, as a general rule, stay the enforcement of a judgment in order that the defendant may have an opportunity to recover a counter-judgment. *Murray v. Tolland*, 3 Johns. Ch. 569; *Winchester v. Hachley*, 2 Cranch 342; *Rawson v. Samuel*, *ubi supra*; *Waterman on Set-Off*, §423; *Kerr on Inj.* 67. The departures from this rule have been very rare indeed, and have occurred only in cases where the counter-claims have had a common origin and were so inseparably connected that one appeared to be the natural product or outgrowth of the other, and where it was manifest that, if one was permitted to be enforced without allowing the other, the party having the benefit of the enforcement, would derive a profit or advantage from his own wrong. That was the case in *Beasley v. Darcy*, 2 Sch. & Lef. [Irish] 403. There a tenant owed his landlord rent, and the landlord had committed a trespass on the land which rendered it of less value, and prevented the tenant, to a certain extent, from getting his rent

out of it. The landlord brought ejectment against the tenant, claiming a forfeiture of his term in consequence of the non-payment of the rent, and had a recovery. The tenant then sought relief in equity and obtained an injunction restraining the landlord from ejecting him; he also obtained an order directing an issue to be tried at law to ascertain what damages he had suffered by the landlord's trespass, and had a recovery for a sum nearly equal to the rent in arrear. He was subsequently permitted to redeem his term by recouping his damages against the rent. *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Piggott v. Williams*, 6 Madd. 95, and *Lord Caswdor v. Lewis*, 1 Y. & C. 427, are cases of the same class. . . . But where the claims originate in separate transactions, or have perfectly independent sources . . . equity will neither afford a remedy by set-off, nor stay the collection of a judgment founded on one until a counter-judgment has been recovered on the other." *Jackson v. Bell*, 31 N. J. Eq. 554.

31. *Prior v. Richards*, 4 Bibb. (Ky.) 356; *Brown's Admr. v. Scott*, 2 Bibb. (Ky.) 635; *Whyte v. O'Brien*, 1 Sim. & St. 551, 57 Eng. Reprint 218 (where the plaintiff acquired a demand greater than the verdict against him after the rendition of the verdict). See also *Jackson v. Bell*, 31 N. J. Eq. 554.

[a] A purchaser at a trustee's sale cannot enjoin a judgment for the purchase money merely because he is a creditor of the estate to an amount exceeding his indebtedness as such would derange and defeat the trust. *Capehart v. Etheridge*, 63 N. C. 353.

32. *Dade v. Irwin*, 2 How. (U. S.) 383, 11 L. ed. 308. See generally the title, "**Set-Off, Counterclaim and Recoupment.**"

33. Ky.—*Merrill v. Souther*, 6 Dana 305; *Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 158. Mass.—*Perry v. Pye*, 215 Mass. 403, 102 N. E. 653. N. Y. *Gay v. Gay*, 10 Paige Ch. 369. Ore.

diction of set-offs is given law courts by statute does not divest courts of equity of their inherent jurisdiction in this respect.<sup>34</sup>

**2. Setting Off Judgments.**—a. *Grounds.*—Although it has been held that the mere fact that there are mutual judgments between the parties is sufficient to give equity jurisdiction to interpose and set off one against the other,<sup>35</sup> some supervening equity which renders necessary the interposition of equity to protect the rights of the plaintiff, is generally required to obtain such relief.<sup>36</sup>

Where a judgment cannot be enforced by legal means because of the non-residence,<sup>37</sup> or insolvency<sup>38</sup> of the judgment creditor, equity

Whelan *v.* McMahan, 47 Ore. 37, 82 Pac. 19, 114 Am. St. Rep. 906.

[a] It depends upon the equitable jurisdiction of the court over its suitors, not upon the statutes of set-off. Hobbs *v.* Duff, 23 Cal. 596, 629.

34. **U. S.**—Hendrickson *v.* Hinekley, 17 How. 443, 15 L. ed. 123. **Colo.** Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042. **Ill.**—Matson *v.* Oberne, 25 Ill. App. 213. **Ky.**—Hughes *v.* M'Coun's Admr., 3 Bibb. 254.

[a] But see (1) Wellborn *v.* Bonner, 9 Ga. 82 ("That judgments may be set off, both at law and in equity, is admitted; but the latter court has no jurisdiction, when, from the facts of the case, the complainant has an ample and adequate remedy in the common law courts"); Zinn Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772, holding (2) that where a party has an adequate remedy by motion to set off judgments, he cannot obtain relief in equity.

[b] The statutes with reference to set-off are not exclusive. Commercial State Bank *v.* Ketchum, 1 Neb. (Unof.) 454, 96 N. W. 614.

[c] "Before courts of mere law had, in analogy to the statute of assignments of George II, assumed jurisdiction to set off one judgment against another, courts of equity had authoritatively exercised the power to do so whenever, for any peculiar cause for equitable intervention, such as insolvency or nonresidence, such a proceeding was necessary to prevent irreparable loss or irremedial injustice; and the assumption of jurisdiction afterwards, by courts of law, did not oust the preestablished authority of courts of equity in those cases to which its extraordinary jurisdiction applied." Merrill *v.* Souther, 6 Dana (Ky.) 305, affirmed in Jeffries *v.* Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

As to set-off of judgments in courts of law, see the title "Judgments, Satisfaction of."

As to effect of remedy at law upon right to equitable relief, see *infra*, XV, C, 6.

35. Prior *v.* Richards, 4 Bibb. (Ky.) 356; Davidson *v.* Alfaro, 16 Hun (N. Y.) 353, 54 How. Pr. 481 (the demands are within the statute and no other equity is needed).

36. **Del.**—Small *v.* Collins, 6 Houst. 273. **Ill.**—Wade *v.* Wade, 12 Ill. 89. **Ore.**—Whelan *v.* McMahan, 47 Ore. 37, 82 Pac. 19, 114 Am. St. Rep. 906.

[a] If the result of the refusal to set off judgments would deprive one party of his property for the benefit of others to whom he is under no obligation, equity will grant the relief prayed for. Tootle-Weakley Millinery Co. *v.* Billingsley, 74 Neb. 531, 105 N. W. 85.

37. **Ill.**—Buckmaster *v.* Grundy, 8 Ill. 626. **Ky.**—Allnut *v.* Winn, 3 J. J. Marsh. 304. **Tenn.**—Clift *v.* Martin, 4 Baxt. 387.

38. **Ala.**—Goldsmith *v.* Stetson & Co., 39 Ala. 183. **Cal.**—Russell *v.* Conway, 11 Cal. 93. **Colo.**—Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042. **Ga.**—Tommey & Stewart *v.* Ellis, 41 Ga. 260. **Ill.**—Hinrichsen *v.* Reinback, 27 Ill. 295, refusing to credit a judgment by the surety of H against the plaintiff, upon an award against H, there being no showing of fraud or insolvency in H or the surety. **Ky.** Merrill *v.* Souther, 6 Dana 305; Allnut *v.* Winn, 3 J. J. Marsh. 304. **Md.** Marshall *v.* Cooper, 43 Md. 46. **Mass.** Perry *v.* Pie, 215 Mass. 403, 102 N. E. 653. **Mo.**—Sumner *v.* Whitley, 1 Mo. 708. **N. Y.**—Simson *v.* Hart, 14 John. 63, 74. **Ohio.**—Barbour *v.* National Exch. Bank, 50 Ohio St. 90, 33 N. E. 542. **Ore.**—Whelan *v.* McMahan, 47 Ore. 37, 82 Pac. 19, 114 Am. St. Rep.



will set it off against a judgment of the latter about to be enforced against the party seeking relief in equity. And where there is a connection between the transactions on which the judgments were rendered, a chancellor may set one off against the other.<sup>39</sup>

b. *Character of Judgments To Be Set-off.*—Although as a general rule, the judgments to be set off against each other should be mutual,<sup>40</sup> equity will allow the set-off of judgments as between the real parties in interest, regardless of the nominal parties.<sup>41</sup> The assignee of a judgment, like the assignee of other choses in action, takes it subject to all equities existing between the debtor and creditor, and therefore takes the judgment subject to set-offs existing against the assignor at the time of the assignment.<sup>42</sup> While, as a general rule, cross-demands cannot be set off where they exist in different rights,<sup>43</sup> judgments to be set off against each other need not be in the same right.<sup>44</sup> It has

906. Tenn.—*Cliff v. Martin*, 4 Baxt. 387. Tex.—*Hanchett v. Gray*, 7 Tex. 549; *Kelly Furn. Carpet & Hdw. Co. v. Shelton* (Tex. Civ. App.), 62 S. W. 794. Eng.—*Williams v. Davies*, 2 Sim. 461, 57 Eng. Reprint 860.

But see *Small v. Collins*, 6 Houst. (Del.) 273.

[a] Compare *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772; *Paulomer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011; and *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16, holding the mere insolvency of a judgment creditor will not of itself justify an injunction against the enforcement of a judgment in order to let in a set-off of a judgment which might have been pleaded in the original action.

[b] *When Insolvency Must Exist.* Where it is sought in equity to set off a judgment against a judgment of one who assigned his judgment on the day of its rendition, on the ground of his insolvency, it must be shown that he was insolvent at and before the time of the assignment. *Henderson v. McVay*, 32 Ala. 471.

[c] A judgment creditor who takes the benefit of the homestead and exemption law which covers all his property and exempts it from the payment of his debts is legally insolvent within the rule of the text. *Tommey & Stewart v. Ellis*, 41 Ga. 260.

39. *Allnut v. Winn*, 3 J. J. Marsh. (Ky.) 304.

40. *McGraw v. Pettibone*, 10 Mich. 539; *Boles v. Griswold*, 2 Mont. 447.

*Necessity for mutuality in demands to be set off*, see *infra*, XV, F, 3, b.

41. *Hobbs v. Duff*, 23 Cal. 596.

[a] *Where One Judgment Is in Name of a Trustee.*—A set-off will be made in equity as between the real parties in interest, even though one of the judgments is in the name of a trustee who holds for the use and benefit of the real parties in interest. *Hobbs v. Duff*, 23 Cal. 596.

[b] *One member of a firm* will be allowed to off-set his own judgment against an insolvent debtor who seeks to enforce a judgment against the firm. *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

42. Colo.—*Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042. Ia.—*Hurst v. Sheets*, 14 Iowa 322. Ky.—*Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 158. See *Markham v. Todd*, 2 J. J. Marsh. 364. Compare *Merrill v. Souther*, 6 Dana 305. Md.—*Marshall v. Cooper*, 43 Md. 46. N. J.—*Brown v. Hendrickson*, 39 N. J. L. 239.

[a] *Necessity For Understanding As To Deduction.*—Equity, following the statutes, will refuse a set off where a debtor takes a transfer of a judgment recovered by a creditor against the party to whom he is indebted by judgment, unless there is some mutual credit between the parties—that is, understanding between them with respect to such deduction. It makes no difference that the creditor of the party seeking the reduction is insolvent. *Small v. Collins*, 6 Houst. (Del.) 273.

43. See the title, "*Set-off, Counterclaim and Recoupment.*"

44. *Simson v. Hart*, 14 Johns. (N. Y.) 63, 75; *Hanchett v. Gray*, 7 Tex. 549.

been held that where the judgments are recovered in different courts, there is no remedy except in equity and a set-off will be decreed.<sup>45</sup> It is immaterial what is the nature of the demands upon which the judgments are founded, whether debt or tort.<sup>46</sup>

c. *Effect of Remedy at Law.*<sup>47</sup> — Where a party has an adequate remedy at law to set off judgments, relief in equity may be denied.<sup>48</sup> The general rule denying equitable relief to a party who has a defense at law which he failed to plead does not preclude relief where the defense is a judgment which a party seeks to set off against the judgment at law.<sup>49</sup> If the judgment was pleaded as a set-off at law and relief was there denied, equity will not grant relief.<sup>50</sup>

3. **Setting Off Cross-Demands Against Judgments.** — a. *Grounds.* Insolvency of the judgment creditor is a ground warranting equity in setting off cross-demands against judgments.<sup>51</sup> But as to whether the

[a] The objection that the judgments are not in the same right is untenable for it is well settled that although the demands, as being joint and several, are not, strictly speaking, due in the same right, yet if the legal or equitable liabilities or claims may become vested in or urged against one, they may be set off against separate demands, and vice versa. *Russell v. Conway*, 11 Cal. 93.

[b] It is not necessary that judgments to be set off against each other be in the same right; it is sufficient if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be diminished or satisfied by the set-off; as where a judgment in trespass recovered by A against B and C is to be set off against a judgment recovered by B against A, for the whole amount of the judgment may be collected from B who can have no contribution from C. *Simson v. Hart*, 14 Johns. (N. Y.) 63.

45. *Webster v. McDaniel*, 2 Del. Ch. 297, 304.

As to setting off judgments of different courts at law, see the title "Judgments, Satisfaction of."

46. *Jackson v. Bell*, 31 N. J. Eq. 554.

47. *Effect of adequacy or inadequacy of remedy at law as ground for equitable relief*, see *supra*, XV, C, 6.

48. Where the party has a remedy by motion to set off the judgments he cannot obtain relief in equity. *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

[a] **Set-Off of Executions.**—Refer-

ring to a statute, authorizing a debtor, when an execution is placed in the hands of an officer, to place his execution against the creditors in the hands of the same officer, and directing a set-off of executions, in *Wells v. Elsam*, 40 Mich. 218, the court, although not deciding that a bill to set off judgments would not lie in equity in a proper case, held the bill would not lie under the facts of the instant case and said: "It is difficult to see what occasion there is, with such a statute, to resort to any other remedy."

49. *Ark.*—*Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 524, *limiting Menifee v. Ball*, 7 Ark. 520. *Cal.*—*Hobbs v. Duff*, 23 Cal. 596, 629; *Russell v. Conway*, 11 Cal. 93. *Ky.*—*Carlyle v. Long*, 5 Litt. 167. *Tex.*—*Kelly Furniture Carpet & Hdw. Co. v. Shelton* (Tex. Civ. App.), 62 S. W. 794.

50. *Greene v. Darling*, 5 Mason 201, 10 Fed. Cas. No. 5,765; *Carlyle v. Long*, 5 Litt. (Ky.) 167.

51. *U. S.*—*Ashton v. McKim*, 4 Cranch C. C. 19, 2 Fed. Cas. No. 584; *Boone v. Small*, 3 Cranch C. C. 628, 3 Fed. Cas. No. 1,644. *Ala.*—*Dunham Lumb. Co. v. Holt*, 124 Ala. 181, 27 So. 556, 123 Ala. 336, 26 So. 663; *O'Neill v. Perryman*, 102 Ala. 522, 14 So. 898; *Farris & McCurdy v. Houston*, 78 Ala. 250; *Wood v. Steele*, 65 Ala. 436; *Tuscumbia, C. & D. R. Co. v. Rhodes*, 8 Ala. 206; *Chandler v. Crawford*, 7 Ala. 506. *Ark.*—*Bettison v. Jennings*, 8 Ark. 287. *Cal.*—*Hobbs v. Duff*, 23 Cal. 596. *Ga.*—*Ponder v. Cox*, 26 Ga. 485. *Ill.*—*Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270. *Ind.*—*Keightley v. Walls*, 27 Ind. 384. *Ia.*—*De Laval*

insolvency of a judgment creditor alone is sufficient to warrant equitable interposition to decree the set-off of a cross-demand against a judgment, the authorities are in conflict, some holding that it is,<sup>52</sup> and others requiring in addition some other grounds of equitable relief.<sup>53</sup>

*Separator Co. v. Sharpless*, 134 Iowa 28, 111 N. W. 438; *Baker v. Ryan*, 97 Iowa 708, 25 N. W. 800. **Ky.**—*Collins v. Fitzpatrick*, 6 J. J. Marsh 67; *Marble v. Telf*, 2 J. J. Marsh 364; *Prior v. Richards*, 4 Bibb 356; *Payne v. Loudon*, 1 Bibb 518. **Miss.**—*Posey & Bro. v. Maddox*, 65 Miss. 193, 3 So. 460; *Abbey v. Van Compen*, 1 Freem. Ch. 273. **Mo.**—*Wright v. Salisbury*, 46 Mo. 26. **N. Y.**—*Davidson v. Alfaro*, 16 Hun 353, 54 How. Pr. 481; *Gay v. Gay*, 10 Paige Ch. 369; *Weston v. Turner*, 22 N. Y. Supp. 141. **N. C.**—*Brittain v. Quiet*, 54 N. C. 328, 62 Am. Dec. 202; *Parks v. Spurgin*, 38 N. C. 153; *Williams v. Helme*, 16 N. C. 151, 18 Am. Dec. 580. **Ohio.**—*Barbour v. National Exch. Bank*, 50 Ohio St. 90, 33 N. E. 542. **Ore.**—*McDonald v. Mackenzie*, 24 Ore. 573, 14 Pac. 866. **Pa.**—*Guttendag v. Lehigh Valley Iron Co.*, 14 Phila. 639. **Tex.**—*Ellis v. Kerr* (Tex. Civ. App.), 23 S. W. 1050. **Va.**—*Shores v. Ware*, 1 Rob. 1. **Eng.**—*Hamp v. Jones*, 9 L. J. Ch. (N. S.) 258.

But see *Rives v. Rives*, 7 Rich. Eq. (S. C.) 353.

[a] **The underlying principle** upon which this doctrine is founded is that when there is a cross-demand, the debtor-creditor has only a claim for any balance remaining after crediting the one with the other as the debt due him. If there is no remaining balance due by the complainant to the judgment creditor, but his claim exceeds the amount of the judgment and the judgment creditor is insolvent, it would be opposed to natural equity to require him to pay the judgment and remand complainant to a court of law for the enforcement of this demand which would inevitably result in his getting nothing upon his judgment, should he recover one. *Dunham Lumber Co. v. Holt*, 124 Ala. 181, 27 So. 556.

[b] **Where a plaintiff has attached sufficient property to cover his claim pending in a proceeding at law, he is not entitled to an injunction on the ground of insolvency.** *Montgomery Water Power Co. v. Chapman*, 128 Fed. 197.

52. **U. S.**—*North Chicago Rolling*

*Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 38 L. ed. 565; *Brown v. Pegram*, 149 Fed. 515. **Ala.**—*Dunham Lumber Co. v. Holt*, 124 Ala. 181, 27 So. 556. But see *O'Neill v. Perryman*, 102 Ala. 522, 526, 14 So. 398; *Pearce v. Winter Iron Wks.*, 32 Ala. 68. **Ky.**—*Parsons v. Richards*, 4 Bibb 356; *Payne v. Loudon*, 1 Bibb 518. **Md.**—*Twigg v. Hopkins*, 85 Md. 301, 37 Atl. 24; *Levy v. Steinbach*, 43 Md. 212. **Neb.**—*Commercial State Bank v. Ketchum*, 1 Neb. (Unof.) 454, 96 N. W. 614. **N. Y.**—*Gay v. Gay*, 10 Paige Ch. 369. **Pa.**—*Guttendag v. Lehigh Valley Iron Co.*, 14 Phila. 639. **Tex.**—*Norton v. Wochler*, 31 Tex. Civ. App. 522, 72 S. W. 1025; *Ellis v. Kerr* (Tex. Civ. App.), 23 S. W. 1050. **Va.**—*McClellan v. Kinnaird*, 6 Gratt. (33 Va.) 352.

[a] **Until an account can be taken**, equity will enjoin a judgment at law where the judgment creditor is insolvent. *Pharr v. Reynolds*, 3 Ala. 521.

53. **Ala.**—*Middleton v. Foshee*, 68 So. 890. **Ill.**—*Matson v. Oberne*, 25 Ill. App. 213. *Compare* *Chicago, D. & V. R. Co. v. Field*, 36 Ill. 270. **N. J.**—*Jackson v. Bell*, 31 N. J. Eq. 554.

[a] **In West Virginia** the mere insolvency of a judgment creditor will not justify equitable relief so as to allow a plaintiff to interpose a set off, which was available in the original action. *Zinn v. Dawson*, 47 W. Va. 45, 24 S. E. 784, 81 Am. St. Rep. 772; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16. But see *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Mattingly v. Sutton*, 19 W. Va. 19.

[b] **Principal and Surety.**—Equity will enjoin a judgment of a judgment-creditor who is insolvent, when the debtor is surety for him on certain notes in an amount exceeding the judgment, none of which have been paid. *Abbey v. Van Campen*, Freem. Ch. (Miss.) 273.

[c] **As To Set-Offs Acquired After Suit Brought.**—Insolvency may be an important factor in supporting an appeal to chancery to make available a set off under certain circumstances, but



If the cross-demand cannot be availed of at law, it may be established as such in equity upon allegation and proof of the insolvency of the judgment creditor.<sup>54</sup>

**Nonresidence.** — The nonresidence of a judgment creditor is recognized as a ground of equitable interposition in some jurisdictions,<sup>55</sup> but not in others.<sup>56</sup>

**b. Nature of Offset.** — Generally the set-off must be liquidated and certain as to amount.<sup>57</sup> A right accruing subsequent to the judgment cannot, it has been held, be set off against the judgment.<sup>58</sup> There must be mutuality in the demands to be set-off.<sup>59</sup> But it is not neces-

it is not ground to maintain a bill by one who after litigation begun between himself and another, acquires demands against the insolvent with which to pay him off. *Desearn v. Babers*, 62 Miss. 421; *Condon v. Shehan*, 46 Miss. 710.

54. *O'Neill v. Perryman*, 102 Ala. 522, 14 So. 898; *Farris & McCurdy v. Houston*, 78 Ala. 250; *Campbell & Wright v. Conner*, 78 Ala. 211; *Wood & Houston v. Steele*, 65 Ala. 436.

**Effect of adequacy or inadequacy of remedy at law**, see *supra*, XV, C, 6; *infra*, XV, F, 3, c.

55. **U. S.**—*North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 617, 14 Sup. Ct. 710, 38 L. ed. 565, referring to Illinois practice; *Brown v. Pegram*, 149 Fed. 515, not resident of the United States. **Ala.** *Duckworth v. Duckworth's Admr.*, 35 Ala. 70. **Ga.**—*Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542; *Ponder v. Cox*, 26 Ga. 485. **Ky.**—*Markham v. Todd*, 2 J. J. Marsh. 364; *Moss v. Rowland*, 1 Duv. 321; *Walker v. Thomas*, 8 Ky. L. Rep. 700. **N. C.**—*Brittain v. Quiet*, 54 N. C. 328, 62 Am. Dec. 202. **Tenn.** *Edminson v. Baxter*, 4 Hayw. 112, 9 Am. Dec. 75. **Va.**—*Shores v. Ware*, 1 Rob. 1.

But see *Wade v. Wade*, 12 Ill. 89, where no reason was shown why the set-off was not pleaded in the law action.

56. *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49; *Beall v. Brown*, 7 Md. 393; *Jackson v. Bell*, 31 N. J. Eq. 554.

57. *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49; *Jackson v. Bell*, 31 N. J. Eq. 554.

[a] **Demands (1) for uncertain damages**, as on breaches of contract or torts, cannot be set off against judgments. *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49; *Jack-*

*son v. Bell*, 31 N. J. Eq. 554. But see *North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 615, 14 Sup. Ct. 710, 715, 38 L. ed. 565; *Brown v. Pegram*, 149 Fed. 515. And compare *Ladew v. Hart*, 8 App. Div. 150, 40 N. Y. Supp. 509 (where (2) a cause of action for conversion was set off against a judgment); *Railroad v. Greer*, 87 Tenn. 698, 11 S. W. 931, where (3) a railroad company was sued by a third party injured as a result of such a misconduct of an employee as renders the latter liable to the employer for the injury. The employee who was also injured recovered a judgment, which he was about to enforce. The court held that the collection of so much of the judgment of the employee, who is insolvent, as equals the amount claimed by the injured person will be enjoined until the action of the injured person is determined.

58. *Maw v. Ulyatt*, 31 L. J. Ch. (N. S.) (Eng.) 32. See also *Desearn v. Babers*, 62 Miss. 421; *Condon v. Shehan*, 46 Miss. 710.

**Where the offset accrued pending appeal**, and could not be pleaded on account of the courts jurisdiction, see *infra*, XV, F, 3, c.

[a] **Existence at Time of Assignment.**—No claim to be set off against the assignor which did not exist in equity at the date of the assignment can authorize an injunction against the judgment of the assignee. *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364, on the authority of *Robbins v. Hally*, 1 Mon. (Ky.) 194.

59. *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49.

[a] **Debt to Principal Set-Off Against Judgment Against Principal and Surety.**—Where the plaintiff in a judgment against two defendants, one as principal, the other as surety, is a

sary that the judgment run to the person against whom the set-off is asked;<sup>60</sup> a court of equity will look beyond the nominal parties to the real parties in interest and adjudicate the rights of the parties accordingly.<sup>61</sup> An assignee of a judgment creditor stands in no better position than his assignor.<sup>62</sup> The general rule in regard to set-offs that debts to be set off against each other must accrue in the same right,<sup>63</sup> prohibits setting off an individual indebtedness of the judgment plaintiff, against a judgment for him in a representative capacity.<sup>64</sup>

c. *Effect of Remedy at Law.*<sup>65</sup>—Equity will not set off a claim against the judgment where the party has an adequate remedy at law,<sup>66</sup> as by an action at law.<sup>67</sup> If, however, there exists some cir-

nonresident of the state and without property in the state, a debt due from him to the principal may be set off in equity against the judgment. *Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542.

[b] The bail of an absconding debtor may be bill in equity set off against the debt of the debtor against the judgment creditor. *Manna v. Drewry*, 5 Leigh (32 Va.) 296.

[c] If insolvency exists, the equitable right of set off is not limited to credits which are strictly mutual. *Central Appalachian Co. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598.

Necessity for mutuality in judgments to be set off, see *supra*, XV, F, 2, b.

60. U. S.—*Central Appalachian Co. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598. Ala.—*Chandler v. Lyon*, 8 Ala. 35. Tenn.—*Railroad v. Greer*, 87 Tenn. 698, 11 S. W. 931.

[a] *Set-Off Against Judgment for Receiver.*—When the contract under which the set-off arose was in existence when a receiver is appointed for the insolvent corporation, the claim may be set-off against a judgment in favor of the receiver of the corporation. *Central Appalachian Co. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598, on the authority of *North Chicago Rolling Mill Co. v. St. Louis Ore & S. Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565.

61. *Hobbs v. Duff*, 23 Cal. 596.

[a] Equity will prevent an insolvent cestui que trust from enforcing through his trustee, a judgment against a party who holds a valid demand against such cestui que trust which the party has no means of enforcing if the set-off is denied. *Hobbs v. Duff*, 23 Cal. 596, 627.

62. Ia.—*De Laval Separator Co. v. Sharpless*, 134 Iowa 28, 111 N. W. 438. N. C.—*Williams v. Helme*, 16 N. C. 151, 18 Am. Dec. 580. Pa.—*Guttendag v. Lehigh Valley Iron Co.*, 14 Phila. 639. Tex.—*Ellis v. Kerr* (Tex. Civ. App.), 23 S. W. 1050. W. Va.—*Mattingly v. Sutton*, 19 W. Va. 19.

But see *De Laval Separator Co. v. Sharpless*, 134 Iowa 28, 111 N. W. 438.

[a] *Compare Catron v. Cross*, 3 Heisk. (Tenn.) 584, holding a simple debt against the assignor of a judgment cannot be set off against a bona fide holder without notice.

[b] *Where Assignor Is Not Insolvent.*—Where the insolvency of the assignor at the time of the assignment is not shown, a debt cannot be set off against the judgment assigned, unless such a connection is shown between the subject matter of the set-off and the claim reduced to judgment as would authorize a set-off in equity. *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364, on the authority of *Robbins v. Holly*, 1 Mon. (Ky.) 194.

63. See generally the title, "Set-Off, Counterclaim and Recoupment."

64. *Meniffee v. Ball*, 7 Ark. 520.

65. Effect of adequacy or inadequacy of remedy at law, see *supra*, XV, C, 6; XV, F, 2, c.

66. U. S.—*Dale v. Train*, 2 How. 383, 11 L. ed. 308. Ill.—*Aholtz v. Goltz*, 114 Ill. 241, 1 N. E. 911. Md.—*Cook v. Murphy*, 7 Gill & J. 282. Mass.—*Wolcott v. Jones*, 4 Allen 367. Va.—*Hudson v. Kline*, 9 Gratt. 379.

67. Ga.—*Bondar v. Cox*, 90 Ga. 185. Ky.—*Brown's Admr. v. Scott*, 2 Bibb. 635. Va.—*Hudson v. Kline*, 9 Gratt. 379.

cumstance, such as insolvency,<sup>68</sup> or nonresidence<sup>69</sup> of the judgment creditor, which renders this remedy inadequate, equity will grant relief in a proper case.

**Where Offset Is Pleadable at Law.**—As a general rule, equity will not grant relief against a judgment where the offset might have been pleaded in the original action.<sup>70</sup> If the plaintiff pleaded his offset at law, and it was there denied, equity will not relieve him by setting his demand off against the judgment.<sup>71</sup> If, however, the party, without any fault or negligence on his part,<sup>72</sup> was prevented from inter-

68. See *supra*, XV, F, 3, a.

69. See *supra*, XV, F, 3, a.

70. U. S.—*Hendrickson v. Hinckley*, 17 How. 443, 15 L. ed. 123. Ala.—*Middleton v. Foshee*, 68 So. 890; *Moore v. Faggard*, 51 Ala. 525; *Duckworth v. Duckworth's Admr.*, 35 Ala. 70; *Pearce v. Winter Iron Works*, 32 Ala. 68. Ark.—*Meniffee v. Ball*, 7 Ark. 520, *limited in Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224, to cases where the party has waived or lost his right to go to the chancellor for relief. *Cummins v. Bentley*, 5 Ark. 9. Ga.—*Hines v. Beers*, 73 Ga. 9. Ia.—*De Laval Separator Co. v. Sharpless*, 134 Iowa 28, 111 N. W. 438. Ky.—*Moss v. Rowland*, 1 Duv. 321; *Lamme v. Saunders*, 1 Mon. 263. Compare, *Hughes v. M'Coun's Admr.*, 3 Bibb. 254; *Ward v. Chiles*, 3 J. J. Marsh. 486. Md.—*Cook v. Murphy*, 7 Gill & J. 282. Ohio.—*Allen v. Medill*, 14 Ohio 445. S. C.—*Tollison v. West*, Harp. Eq. 93. Va.—*Linke & Klepper v. Fleming*, 25 Gratt. (66 Va.) 704, 707 (query); *Griffith v. Thompson*, 4 Gratt. (43 Va.) 147. W. Va.—*Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321. See also *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

[a] But see *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270, holding that the rule that equity will not enjoin a judgment when the defense might have been pleaded in the action at law does not apply to the defense of set-off, and this is a defense which a defendant may waive and then later enforce by action. Compare, *Winchester v. Grosvenor*, 48 Ill. 517, holding with the general rule stated in the text.

[b] **Where Defendant Is Insolvent.** If the matter of set-off is available in the suit at law and also in equity because of the insolvency of him against whom the demand exists, the party can-

not withhold his set-off at law because available in chancery, and when the judgment is rendered, and then set it up in equity against the judgment. *Middleton v. Foshee* (Ala.), 68 So. 890; *Pearce v. Winter Iron Wks.*, 32 Ala. 68. But see *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270; *Wright v. Salisbury*, 46 Mo. 26.

71. *Hughes v. M'Coun's Admr.*, 3 Bibb. (Ky.) 254; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91.

Matters presented must not have been considered by law court, see *supra*, XV, E, 2.

[a] When a defendant is prevented by accident, surprise or other cause from proving his set off, the practice is to withdraw it in order that the judgment may not be a bar to an action for the amount. A defendant under such circumstances who should suffer a judgment to be obtained against him without withdrawing his set-off, would no more be entitled to relief in equity against the judgment on the ground of accident or surprise, than a plaintiff would be entitled to like relief on a like ground who failed to suffer a nonsuit. *Hudson v. Kline*, 9 Gratt. (50 Va.) 379.

72. *Hines v. Beer*, 76 Ga. 9.

[a] Where it is claimed that the offsets were not pleaded because of sickness of the petitioner's family, an injunction will be denied where it appears the offsets were neither pleaded nor filed, and that counsel of the petitioner was present at the trial and no continuance was asked. *Griffith v. Thompson*, 4 Gratt. (45 Va.) 147.

[b] Reliance upon erroneous advice of counsel is not sufficient excuse for failure to interpose set-offs. *Duckworth v. Duckworth's Admr.*, 35 Ala. 70.

Party must not have been at fault, see *supra*, XV, C, 3.



posing his set-off in the action at law, by reason of fraud,<sup>73</sup> accident,<sup>74</sup> mistake,<sup>75</sup> surprise,<sup>76</sup> his ignorance of the set-off,<sup>77</sup> or some unavoidable occurrence,<sup>78</sup> equity will set off the amount of the claim against the judgment. If there exists some well defined equitable ground such as insolvency, which makes the remedy at law inadequate,<sup>79</sup> So if the offset could not have been interposed in the law suit,<sup>80</sup> as where the offset is cognizable only in equity,<sup>81</sup> equity will compel the offset.

**4. Proceedings To Obtain Set-off.**—A suit to set off a judgment of one court against the judgment of another is equitable in nature,<sup>82</sup> and usually brought in a court of chancery.<sup>83</sup>

**Pleadings.**—A set-off against a judgment may be had in equity either by motion or by bill.<sup>84</sup> If the proceeding is by motion the right to set off does not exist unless both demands have been reduced to judgment.<sup>85</sup> But it is otherwise where the proceeding is by original

73. *Allen v. Medill*, 14 Ohio 445; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

**Fraud preventing presentation of party's case or defense**, see *supra*, XV, E, 5, b, (III).

74. *Winchester v. Grosvenor*, 48 Ill. 517; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

**Accident as excuse for failure to present defense**, see *supra*, XV, E, 5, e, (III).

75. *Winchester v. Grosvenor*, 48 Ill. 517; *Allen v. Medill*, 14 Ohio 445.

[a] **Mistake as to the time the case at law was to be tried is not ground for equitable intervention.** *Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

**Mistake as ground for equitable relief**, see generally *supra*, XV, E, 7.

76. *Ala.*—*Hill v. McNeill*, 8 Port. 402. *Va.*—*Mann v. Drewry*, 5 Leigh (32 Va.) 296. *W. Va.*—*Sayre's Admr. Harpold*, 33 W. Va. 553, 11 S. E. 16.

77. *Terrill's Admr. v. Southall*, 3 Barb. (Ky.) 408.

**Ignorance as excuse for failure to present defense**, see *supra*, XV, E, 5, e, (IV).

78. *Cummins v. Bentley*, 5 Ark. 9; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16 (some adventitious circumstance beyond plaintiff's control).

79. **Effect of adequacy or inadequacy of remedy at law**, see *supra*, XV, C, 6; XV, F, 2, c.

80. *Duckworth v. Duckworth's Admr.*, 55 Ala. 70; *Hamp v. Jones*, 9 L. J. Ch. (N. S.) 1109, 258.

[a] **Where a set-off cannot be set up at law, equity will set it off against the judgment in favor of an insolvent**

judgment creditor. *Wood v. Steele*, 65 Ala. 436.

[b] **Where the claim of offset accrued pending appeal, and it could not be there pleaded on account of the court's jurisdiction, equity will set it off against an insolvent judgment creditor.** *Ellis v. Kerr* (Tex. Civ. App.), 23 S. W. 1050.

[c] **Where the judgment creditor is a married woman, equity will allow a set-off against the judgment as the cross demand is not available at law.** *Farris & McCurdy v. Houston*, 78 Ala. 250.

81. *Chandler v. Lyon*, 8 Ala. 35; *French v. Garner*, 7 Port. (Ala.) 549; *Gay v. Gay*, 10 Paige Ch. (N. Y.) 369. See *Weston v. Turner*, 22 N. Y. Supp. 141, whether the equitable set-off might have been interposed at law is not determined, but the set-off is allowed.

82. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, 104 N. W. 85.

83. *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85.

84. *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042.

85. *Colo.*—*Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042. *N. Y.* *Davidson v. Alfaro*, 16 Hun 353, 54 How. Pr. 481; *Gay v. Gay*, 10 Paige 369. *Ohio.*—*Barbour v. National Exch. Bank*, 50 Ohio St. 90, 33 N. E. 542.

**Character of judgments to be set off**, see *supra*, XV, F, 2, b.

[a] **Where Debt Is Assigned Pending Litigation.**—The right to set off one judgment or decree against another by motion in equity exists only in those cases where the debts on both sides have been liquidated by judgment or decree before the assignment of either

bill. In such a case a mere indebtedness may be set off against a judgment.<sup>86</sup>

The plaintiff must in his bill allege facts sufficient to entitle him to the relief sought.<sup>87</sup> The general rules as to certainty in pleading must be observed.<sup>88</sup> The reasons why the complainant may not proceed at law to recover the claim he seeks to offset against the judgment must be alleged.<sup>89</sup> The plaintiff must show that he has a definite credit.<sup>90</sup>

**Hearing and Determination.**—The general rules governing equity pro-

to a third party. A debt having no connection with another which is assigned to a stranger pending litigation, and before it is liquidated by a final judgment or decree, cannot be set off against the other on motion in equity. *Gay v. Gay*, 10 Paige Ch. (N. Y.) 369.

86. *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042; *Davidson v. Alfaro*, 16 Hun (N. Y.) 353, 54 How. Pr. 481; *Gay v. Gay*, 10 Paige Ch. (N. Y.) 369. See also *supra*, XV, F, 3, b.

87. U. S.—*Boone v. Small*, 3 Cranch C. C. 628, 3 Fed. Cas. No. 1,644. Ala. *Hill v. McNeill*, 8 Port. 432. Tenn. *Smith v. Ross*, 3 Humph. 220.

[a] **Showing as to Claim.**—The party should at least disclose as much, or as strong a claim to be paid the debt sought to be offset, as if he was suing originally on such debt, to say nothing of other matters and equities it may be necessary to show. *Walker v. Ayres*, 1 Iowa 449.

[b] That the judgment to be offset remains unsatisfied and in full force must be shown. *Walker v. Ayres*, 1 Iowa 449.

[c] Where a party subsequent to the rendition of a judgment against him purchases a judgment against the other party, equity will not set off the judgments against each other in the absence of an affirmative showing that there is no other judgment liens which can claim priority, for otherwise, a junior judgment might be purchased and satisfaction had thereof out of the defendant's property to the exclusion of judgment creditors having prior liens. *Wellborn v. Bonner*, 9 Ga. 82.

[d] **Showing as to Purchase of Claims.**—An averment that plaintiff had "acquired" the claims he seeks to offset, is not sufficient. He must aver

and prove that he had not merely acquired, but that he had bought and paid for the claims, precisely when he purchased the claims, and that he purchased them without notice of an assignment of the judgment. *Townsend v. Quinan*, 36 Tex. 548.

[e] **Absolute insolvency** of the judgment creditor must be shown. An averment that the judgment creditor is in "failing circumstances" is insufficient. *Townsend v. Quinan*, 36 Tex. 548.

[f] **Where the insolvency of the assignor of a claim reduced to judgment by the assignee is the ground for set-off in equity**, it must be shown that the assignor was insolvent at the time he assigned the claim, and therefore that, at that time, the plaintiff had a right to an equitable set-off against him. *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364.

88. *Brown v. Pegram*, 149 Fed. 515; *Duckworth v. Duckworth's Admr.*, 35 Ala. 70.

[a] An averment that judgment has been recovered against H. and B. and the plaintiff as surety of H., "which said sum of money said B. and W. have been compelled to pay," is not a distinct allegation that plaintiff paid any money for H. entitling him to an equitable set-off. There is no averment that the plaintiff has actually paid out of his own money or property any part of said sum, or any statement of the amount justly due him which he claims to have set off. *Wolcott v. Jones*, 4 Allen (Mass.) 367.

89. *Aholtz v. Goltra*, 114 Ill. 241, 1 N. E. 911; *Wolcott v. Jones*, 4 Allen (Mass.) 367.

90. It is insufficient to show that there have been dealings between the parties on which possibly a sum of money may be coming to the plaintiff. *Parks v. Spurgin*, 38 N. C. 153.

cedure apply to the hearing and determination of a suit to compel a set-off.<sup>91</sup>

A temporary injunction will be granted in a proper case.<sup>92</sup>

Where a portion of the judgment will remain due after offsetting the demand, equity will enjoin the judgment only to the sum covered by the off-set, and the judgment creditor will be allowed to enforce his judgment for the remainder.<sup>93</sup> Where the off-set exceeds the judgment, a decree ordering payment of the excess is erroneous.<sup>94</sup>

In granting relief where the claim has not been reduced to judgment, the court frequently enjoins the collection of the judgment until the set-off is liquidated in an action at law, and then makes the injunction perpetual in whole or part or dissolves it as the determination at law may require.<sup>95</sup> On dissolution of an injunction on motion, the

91. See the titles "Equity Jurisdiction and Procedure;" "Hearing."

[a] A party applying to equity to set off judgments is entitled to relief as a matter of right. *Holles v. Duff*, 20 Cal. 596, 629; *Simsen v. Hart*, 14 Johns. Ch. (N. Y.) 63. Compare, *Love's Adm. v. Pizer, Wright* (Ohio) 412, denying relief where the plaintiff refused offers of the relief now asked for.

[b] Undertaking.—If the bill states a precise sum as a set-off, it is proper for the judge to require an undertaking in that amount and permit the creditor to proceed with his execution for the residue. *Faison v. Mellwaine*, 72 N. C. 312.

92. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446.

[a] An undertaking for less than the amount of the judgment does not authorize an injunction restraining the entire judgment. *Faison v. Mellwaine*, 72 N. C. 312.

[b] Affidavit.—But the court cannot properly grant a temporary injunction restraining a judgment because of the existence of offsets, in the absence of an affidavit to a definite sum by way of set-off. *Faison v. Mellwaine*, 72 N. C. 312.

93. Ala.—*French v. Garner*, 7 Port. 519. Ky.—*Markham v. Todd*, 2 J. J. Marsh. 364; *Terrill's Adm. v. Southall*, 3 Bibb 458. La.—*Palfrey v. Shuff*, 2 Mart. (N. S.) 51. Md.—*Hodges v. Planters Bank*, 7 Gill & J. 306. Mo. *Sumner v. Whitley*, 1 Mo. 708. N. C. *Kerr v. Coates*, 17 N. C. 378.

[a] The injunction should be granted with a proviso, that the plaintiff at law may proceed by execution to col-

lect the undisputed balance of the judgment, where the credit is less than the judgment. *Hodges v. Planters' Bank*, 7 Gill & J. (Md.) 306.

[b] Form of Decree.—In *Sumner v. Whitley*, 1 Mo. 708, it was held the proper decree should be that "S. pay to W. the difference between his judgment and W's., with six per cent interest, unless such difference has already been paid; that the balance of such judgment stand perpetually enjoined, except the costs, and that, as to the costs respectively, each have his execution, and that S. recover his costs in this court, and that S. pay the costs accrued in this chancery proceeding in the court below."

[c] In *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042, the judgment was reversed with instructions to decree the set-off so as to cancel J's. judgment, and apply its amount as a credit on the judgment of W., leaving the unpaid balance of the latter judgment to be collected by the ordinary legal methods.

94. The court should not take cognizance of the demands farther than is necessary to meet the judgment. *Hughes v. M'Coun's Admr.*, 3 Bibb (Ky.) 254.

95. If an executor sued for his testator's debt is prevented from proving a set-off by unconscionable conduct of an insolvent plaintiff and by his own mistake, equity may, in its discretion, enjoin the collection of the judgment until the set-off is liquidated in an action at law. *Wells v. Cochran*, 88 Neb. 367, 129 N. W. 533.

[a] But compare, *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364, holding that where the matter of set-off consists of an account, the amount of the set-off



court should merely dissolve the injunction and award statutory damages, if any. A decree of payment of the judgment at law is unauthorized.<sup>96</sup>

**G. PROCEEDINGS TO OBTAIN RELIEF.**—Ordinarily equitable relief against a judgment is had by bill to impeach the judgment.<sup>97</sup> Relief may also be had by a proceeding to compel a set-off of one judgment or demand against another judgment.<sup>98</sup>

**Who Entitled to Relief.**—This relief is available to plaintiffs to the original action at law as well as to defendants, although it is most frequently granted to the latter.<sup>99</sup> Such relief is not confined, however, to the parties to the original action; strangers to the action may apply for equitable relief from a judgment in a proper case.<sup>1</sup>

**H. EFFECT OF INJUNCTION ON JUDGMENT.**—An injunction against enforcing a judgment suspends the execution of the judgment,<sup>2</sup> and, by consequence, the enforcement of lien;<sup>3</sup> but it does not destroy either. The execution is merely restrained, but the force and effect of the judgment is not at all impaired. As soon as this restraint is removed by a dissolution of the injunction, it is again restored to all its legal incidents.<sup>4</sup> Where an injunction bond<sup>5</sup> providing for the

should be ascertained by a commissioner or jury. If the party waive certain matters in the case, then the trial court shall ascertain the amount of the set-off in this manner and perpetuate the injunction pro tanto.

[b] If insolvency or some other equity exists, equity will restrain the enforcement of the demand against which the set-off is to be applied until the cross-demand can be liquidated. *Central Appalachian Co. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598; *Davidson v. Alfaro*, 16 Hun (N. Y.) 353.

[c] Where a plaintiff brings an action in assumpsit to recover certain commissions and later a suit in equity to enjoin a judgment against him and enforce a set-off against it of the claim pending in the law suit, all the relief which the plaintiff needs and is entitled to, is a stay of the collection of the judgment until the time of the determination of his demand in the law suit, and then to have the injunction made perpetual in whole or part, or dissolved, according as such determination might be. *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270.

96. *Payne v. Loudon*, 1 Bibb (Ky.) 518.

97. See 4 STANDARD PROC. 478, et seq.

98. See *supra*, XV, F, 4.

99. *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697.

**Parties to bill for equitable relief,** see 4 STANDARD PROC. 482.

1. See 4 STANDARD PROC. 484.

2. *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Smith v. Everly*, 4 How. (Miss.) 178; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591.

3. *Miss.*—*Smith v. Everly*, 4 How. 178; *Lynn v. Gridley*, Walk. 548, 12 Am. Dec. 591. *Md.*—*Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708. *Tenn.*—*Miller v. Estill*, 8 Yerg. 452.

[a] But see *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799, holding that where an injunction against a judgment is perpetuated as to a part only, the lien of the part not affected continues from the date of the judgment.

4. *Smith v. Everly*, 4 How. (Miss.) 178; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591; *Overton v. Perkins*, Mart. & Yerg. (Tenn.) 367.

[a] When the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to a levy when the injunction is removed. *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591.

5. *Bartlett & Waring v. Doe ex dem. Gayle & Phillips*, 6 Ala. 305, 41 Am. Dec. 52; *Mansony v. United States Bank*, 4 Ala. 735. *Contra*, *Overton v.*

satisfaction of the judgment lien is given the lien has been held to be destroyed. An injunction against enforcing a judgment does not have the effect of prolonging the lien beyond the statutory period as against purchasers from the judgment debtor,<sup>6</sup> in the absence of statutes providing otherwise.<sup>7</sup> But the person who causes an injunction to issue may be estopped from asserting that the lien is barred by the statute of limitations.<sup>8</sup>

**XVI. REVIEW.**<sup>9</sup>—A. GENERAL STATEMENT.—There are several methods by which a judgment may be reviewed both by the court rendering the same or one of similar jurisdiction, or by an appellate court.<sup>10</sup> Thus, a judgment may be reviewed by the court in which it was rendered for the purpose of making some amendment thereto,<sup>11</sup> or opening, vacating and setting it aside.<sup>12</sup> It may also be reviewed in an equitable action to obtain relief therefrom,<sup>13</sup> or by the remedy of *audita querela*.<sup>14</sup> An action to review a judgment is provided for in some jurisdictions.<sup>15</sup> An appeal,<sup>16</sup> a writ of error,<sup>17</sup> writ of error *coram nobis*,<sup>18</sup> writ of certiorari,<sup>19</sup> are also proper methods for reviewing the judgment.

B. ACTION TO REVIEW.—1. In General.—Statutes sometimes

Perkins, Mart. & Yerg. (Tenn.) 367, distinguished in *Miller v. Estill*, 8 Yerg. (Tenn.) 542.

[a] The principle on which the injunction is held to discharge the lien of the judgment or execution is that the bond furnishes the plaintiff with another security for his debt upon which he may have an execution after the injunction is dissolved. *Bartlett & Waring v. Doe ex dem. Gayle & Phillips*, 6 Ala. 305, 41 Am. Dec. 52; *Mansony v. United States Bank*, 4 Ala. 735.

[b] Where the condition of the bond is merely to pay all damages sustained by the wrongful suing out of the injunction and not to pay and satisfy the judgment, the lien of the judgment is not discharged. *Bartlett & Waring v. Doe ex dem. Gayle & Phillips*, 6 Ala. 305, 41 Am. Dec. 52.

6. *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549; *Tucker v. Shade*, 25 Ohio St. 355.

[a] If, because of an injunction, no levy or sale is made within twelve months, a purchaser from the debtor takes title superior to the lien regardless of the condition of the creditor personally. *Miller v. Estill*, 8 Yerg. (Tenn.) 452.

7. *Apelgate v. Edwards*, 45 Ind. 329.

8. A mortgagee of property con-

veyed by the judgment debtor will not be entitled to hold it discharged of the lien of the judgment which was prior and superior to the lien of the mortgage, when the lien of the judgment has become barred by the statute of limitations, in a case where the judgment creditor has been restrained at the instance of the mortgagee from enforcing his judgment within the period prescribed by the statute. *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549.

9. Review of judgments of justice's courts, see the title "Justices of the Peace."

Review of judgments in particular actions or proceedings, see the specific titles throughout this work.

10. Collateral attack on judgment, see *infra*, XVII, A.

11. See *supra*, XIII.

12. See *supra*, XIV.

13. See *supra*, XV, and the title "Bills to Impeach Judgments and Decrees."

14. See the title "Audita Querela," and *supra*, XIV, E, 2.

15. See *infra*, XVI, B.

16. See generally the title "Appeals."

17. See generally the title "Writ of Error."

18. See *infra*, XVI, C.

19. See generally the title "Certiorari."

provide for an action to review a judgment.<sup>20</sup> Such an action is an outgrowth of the old chancery bill of review,<sup>21</sup> and is of an equitable, rather than a legal, nature.<sup>22</sup> It is not, generally speaking, an independent proceeding;<sup>23</sup> but it is incident to the original action.<sup>24</sup> In the sense that in the proceeding for review no new steps may be taken in the original action, such proceeding is an independent one, however.<sup>25</sup> It is a direct, rather than a collateral attack upon the judgment.<sup>26</sup> When based upon some error of law, it partakes of the nature of an appeal,<sup>27</sup> or a writ of error.<sup>28</sup>

The purpose of the action to review, broadly stated, is to afford the trial court an opportunity to review its judgment and proceedings leading thereto, and to correct its own errors.<sup>29</sup> From the litigant's

20. See Burns' Ann. Ind. St., 1914, §645; *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989; *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575; *Jones v. City of Tipton*, 13 Ind. App. 392, 41 N. E. 831; and generally the statutes.

21. *Jones v. City of Tipton*, 13 Ind. App. 392, 41 N. E. 831.

As to bill of review, see the title "Bills of Review."

22. *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989.

23. *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718.

[a] "Bills of review are so far in the nature of petitions for a rehearing, that they cannot be independent of the original action in the sense of giving new character to the subject-matter in litigation, and of invoking a jurisdiction forbidden to the original action. If the independence of the bill . . . could be maintained, we would have the anomalous practice of permitting the shifting of jurisdiction by seeking a revision of the judgment, and in permitting an appeal to one court for the review of errors, which otherwise would be the subject of review in another court of appeals, or would not be the subject of appeal at all." *Ex parte* John Kiley, 135 Ind. 225, 34 N. E. 989.

24. *Ex parte* Kiley, 135 Ind. 225, 231, 34 N. E. 989; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Jones v. City of Tipton*, 13 Ind. App. 392, 41 N. E. 831.

25. *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989.

26. *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344.

[a] Where the ground set forth in

the complaint can only be shown by matter dehors the record, the proceeding resolves itself into a collateral attack which cannot proceed as an action to review. *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718.

Collateral attack on judgment, see *infra*, XVII, A.

27. *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Evansville & R. R. Co. v. Maddox*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. 648; *Tachau v. Fiedeldey*, 81 Ind. 54; *Searle v. Whipperman*, 79 Ind. 424; *Hardy v. Chipman*, 54 Ind. 591; *Myer v. Minch*, 45 Ind. App. 495, 91 N. E. 32; *Williams v. Manley*, 33 Ind. App. 270, 69 N. E. 469; *Bartmess v. Holliday*, 27 Ind. 544, 61 N. E. 750; *State Building, etc. Assn. v. Brackin*, 27 Ind. App. 677, 62 N. E. 91.

[a] As a proceeding to review a judgment has for its object the correction of some error upon the face of the proceedings, by invoking the action of the court committing the error, it is a substitute for the remedy by appeal, and is of the same nature. *State v. King*, 30 Ind. App. 389, 66 N. E. 85.

[b] "Each is a proceeding to review a judgment, and any question that arises upon an appeal may be reached by a bill to review, and any question that does not arise upon an appeal cannot be reached by proceedings to review. In this respect they are precisely alike." *Searle v. Whipperman*, 79 Ind. 424.

Error of law as ground for action to review judgment, see *infra*, XVI, B, 4, b.

28. *Coen v. Funk*, 26 Ind. 289.

29. *Ex parte* Kiley, 135 Ind. 225, 34



point of view, its object is to set aside the original judgment and procure a new trial.<sup>32</sup> An action to review a judgment will not have the effect of staying execution thereon unless a bond is filed as required by statute.<sup>31</sup>

**2. Concurrent Remedies.**—A party may not prosecute both an appeal and an action to review based upon the same judgment, but must elect as to which remedy he will adopt;<sup>32</sup> the pursuit of one operates as a waiver of the other,<sup>33</sup> except where the appeal was for error of law and a subsequent complaint to review is predicated on new matter.<sup>34</sup> Occasion may arise where an injunction would afford the desired relief,<sup>35</sup> but in jurisdictions where the action to review is available, extending as it does to judgments at law as well as decrees in equity,<sup>36</sup> the latter remedy is generally considered exclusive.<sup>37</sup> But a party is not bound to resort to the remedy afforded by a legal action to review a judgment where this remedy is not as practicable and efficient to the ends of justice and its prompt administration both in respect to the ultimate relief and the mode of obtaining it, as the equitable remedy by injunction.<sup>38</sup>

**3. Judgments Which May Be Reviewed.**<sup>39</sup>—Under the common law, where the jurisdictions of law and equity courts are separate, bills of review were maintainable only for relief against decrees in equity.<sup>40</sup> The action to review, however, is generally extended so as to afford

N. E. 989; *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13.

[a] The purpose of an action to review is to test the validity of the proceedings under review. *Meharry v. Meharry*, 59 Ind. 257.

30. *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

[a] "When the review is based on the ground of new matter discovered after the rendition of the original judgment, it does not differ materially from, and its effect is the same as the setting aside of a judgment on a motion for a new trial." *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139.

31. *State v. King*, 30 Ind. App. 389, 66 N. E. 85, under a statute providing that when proceedings are stayed pending the hearing in the action to review, the court shall direct a bond to be given, as in cases of appeal.

32. *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263; *McCurdy v. Love*, 97 Ind. 62; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Corydon*, 80 Ind. 95; *Dunkle v. Elston*, 71 Ind. 585; *Indiana Mut., etc. Ins. Co. v. Routledge*, 7 Ind. 25.

33. *McCurdy v. Love*, 97 Ind. 62; *Traders Ins. Co. v. Carpenter*, 85 Ind.

350; *Klebar v. Corydon*, 80 Ind. 95; *Dunkle v. Elston*, 71 Ind. 585; *Davis v. Binford*, 70 Ind. 44.

34. **A complaint for new matter**, may, if filed within the statutory time, therefore be filed after an affirmance in the appellate court where the appeal was on questions of law. *Hill v. Roach*, 72 Ind. 57.

**New matter as ground for action of review**, see *infra*, XVI, B, 4, c.

35. **As to equitable relief from judgment**, see *supra*, XV.

36. See *infra*, XVI, B, 3.

37. *Ross v. Banta*, 140 Ind. 120, 135, 34 N. E. 865, 39 N. E. 732.

38. *Michener v. Springfield Engine, etc. Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

39. **Nature of decisions reviewable by bill of review**, see 4 STANDARD PROC. 432, et seq.

**Classification of judgments**, see 14 STANDARD PROC. 764, et seq.

40. *Ross v. Banta*, 140 Ind. 120, 136, 34 N. E. 865, 39 N. E. 732. See also, *Ex parte John Kiley*, 135 Ind. 225, 34 N. E. 989, wherein the court said: "The bill of review was instituted as a remedy by which the trial court might correct its own errors after the completion of its rolls. One of its es-

relief from judgments at law as well as decrees in equity,<sup>41</sup> with the limitation that the judgment attacked be in a civil and not a criminal case.<sup>42</sup> Decrees of divorce are not reviewable by action, however, by express provision of statute in some states.<sup>43</sup> Nor are judgments in matters growing out of the settlement of decedents' estates,<sup>44</sup> or judgments obtained in ex parte proceedings,<sup>45</sup> or entered by agreement,<sup>46</sup> or orders which are only interlocutory,<sup>47</sup> reviewable by action. Default judgments are reviewable by action or not depending upon the ground presented therefor.<sup>48</sup>

**4. When Maintainable.**<sup>49</sup> — *a. In General.* — Where the facts entitle a party to the relief awarded, an action of review will not lie,<sup>50</sup> even though the prayer for relief in the complaint filed in the original action is not broad enough to cover the relief granted.<sup>51</sup> That the note upon which a judgment is founded was usurious is not a sufficient ground for an action to review the same.<sup>52</sup> That an attorney entered the appearance of a party to a cause of action without authority is no ground for an action to review a judgment against him.<sup>53</sup>

*b. Errors of Law Apparent.* — **(I.) In General.** — Any error of law appearing in the proceedings and judgment is ground for action to review the same.<sup>54</sup> The error must appear on the face of the record,<sup>55</sup> and must be one which might have been urged on an appeal from the

essential features was that the remedy should be applied in the same court which committed the error. In no instance has one court employed the remedy to review the action of a court of an entirely different character, and possessing jurisdiction of an essentially different type."

See generally the title "**Bills of Review.**"

**41.** *Ross v. Banta*, 140 Ind. 120, 136, 24 N. E. 865, 39 N. E. 732.

**[a]** **Judgment of partition** may be reviewed. See *Lucas v. Peters*, 45 Ind. 313.

**[b]** **Where a personal judgment against a married woman**, when the coverture appears upon the face of the complaint in the cause, is erroneous, the proper remedy is by action for review. *Hinsey v. Feeley*, 62 Ind. 85; *Emmett v. Yandes*, 60 Ind. 548.

**To review judgment in inquisition of lunacy**, see 13 **STANDARD PROC.** 486, et seq.

**42.** *Frazier v. State*, 106 Ind. 562, 7 N. E. 378.

**43.** *Burns' Ann. Ind. St.*, 1914, §645; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; *Earle v. Earle*, 91 Ind. 27; *Willman v. Willman*, 57 Ind. 500.

**44.** *McCurdy v. Love*, 97 Ind. 62.

**45.** *Williams v. Williams*, 18 Ind.

345; *Davidson v. Lindsay*, 16 Ind. 186.

**46.** *Collins v. Rose*, 59 Ind. 33.

**47.** *Cravens v. Chambers*, 69 Ind. 84; *First Nat. Bank of Indianapolis v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

**48.** See *infra*, XVI, B, 4, b, (II).

**49.** **When bills of review maintainable**, see 4 **STANDARD PROC.** 435, et seq.

**50.** *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754.

**51.** *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754.

**52.** *Mitchell v. Boyer*, 58 Ind. 19.

**53.** *Floyd County Agri. & Mech. Assoc. v. Tompkins*, 23 Ind. 348.

**54.** *Burns' Ann. Ind. St.*, 1914, §646; *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254; *Berkshire v. Young*, 45 Ind. 461; *Floyd Co. Agri. & Mech. Assoc. v. Tompkins*, 23 Ind. 348; *Deputy v. Dollarhide*, 42 Ind. App. 554, 561, 86 N. E. 344.

**55.** *Weathers v. Doerr*, 53 Ind. 104; *Richardson v. Howk*, 45 Ind. 451.

**[a]** This is essential because an action to review, based upon error of law, is tried upon the record alone. See *infra*, XVI, B, 10, a.

**[b]** **Necessity for exception or application to court for correction**, see *infra*, XVI, B, 4, b, (III).

judgment which it is sought to have reviewed.<sup>56</sup> An error which would, on such an appeal, be regarded as having been waived, will be viewed in a like manner on proceedings to review.<sup>57</sup> Only errors committed prior to, and in connection with the judgment, are grounds for review.<sup>58</sup> A mere error in the form of the judgment is not ground for an action to review the same, where the complaint in the original action states facts entitling the plaintiff to some relief.<sup>59</sup>

(II.) Default Judgments. — Judgments by default can be reviewed where the court which rendered the judgment has no jurisdiction of the subject-matter,<sup>60</sup> or when the complaint does not state facts sufficient to constitute a cause of action.<sup>61</sup> An error in rendering a judgment by default prematurely will also sustain an action for review,<sup>62</sup> as will an error in rendering judgment by default on an instrument calling for usurious interest.<sup>63</sup> But where all the proceedings prior to a judgment by default are regular, and the complaint states facts sufficient to constitute a cause of action as against a demurrer, it is not reviewable by action.<sup>64</sup> Nor are errors in the form of the judgment,<sup>65</sup> or insufficiency of the title of the cause contained in the complaint in the original action,<sup>66</sup> grounds for an action to review a default judgment.

56. *Evansville and Richmond R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257; *Baker v. Ludlam*, 118 Ind. 187, 20 N. E. 648; *Shoaf v. Joray*, 86 Ind. 70; *Tachau v. Fiedeldey*, 81 Ind. 54; *Rice v. Turner*, 72 Ind. 559; *Richardson v. Howk*, 45 Ind. 451; *Myer v. Mineh*, 45 Ind. App. 495, 91 N. E. 32; *Williams v. Manley*, 33 Ind. App. 270; *State ex rel. Holliday v. King*, 30 Ind. App. 389, 66 N. E. 85; *Bartmess v. Holliday*, 27 Ind. App. 544, 61 N. E. 750; *State Building, etc. Assn. v. Brackin*, 27 Ind. App. 677, 62 N. E. 91; *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

57. *Tachau v. Fiedeldey*, 81 Ind. 54. See also *Richardson v. Howk*, 45 Ind. 451.

58. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

[a] If there were anything irregular as to the issuing of the execution, or in the levy thereunder, was void or avoidable, such matters are not cause for, and cannot be considered in, an action to review the judgment. The court may review any of its proceedings that enter into, or are connected with, and form part of, the judgment rendered by it, but not the acts of an officer, after judgment, in trying to enforce the collection of the same. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254, note 65.

59. *Slussman v. Kensler*, 88 Ind. 190. See also *infra*, XVI, B, 4, b, (II), note 65.

60. *Shoaf v. Joray*, 86 Ind. 70.

[a] Where the record in a default case shows an insufficient proof of publication of a nonresident notice, the fact that the trial court assumed jurisdiction does not prevent it, in an action to review such judgment, from setting such judgment aside, the presumption of jurisdiction being unavailing where the proof shows there was none. *Deputy V. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344.

61. *Shoaf v. Joray*, 86 Ind. 70; *Seare v. Whipperman*, 79 Ind. 424; *Berkshire v. Young*, 45 Ind. 461.

[a] Where judgment by default is rendered on an insufficient complaint, it may be reviewed by action, although no exception appears in the record. *Berkshire v. Young*, 45 Ind. 461.

62. *Mitchell v. McCorkle*, 69 Ind. 184.

Judgment by default without service of process is ground for review. *McArthur v. Leffler*, 110 Ind. 526, 10 N. E. 81.

63. *Davidson v. King*, 49 Ind. 338.

64. *Hardy v. Miller*, 89 Ind. 440; *Shoaf v. Joray*, 86 Ind. 70.

65. *Shoaf v. Joray*, 86 Ind. 70. See also *supra*, XVI, B, 4, b, (I), note 59.

66. *Shoaf v. Joray*, 86 Ind. 70.



(III.) **Necessity for Exception or Objection, Motion for New Trial, etc.** Where no objection is made or exception reserved to rulings made during the progress of a trial, or on the motion for a new trial, an action to review the judgment cannot be maintained upon the ground that there was error in such rulings,<sup>67</sup> unless the errors objected to are of a character which are never waived.<sup>68</sup> And before errors can be assigned in a complaint to review a judgment, a motion for a new trial must have been made and denied.<sup>69</sup> In the case of a default judgment, a motion to correct or set aside the default must first have been made,<sup>70</sup> unless the ground for review be that the complaint in the original cause does not state facts sufficient to constitute a cause of action.<sup>71</sup>

c. *New Matter.*—Material new matter,<sup>72</sup> discovered since the ren-

67. *Egoff v. Board*, 170 Ind. 238, 84 N. E. 151; *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831; *American Ins. Co. v. Gibson*, 104 Ind. 336, 3 N. E. 892; *Slussman v. Kensler*, 88 Ind. 190; *Goar v. Cravens*, 57 Ind. 365; *Kitch v. State*, 53 Ind. 59; *Richardson v. Howk*, 45 Ind. 451; *Davis v. Perry*, 41 Ind. 305; *Train v. Gridley*, 36 Ind. 241; *Darlington v. Warner*, 14 Ind. 449; *Myer v. Minch*, 45 Ind. App. 495, 91 N. E. 32.

[a] **The error is considered waived** unless excepted to. *Egoff v. Board Children's Guardians*, 170 Ind. 238, 84 N. E. 151; *Richardson v. Howk*, 45 Ind. 451.

[b] **Errors committed in the absence of a party** who had appeared in the action and who was thus constructively notified of all subsequent proceedings, were held to be within the operation of this requirement in *Richardson v. Howk*, 45 Ind. 451.

[c] **Necessity for Bill of Exceptions.** Error claimed in denying a motion can only be presented in review when a proper bill of exceptions has been prepared, signed and filed. *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257.

**Necessity for complaint showing exception**, see *infra*, XVI, B, 8, b, (1).

68. *McCormack v. First Nat. Bank of Greensburgh*, 53 Ind. 466; *Berkshire v. Young*, 45 Ind. 461; *Davis v. Perry*, 41 Ind. 305.

[a] The rule that failure to except to rulings of the court waives the error, if any, "cannot be true as to the questions of the jurisdiction of the court of the subject-matter of the action, or that the complaint does not

state facts sufficient to constitute a cause of action. These questions are not waived by failing to make the objection, or to except." *Davis v. Perry*, 41 Ind. 305. See also *McCormack v. First Nat. Bank of Greensburgh*, 53 Ind. 466.

69. *Graves v. State*, 136 Ind. 406, 36 N. E. 275. See *American Ins. Co. v. Gibson*, 104 Ind. 336, 3 N. E. 892.

[a] **This is on the principle that "a proceeding to review a judgment is in the nature of an appeal. . . . A party is required to file a motion for a new trial, before he can present a question on appeal to the supreme court, and the same rule applies in like manner before error can be assigned in a complaint to review a judgment. Generally speaking, the trial of a cause is not ended until a motion for a new trial is disposed of or waived."** *Graves v. The State*, 136 Ind. 406, 36 N. E. 275.

70. *Searle v. Whipperman*, 79 Ind. 424. And see *Tachau v. Fiedelhey*, 81 Ind. 54; also *American Ins. Co. v. Gibson*, 104 Ind. 336, 342, 3 N. E. 892.

71. *Sarle v. Whipperman*, 79 Ind. 424.

72. *Burns' Ann. Ind. St.*, 1914, §646; *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554; *Tate v. Fletcher*, 77 Ind. 102; *Francis v. Davis*, 69 Ind. 452; *Deputy v. Dollarhide*, 42 Ind. App. 554, 561, 86 N. E. 344; *Springfield Engine & Thresher Co. v. Michener*, 23 Ind. App. 130.

[a] As where an attorney innocently advises his client as to a matter in which he was, at that time adversely interested, which fact was not discovered until after judgment, this is new

dition of the judgment complained of,<sup>74</sup> and which could not, with reasonable diligence, have been discovered,<sup>75</sup> or called to the attention of the court at an earlier date,<sup>75</sup> is a ground for review, provided it be such matter as would entitle the party to a different judgment.<sup>76</sup>

New matter as a ground for the action to review a judgment is different from and should not be confused with newly discovered evidence, which is not a ground for such an action, but only for a new trial.<sup>77</sup> Nor does the term "new matter" include new matter of law, such as a curative statute.<sup>78</sup>

d. *Fraud*.—Fraud in obtaining a judgment is not a ground for an action to review.<sup>79</sup> But fraud which goes to make up the original cause of action or defense may, under some circumstances, be available on such a proceeding as new matter.<sup>80</sup>

matter justifying the action. *Dippel v. Schicketanz*, 100 Ind. 376.

As to fraud considered as new matter, see *infra*, XVI, B, 4, d.

73. *Burns' Ann. Ind. St.*, 1914, §646; *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

74. *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *Davidson v. King*, 51 Ind. 224.

75. *Majors v. Craig*, 144 Ind. 39, 43 N. E. 3.

76. *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *Francis v. Davis*, 649 Ind. 452; *Simpkins v. Wilson*, 11 Ind. 541.

[a] In *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221, it is said, "It is very clear that new matter, discovered since the rendition of the first judgment, in order to entitle the losing party to a review of that judgment, must be such matter, as, if alleged in the original pleadings, and supported by the evidence, would have entitled such party to a different judgment."

77. *Hines v. Driver*, 100 Ind. 315; *Francis v. Davis*, 69 Ind. 452; *Barnes v. Dewey*, 58 Ind. 418; *Roush v. Layton*, 51 Ind. 106; *Webster v. Maiden*, 41 Ind. 124; *Fleming v. Stout*, 19 Ind. 328; *Hall v. Palmer*, 18 Ind. 5; *Nelson v. Johnson*, 18 Ind. 329.

[a] "New matter is a different thing from new evidence. Matter, as the word is used in law, means a fact or facts constituting the whole or a part of a ground of action or defense." *Nelson v. Johnson*, 18 Ind. 329.

Newly discovered evidence as ground for new trial, see generally the title "New Trial."

78. *Worley v. Town of Ellettsville*, 60 Ind. 7, wherein the court said: "We are of opinion, that the 'new matter' contemplated by . . . the code of procedure, . . ., means new matter of fact material to the case in which the judgment sought to be reviewed was rendered, and which existed before the judgment was rendered, and does not include new matter of law subsequently enacted."

79. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254; *Nealis v. Dicks*, 72 Ind. 374, *disapproving* dictum to the contrary in *Quick v. Goodwin*, 19 Ind. 438; *Mitchell v. Boyer*, 58 Ind. 19.

As ground for equitable relief, see *supra*, XV, E, 6, b, (II).

80. *Ferguson v. Hull*, 136 Ind. 339, 344, 36 N. E. 254.

[a] "It is said, in the syllabus to one case, that a judgment may be reviewed on the ground that it was obtained by fraud, but the case does not so decide, and clearly such is not the law. The new matter contemplated by the statute must mean some fact or facts going to make up the original cause of action or defense, and not some act of fraud by which the judgment was obtained. If the fraud goes to constitute the cause of action, it is a fact that may amount to new matter within the statute. But where the fraud is in obtaining the judgment, while it may be ground for setting it aside, it is not ground for review." *Works Prac. and Pl.*, §1049, *quoted with approval* in *Ferguson v. Hull*, 136 Ind. 339, 344, 36 N. E. 254.

As to new matter as a ground for this action, see *supra*, XVI, B, 4, c.

5. **Jurisdiction.** — A proceeding to review a judgment falls within the jurisdiction of the court where such judgment is rendered;<sup>81</sup> and, on appeal from such proceeding follows the jurisdiction of such action.<sup>82</sup>

6. **Parties.**<sup>83</sup> — The right to review a judgment by action is generally limited to a party to the judgment affected,<sup>84</sup> and the heirs,<sup>85</sup> devisees,<sup>86</sup> or personal representatives of a deceased party,<sup>87</sup> or a person in privity with such party.<sup>88</sup> One not a party to a judgment and not claiming as heir, devisee, or personal representative of a deceased party, or otherwise in privity with a party to the judgment, cannot maintain an action to review it.<sup>89</sup> All the parties to the original suit, who are adversely interested, are necessary parties to an action to review.<sup>90</sup>

81. Burns' Ann. Ind. St., 1914, §645; *Dallin v. McIvor*, 140 Ind. 386, 39 N. E. 461; *Ex parte Kiley*, 134 Ind. 225, 34 N. E. 989; *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334; *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

[a] "It is not only proper, but imperative," that the action to review be brought in the court in which the original judgment was obtained. *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334.

[b] The institution of proceedings looking toward an appeal will not divest the trial court of jurisdiction of such an action. If the appeal may be said to have been "perfected," however, jurisdiction is lost to the trial court to entertain a subsequent action to review. *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595. Appeal and action to review as concurrent remedies, see *supra*, XVI, B, 2.

82. *Dallin v. McIvor*, 140 Ind. 386, 39 N. E. 461; *Ex parte Kiley*, 134 Ind. 225, 34 N. E. 989; *Jones v. City of Tip-ton*, 13 Ind. App. 392, 41 N. E. 831.

83. Parties to bill of review, see 4 STANDARD PROC. 411.

84. Burns' Ann. Ind. St., 1914, §645. And see *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; *Ross v. Banta*, 140 Ind. 120, 136, 34 N. E. 865, 39 N. E. 732; *Leaman v. Sample*, 91 Ind. 236; *Webster v. Maiden*, 41 Ind. 124.

[a] Under a statute providing that "any person who is a party to any judgment, etc.," may file a complaint for a review, an accommodation guarantor or indorser of a note is entitled to review a judgment against him without reviewing the judgment against the makers, where after the judgment against him the makers defeated the claim against them in the same action,

on the ground of failure of consideration. *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, *affirming* 23 Ind. App. 130, 55 N. E. 32.

85. Burns' Ann. Ind. St., 1914, §645; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; *Webster v. Maiden*, 41 Ind. 124.

86. Burns' Ann. Ind. St., 1914, §645; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

87. Burns' Ann. Ind. St., 1914, §645.

88. The grantee of property affected by a judgment, which judgment might properly have been reviewed at the instance of the grantor, is a proper party plaintiff in an action for this purpose. *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732, *disaffirming* in this respect, *Walker v. Heller*, 90 Ind. 198.

89. *Owen v. Cooper*, 46 Ind. 524; *Cassel v. Case*, 14 Ind. 393.

[a] This is on the principle that such a person cannot be adversely affected by the judgment. *Owen v. Cooper*, 46 Ind. 524.

90. *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334; *Concannon v. Noble*, 96 Ind. 326; *Burns v. Singer Mfg. Co.*, 87 Ind. 541; *Owen v. Cooper*, 46 Ind. 524; *Douglay v. Davis*, 45 Ind. 493; *Cassel v. Case*, 14 Ind. 393, 490; *Tereba v. Stand. Cabinet Mfg. Co.*, 32 Ind. App. 9, 68 N. E. 1033.

[a] In *Sloan v. Whiteman*, 6 Ind. 434, it was held that, as a general rule, a bill of review ought to have the same parties as the proceeding sought to be reviewed, but they may be either complainants or defendants, according to their interests in the matter to be reviewed.

[b] Sureties on a bond, who, to-



7. **Time for Filing Complaint.** — The statute prescribes the limit of time within which an action to review a judgment may be brought,<sup>91</sup> and must be complied with.<sup>92</sup> Persons under a legal disability are usually allowed by statute a certain time after the removal of such disability within which to bring an action to review a judgment against them.<sup>93</sup> But the only limitations on these proceedings are those set forth in the statutes;<sup>94</sup> the general statutes of limitations do not apply to actions of this character.<sup>95</sup>

8. **Form, Contents and Sufficiency of Complaint.**<sup>96</sup> — a. *In General.* — A complaint for review of a judgment stands upon the same footing as a complaint in all other causes: to be sufficient it must exhibit a good cause of action.<sup>97</sup> It must proceed upon a single, definite theory and be good upon the theory upon which it proceeds.<sup>98</sup> Thus, a complaint, bad as a complaint for review, will not be treated as an application for relief on the ground of mistake, inadvertence, surprise

together with the principal, are joint defendants in the original suit upon the bond, may unite in a complaint for review, making the principal either a party plaintiff or a party defendant. *Burns v. Singer Mfg. Co.*, 87 Ind. 541.

91. See *Burns' Ann. Ind. St.*, 1914, §416; *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575.

92. *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575; *Springfield, etc. Co. v. Michener*, 23 Ind. App. 130, 55 N. E. 32; *First Nat. Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

93. *Burns' Ann. Ind. St.*, 1914, §645; *Alexander v. Dougherty*, 69 Ind. 388; *Harlen v. Watson*, 63 Ind. 143.

[a] The requirement that a complaint for review on the ground of new matter shall be filed "without delay after the discovery of such material new matter," operates to modify and control the provisions of the statute which extends the time for filing such a complaint when the complainant is under some recognized disability. Thus it has been said, "The provision in favor of parties under disabilities relates to the time of filing the complaint for review; but the complaint, based upon the discovery of new matter, whenever filed must be verified by the complainant, and show that the new matter could not have been discovered before judgment by reasonable diligence." *Debolt v. Debolt*, 86 Ind. 521; *Alexander v. Daugherty*, 69 Ind. 388.

94. *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575; *Springfield, etc. Co. v. Mich-*

*ener*, 23 Ind. App. 130, 55 N. E. 32.

[a] No reservation in favor of non-residents of the state is contained in the statute; hence such a reservation cannot be inferred from statutes enacted with reference to other proceeding. *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575.

95. *Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575; *Springfield, etc. Co. v. Michener*, 23 Ind. App. 130, 55 N. E. 32.

96. **Form, contents and sufficiency of bill of review**, see 4 STANDARD PROC. 448, et seq.

97. *Hague v. First Nat. Bank*, 159 Ind. 636, 65 N. E. 907.

[a] "The complaint must contain in allegation what must be shown in proof." *Hines v. Driver*, 100 Ind. 315.

[b] Where the complaint asks that the judgment be reviewed as to two or more parties, it must state a good cause of action as to all of such parties; its failure to do so is fatal on demurrer. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926.

[c] A complaint to review a decree quieting title to land, against a subsequent purchaser, on the ground that the defendant in the quiet title suit was wrongfully informed by plaintiff's attorney that the complaint did not include any land owned by him, must show by specific averment that the purchaser acted with knowledge of such information and that the same was false. *Majors v. Craig*, 144 Ind. 39, 43 N. E. 3.

98. *Baker v. Ludlum*, 118 Ind. 87, 20 N. E. 648.

or excusable neglect.<sup>99</sup> Where the defects in a complaint for review are of a character curable by verdict, it is good as against a motion in arrest of judgment.<sup>1</sup>

**Joinder of Actions.** — An action to review a judgment cannot be joined with an action against an officer for a wrong done in enforcing the collection of such judgment.<sup>2</sup>

**b. Particular Averments.** — (I.) **Where Based on Errors of Law.**<sup>3</sup> The complaint in an action to review a judgment for errors of law must show upon its face some prejudicial error of the court in the former trial,<sup>4</sup> to which exception was properly taken and reserved,<sup>5</sup> and that the necessary steps were taken, by way of motion or otherwise, to enable the party complaining to present such supposed erroneous rulings for review.<sup>6</sup> It should set forth a complete record of the case, or at least so much thereof as is necessary to fully present the error complained of,<sup>7</sup> without resorting to the exhibits filed with

99. *Baker v. Ludlum*, 118 Ind. 87, 20 N. E. 648.

[a] On the other hand, a complaint for review, bad strictly as such, which asked also for a sum of money, was held to have been properly treated as a complaint for the recovery of money. *Owen v. Cooper*, 46 Ind. 524.

1. *Jones v. Ahrens*, 117 Ind. 600, 19 N. E. 335; *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334.

2. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

3. **Errors of law as ground for review**, see *supra*, XVI, B, 4, b.

4. *Hague v. First Nat. Bank*, 159 Ind. 636, 65 N. E. 907; *Travelers' Ins. Co. v. School Twp.* 36, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100; *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831; *Weathers v. Doerr*, 53 Ind. 104; *State v. Wills*, 26 Ind. App. 329, 59 N. E. 868.

[a] In *State ex rel. Miller v. Wills*, 26 Ind. App. 329, 59 N. E. 868, the court said: "As to any other error of law, the facts upon which the ruling is based are not shown by the complaint, and it has been repeatedly held that it is essential to a complaint for a review of a judgment for error of law that the complaint specifically set forth the ruling of the court relied upon as error and the facts upon which the ruling is based, and that the plaintiff at the time of such ruling excepted thereto."

5. *Hague v. First Nat. Bank*, 159 Ind. 636, 65 N. E. 907; *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Goar v. Cravens*, 57 Ind. 365; *Kitch v. State*, 53 Ind. 59; *Train v. Gridley*, 36

Ind. 241; *State v. Wills*, 26 Ind. App. 329, 59 N. E. 868.

6. *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274.

7. *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Jamison v. Lake Erie, etc. R. Co.*, 149 Ind. 521, 48 N. E. 223; *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831; *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; *Graves v. State*, 136 Ind. 406, 36 N. E. 275; *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Bradford v. Tp. of Marion*, 107 Ind. 280, 7 N. E. 256; *Stevens v. City of Logansport*, 76 Ind. 498; *Davis v. Binford*, 70 Ind. 44; *Cravens v. Chambers*, 69 Ind. 84; *Meharry v. Meharry*, 59 Ind. 257; *Mitchell v. Boyer*, 58 Ind. 19; *Goar v. Cravens*, 57 Ind. 365; *Hardy v. Chipman*, 54 Ind. 591; *Kitch v. State*, 53 Ind. 59; *Weathers v. Doerr*, 53 Ind. 104; *Owen v. Cooper*, 46 Ind. 524; *Davis v. Perry*, 41 Ind. 305; *Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330; *McDade v. McDade*, 29 Ind. 340; *State v. Wills*, 26 Ind. App. 329, 59 N. E. 868; *Kiley v. Murphy*, 7 Ind. App. 239.

[a] The reason given for this rule is that the complaint for a review, under the code, for error apparent in the record, is in the nature of an appeal, just as in equity "a bill of review was in the nature of a writ of error." The question must be tried by the record of the case to be reviewed, and hence the same necessity for the presentation of a complete record, as in the case of an appeal. *Stevens v. City of Logansport*, 76 Ind. 498.

the complaint.<sup>8</sup> Parts of the record not pertinent to the question raised may be omitted.<sup>9</sup> It is not necessary that the copy of the record

[b] "Where the proceeding is for error of law apparent on the face of the record, . . . [the complaint] . . . must set out so much of the record in the original cause as would be necessary to present the same question on appeal to this court." *Graves v. State*, 136 Ind. 406, 36 N. E. 275.

[c] "The complaint for review should itself set forth a complete record of the case, or at least so much thereof as is necessary to fully present the error complained of. This record should be embodied in the complaint, or should, at least, be so referred to and identified as an exhibit as to become substantially a part of the complaint." *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831. See *Stevens v. City of Logansport*, 76 Ind. 498.

[d] Where the complaint in an action for review sets out the complaint in the original cause, "the appearance of the defendants, their motion to strike out parts of the complaint, and the action of the court upon it, their demurrer to the complaint, the judgment of the court upon the demurrer, the answer of the defendants to the complaint, the demurrer of the appellant to the second paragraph of the answer, the judgment of the court upon the demurrer, the trial, finding and judgment of the court in favor of the appellant, the order of injunction and service of the same, . . . it sufficiently appears that a full record of the proceedings sought to be reviewed is contained in the complaint." *Lecch v. Perry*, 77 Ind. 422.

[e] If a motion for a new trial was made this fact, as well as the grounds upon which the same was urged, should appear by proper averments in the complaint. *Lightcap v. Konovosky*, 161 Ind. 609, 69 N. E. 396.

8. *Lightcap v. Konovosky*, 161 Ind. 609, 69 N. E. 396; *Hague v. First Nat. Bank*, 159 Ind. 636, 65 N. E. 907; *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Wabash R. Co. v. Young*, 154 Ind. 24, 55 N. E. 853; *Travelers' Ins. Co. v. School Twp.*, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100; *Jamison v. Lake Erie R. Co.*, 149 Ind. 521, 48 N. E. 223; *Findling v. Lewis*, 148 Ind. 429, 47 N. E. 831; *Hines v. Driver*, 100 Ind. 315;

*State v. Wills*, 26 Ind. App. 329, 59 N. E. 868.

[a] To constitute a valid complaint for review, enough of the issuable facts of the former case to show the grounds, effect, and limitation of the rulings complained of must be set out in the complaint, together with the nature of the rulings and exceptions, so that the court may be able to see from the body of the complaint itself, and without referring to exhibits filed therewith, that the plaintiff is entitled to relief against an error that has been committed by the court against him. *Hague v. First Nat. Bank*, 159 Ind. 636, 65 N. E. 907. To same effect, *Wabash R. Co. v. Young*, 154 Ind. 24, 55 N. E. 853; *Travelers' Ins. Co. v. School Twp.*, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100.

[b] "In such a complaint the rules of good pleading require that all the facts relied upon as entitling the party to relief should be averred, and particularly set forth in the complaint, with accuracy and clearness, so that without resort to the exhibits filed the court may have before it a full and complete statement of the case. If pleadings, proceedings, or entries are referred to, while they need not be set out in *haec verba*, yet the substance of such portions of them as are necessary to a right understanding of the real matters of the complaint should be incorporated in that pleading. A complaint to review a judgment is not founded upon the proceedings and judgment sought to be reviewed, and copies of such proceedings and judgment filed with the complaint cannot supply omissions of necessary allegations of their contents in the complaint itself." *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274.

[c] Repeated allegations that "the court erred" are "only conclusions which lend no aid to the requirement that the complaint should disclose an error in some ruling of the court." *Travelers' Ins. Co. v. School Twp.*, 151 Ind. 36, 49 N. E. 1, 51 N. E. 100.

Exhibits to complaint for review, see *infra*, XVI, B, 8, d.

9. *Jamison v. Lake Erie, etc. Railroad Co.*, 149 Ind. 521, 48 N. E. 223;



set forth shall be a certified transcript thereof;<sup>10</sup> it is sufficient that the complaint contain an averment that the copy set forth is a true one.<sup>11</sup> Where the record thus made up is apparently complete, an averment that it shows all the proceedings is unnecessary.<sup>12</sup>

(II.) *Where Based on New Matter.*<sup>13</sup> — Since new matter to be available as a ground for review must be such as could not, with due diligence have been discovered in time to be presented at the trial of the original action,<sup>14</sup> in a complaint based on this ground, it must be alleged that such matter was unknown at the time the judgment was rendered,<sup>15</sup> and could not have been discovered by the exercise of due diligence before the rendition of judgment.<sup>16</sup> The facts constituting the diligence used to ascertain such new matter must be made to appear by specific and detailed averments:<sup>17</sup> a general allegation is insufficient for this purpose.<sup>18</sup> If the diligence consisted in making inquiries, the time, place and circumstances thereof must be stated.<sup>19</sup> A complaint on this ground must also affirmatively show that with the

*Funk v. Davis*, 103 Ind. 281, 2 N. E. 739; *State v. Wills*, 26 Ind. App. 329, 59 N. E. 868.

[a] The original complaint need not be set forth where an amended complaint was filed. *Funk v. Davis*, 103 Ind. 281, 2 N. E. 781.

10. *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139.

11. *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139.

12. *Leech v. Perry*, 77 Ind. 422.

[a] It will not be presumed, under such circumstances, that other and seemingly useless pleadings were filed in the cause. *Leech v. Perry*, 77 Ind. 422.

13. New matter as ground for review, see *supra*, XVI, B, 4, c.

14. See *supra*, XVI, B, 4, c.

15. *Alexander v. Daugherty*, 69 Ind. 388; *Whitehall v. Crawford*, 67 Ind. 84.

16. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926; *Osgood v. Smock*, 144 Ind. 387, 40 N. E. 37; *McCauley v. Murdock*, 97 Ind. 229; *Debolt v. Debolt*, 86 Ind. 521; *Tate v. Fletcher*, 77 Ind. 102; *Hill v. Roach*, 72 Ind. 57; *Francis v. Davis*, 69 Ind. 452; *Whitehall v. Crawford*, 67 Ind. 84; *Barnes v. Dewey*, 58 Ind. 418; *Tereba v. Standard Cabinet Mfg. Co.*, 32 Ind. App. 9, 68 N. E. 1033.

17. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926; *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Osgood v. Smock*, 144 Ind. 387, 40 N. E. 37; *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *McDonald v. Coryell*, 134 Ind. 493, 34 N. E. 7; *Debolt v. Debolt*, 86 Ind. 521; *Alexander v. Daugherty*, 69 Ind. 388;

*Francis v. Davis*, 69 Ind. 452; *Collins v. Rose*, 59 Ind. 33; *Barnes v. Dewey*, 58 Ind. 418; *Bryant v. Hoskins*, 53 Ind. 218; *Gregg v. Loudon*, 51 Ind. 585.

18. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926; *Osgood v. Smock*, 144 Ind. 387, 40 N. E. 37; *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221; *Debolt v. Debolt*, 86 Ind. 521; *Peyton v. Kruger*, 77 Ind. 486; *Alexander v. Daugherty*, 69 Ind. 388; *Barnes v. Dewey*, 58 Ind. 418.

[a] A general averment (1) which follows the language of the statute as to the amount and nature of diligence used is insufficient. *Debolt v. Debolt*, 86 Ind. 521. (2) Thus, an allegation that the party "could not, by any reasonable diligence, have discovered these facts before the recovery of the judgment," is not sufficient. *Warne v. Irwin*, 153 Ind. 20, 53 N. E. 926. (3) The reason for this is founded upon that policy of the courts which views with disfavor actions upon this ground. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935.

19. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Osgood v. Smock*, 144 Ind. 387, 40 N. E. 37; *McDonald v. Coryell*, 134 Ind. 493, 34 N. E. 7.

[a] This requirement is placed upon the ground that only such pleading will inform the court as to whether or not "the inquiries were made in the proper quarter and in due season." *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Jones v. City of Tipton*, 142 Ind. 643, 42 N. E. 221.

[b] It is not sufficient to state that

discovery of the alleged new matter the party promptly instituted legal proceedings to bring it to the attention of the court;<sup>20</sup> and a mere averment to this effect is not sufficient; the complaint should show that this is so by stating when the discovery was made.<sup>21</sup> The materiality of the newly discovered evidence must also be made to affirmatively appear: it must not be left to inference from the pleadings and evidence in the original case.<sup>22</sup> But if the complaint is otherwise sufficient, it is not bad on demurrer for want of facts merely because it fails to show that the suit was commenced within the time limited for filing such suit,<sup>23</sup> or after the removal of the disabilities of the person bringing the suit.<sup>24</sup> As in the case of a complaint for review on the ground of errors of law,<sup>25</sup> the complaint should set out a complete record of the judgment which seeks to review.<sup>26</sup>

Where the complaint to review is based on new matter it should be verified by the complainant.<sup>27</sup> But it need not be further supported by the affidavit of the witness by whom this new matter is to be proved.<sup>28</sup>

c. *Amendment*.—Leave may be given to amend a complaint for review.<sup>29</sup>

d. *Exhibits*.<sup>30</sup>—Affidavits, where the ground of review is new matter,<sup>31</sup> and the bill of exceptions, where the ground is error in law,<sup>32</sup> may be made a part of the complaint as exhibits. They are, however, restricted to the single purpose of showing the former evidence and proceedings and the new matter discovered, if any.<sup>33</sup>

9. *Form, Contents and Sufficiency of Answer or Demurrer*. When a complaint is filed for errors of law apparent on the face of the record, the defendant can answer any other error apparent on the face of the record which, if assigned as cross-error on appeal, would

the plaintiff was diligent in making inquiries of such persons as he believed would be likely to know anything about the case. *Osgood v. Smock*, 144 Ind. 371, 40 N. E. 37.

20. *Majors v. Craig*, 144 Ind. 39, 43 N. E. 2; *Debolt v. Debolt*, 86 Ind. 521; *Tate v. Fletcher*, 77 Ind. 102; *Francis v. Davis*, 69 Ind. 452; *Collins v. Rose*, 59 Ind. 33; *Barnes v. Dewey*, 58 Ind. 418.

21. *Barnes v. Dewey*, 58 Ind. 418.

22. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Francis v. Davis*, 69 Ind. 452.

23. *Boyd v. Fitch*, 71 Ind. 306.

24. *Boyd v. Fitch*, 71 Ind. 306.

25. See *supra*, XVI, B, 8, b, (I).

26. *Whitehall v. Crawford*, 67 Ind. 84; *Comer v. Himes*, 58 Ind. 573. See also *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 149.

27. *Burns' Ann. Ind. St.*, 1914, §647; *Debolt v. Debolt*, 86 Ind. 521; *Tate v.*

*Fletcher*, 77 Ind. 102; *Hill v. Roach*, 72 Ind. 57.

28. *Hill v. Roach*, 72 Ind. 57.

29. *Foster v. Potter*, 24 Ind. 363. See also *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

30. See generally the title "Exhibits."

31. *Hines v. Driver*, 100 Ind. 315.

[a] Where the ground is material new matter an affidavit of the witnesses by whom this new matter is to be proved, attached as an exhibit to the complaint, neither adds to nor detracts therefrom. *Hill v. Roach*, 72 Ind. 57.

New matter as ground for review, see *supra*, XVI, B, 4, c.

32. *Hines v. Driver*, 100 Ind. 315.

Error of law as ground for review, see *supra*, XVI, B, 4, b.

33. *Hines v. Driver*, 100 Ind. 315.

Complaint must nevertheless be com-

result in an affirmance of the judgment,<sup>34</sup> or he may answer such defenses as the statute of limitations,<sup>35</sup> the pendency of an appeal,<sup>36</sup> payment and the like,<sup>37</sup> or he may deny that the copy of the record set out in the complaint is a correct and complete copy of the record sought to be reviewed.<sup>38</sup> But no issue of fact may be formed touching the merits of the original case.<sup>39</sup>

If it is desired to question the legal sufficiency of the complaint this should be done by demurrer.<sup>40</sup> Where the complaint shows the action is barred it is subject to demurrer on this ground.<sup>41</sup> Otherwise an answer must be resorted to.<sup>42</sup> A defect of parties should be taken advantage of at the earliest opportunity, and is good cause for sustaining a demurrer.<sup>43</sup> When the plaintiff is prosecuting an appeal and an action to review at the same time, this is a fact which should be presented by answer.<sup>44</sup>

**10. Hearing and Determination.**—a. *In General.*—The hearing in an action to review a judgment is by the court; no right to a jury exists.<sup>45</sup>

The procedure upon the hearing is, in many respects, controlled by the rules governing that on applications for a new trial,<sup>46</sup> and by the rules of procedure which are applied to appeals.<sup>47</sup> Where the grounds for review are errors of law, the alleged errors depend upon the record

plete in itself, see *supra*, XVI, B, 8, b, (I).

34. *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

35. *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

36. *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

37. *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

38. *Bartmess v. Holliday*, 27 Ind. App. 544, 61 N. E. 750; *Kiley v. Murphy*, 7 Ind. App. 239, 34 N. E. 112, 650.

39. *Richardson v. Howk*, 45 Ind. 451.

40. *Michener v. The Springfield Engine, etc. Co.*, 142 Ind. 130, 135, 40 N. E. 679, 31 L. R. A. 59; *Hines v. Driver*, 100 Ind. 315; *Richardson v. Howk*, 45 Ind. 451.

[a] **Effect of Overruling or Sustaining Demurrer.**—Board Knox County Comrs. *v. Montgomery*, 109 Ind. 69, 9 N. E. 590; *Leech v. Perry*, 77 Ind. 422; *Richardson v. Howk*, 45 Ind. 451.

41. See generally the title "Limitation of Actions."

[a] Where (1) a complaint shows upon its face that the cause of action, which it avers, has been barred by time, and also shows upon its face that the plaintiff was under no legal disability to sue during the time, a demurrer lies. *Harlen v. Watson*, 63 Ind. 143. (2) But where, in such a case,

the complaint alleges nothing as to the legal disability of the plaintiff, a demurrer will not lie. *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739; *Whitehall v. Crawford*, 67 Ind. 84; *Harlen v. Watson*, 63 Ind. 143.

42. *Whitehall v. Crawford*, 67 Ind. 84; *Harlen v. Watson*, 63 Ind. 143. See generally the titles "Answers;" "Demurrer."

43. *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334. See generally the titles "Demurrer;" "Parties."

[a] This defect should be moved against promptly inasmuch as it is of a nature which may be cured by a judgment and cannot be presented on a motion in arrest of judgment. *Jones v. Ahrens*, 116 Ind. 490, 19 N. E. 334.

44. *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263.

**Appeal and action to review as concurrent remedies**, see *supra*, XVI, B, 2.

45. *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

**Right to jury trial generally**, see the title "Juries and Jurors."

46. *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

47. *Murphy v. Branaman*, 156 Ind. 77, 59 N. E. 274; *Graves v. State*, 136 Ind. 406, 36 N. E. 275; *Ex parte John Kiley*, 135 Ind. 225, 34 N. E. 989; *Evansville, etc. R. R. Co. v. Maddux*,



as made in the original cause,<sup>48</sup> and are to be tried on the record alone.<sup>49</sup>

The relief granted may consist in reversing or affirming the judgment,<sup>50</sup> in whole or in part,<sup>51</sup> or in modifying the same,<sup>52</sup> as the justice of the individual case may require. Thus should the record show the plaintiff in the original action to be entitled to all the relief therein awarded, the judgment will not be disturbed;<sup>53</sup> and on the other hand, a judgment which, as appears from the record, is wholly unauthorized, will be set aside.<sup>54</sup>

Costs are awarded according to the rule prescribed for the awarding of costs in the supreme court on appeal.<sup>55</sup>

b. *Operation and Effect of Determination.* — The result of a successful application to review is the same as a successful appeal to the supreme court.<sup>56</sup> A judgment either for or against a review of a former judgment puts an end to the action for review.<sup>57</sup> A judgment for the plaintiff in such an action operates to reinstate the former case,<sup>58</sup> and concludes the defendant therein on that score unless an

134 Ind. 571, 34 N. E. 345, 34 N. E. 511; *Baker v. Ludlam*, 118 Ind. 187, 20 N. E. 648; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350.

48. *Ex parte John Kiley*, 135 Ind. 225, 34 N. E. 989; *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. 648; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718.

Errors of law as ground for review, see *supra*, XVI, B, 4, b.

49. *Evansville, etc. R. R. Co. v. Mad-dux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Baker v. Ludlam*, 118 Ind. 187, 20 N. E. 648; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Richardson v. Howk*, 45 Ind. 451; *Myer v. Minch*, 45 Ind. App. 495, 91 N. E. 32; *Williams v. Manley*, 33 Ind. App. 270, 69 N. E. 469; *State Building, etc. Assn. v. Brack-in*, 27 Ind. App. 677, 62 N. E. 91; *Bart-mess v. Holliday*, 127 Ind. App. 544, 61 N. E. 750.

[a] Thus, in no case, can any question be made which depends upon a motion to set aside a default unless the record shows that such a motion was made, overruled and an exception taken. *Baker v. Ludlam*, 118 Ind. 87, 20 N. E. 648.

[1] In an action to review a judgment on the ground that the court never acquired jurisdiction of the defendant, the action, as such must fall, when the record contradicts this averment with a recital of a general appearance by the defendant. *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718.

50. *Hornady v. Shields*, 119 Ind. 201,

21 N. E. 554; *Francis v. Davis*, 69 Ind. 452; *Davidson v. King*, 49 Ind. 338; *Alsop v. Wiley*, 17 Ind. 452.

[a] Judgment may be reversed in part and affirmed in part. *Davidson v. King*, 49 Ind. 338.

[b] Relief on review of a judgment of partition may only consist of the appointment of the same or other commissioners to make another partition. *Lucas v. Peters*, 45 Ind. 313.

51. *Burns' Ann. Ind. St.*, 1914, §650; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554; *Francis v. Davis*, 69 Ind. 452; *Davidson v. King*, 49 Ind. 338; *Hall v. Palmer*, 18 Ind. 5; *Alsop v. Wiley*, 17 Ind. 452. See also *Willman v. Willman*, 57 Ind. 500.

52. *Burns' Ann. Ind. St.*, 1914, §650; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554; *Francis v. Davis*, 69 Ind. 452; *Davidson v. King*, 49 Ind. 338; *Alsop v. Wiley*, 17 Ind. 452.

53. *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754.

54. *McArthur v. Leffler*, 110 Ind. 526, 10 N. E. 81.

55. *Burns' Ann. Ind. St.*, 1914, §650; *Davidson v. King*, 49 Ind. 338. See generally the title "Costs."

56. *Wright v. Churchman*, 135 Ind. 683, 35 N. E. 835.

57. *Brown v. Keyser*, 53 Ind. 85, quoted with approval in *Board Comrs. Knox County v. Montgomery*, 109 Ind. 69, 9 N. E. 590.

58. *Board Comrs. Knox County v. Montgomery*, 109 Ind. 69, 9 N. E. 590.

appeal is properly perfected.<sup>59</sup> After a judgment has been reviewed and reversed it is in no way a bar to a subsequent suit on the same cause of action;<sup>60</sup> but an affirmance of the original judgment on an action to review is a bar to a second action to review the same judgment.<sup>61</sup>

**11. Appeal.**<sup>62</sup>—The general rule is that an appeal may be taken from the judgment of review,<sup>63</sup> unless the original judgment was not appealable.<sup>64</sup> If, in a particular case, an appeal may be had, it will lie in the court which would have jurisdiction of an appeal from the original judgment.<sup>65</sup> In reviewing the action of the court in such a proceeding, the appellate tribunal will be guided largely by those rules and considerations which control its determination of appeals from orders determining motions for a new trial.<sup>66</sup> When a complaint to review is questioned for the first time on appeal every presumption will be indulged in favor of its sufficiency.<sup>67</sup>

**C. WRIT OF ERROR CORAM NOBIS.**<sup>68</sup>—**1. Nature and Scope of Remedy.**—The function of the writ of error coram nobis is to bring a judgment before the court which rendered it for review and correction as to some error of fact not appearing in the record.<sup>69</sup> It is

59. Board Comrs. Knox County v. Montgomery, 109 Ind. 69, 9 N. E. 590.

Appeal from action to review, see *infra*, XVI, B, 11.

60. Maghee v. Collins, 27 Ind. 83.

61. Coen v. Funk, 26 Ind. 289, wherein the court said: "There should be an end to litigation somewhere, a rule the necessity of which is illustrated by the case at bar, and it could scarcely be so, if new suits may be brought to review the same judgment as often as a party may desire, or may suppose that a new cause therefor has been discovered."

Former judgment as merger or bar, see generally *infra*, XVII, B.

62. See generally 2 STANDARD PROC. 106.

63. *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989; *Keepfer v. Force*, 86 Ind. 81; *Dunkle v. Elston*, 71 Ind. 585; *Brown v. Keyser*, 53 Ind. 85.

[a] An appeal lies from a judgment of review which sets aside the original judgment; the defendant in the action for review need not wait for a final determination of the new trial thus obtained. *Keepfer v. Force*, 86 Ind. 81.

64. *Ex parte* Kiley, 135 Ind. 225, 34 N. E. 989; *Klebar v. Corydon*, 80 Ind. 95.

65. See *supra*, XVI, B, 5.

66. *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

As to appeals from orders determining new trials, see generally 2 STANDARD PROC. 181, and the title "New Trial."

[a] Thus, the appellate court will not reverse a judgment in such a case which grants a new trial, unless it is apparent that a great injustice has been done. *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

67. *Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554.

[a] A judgment for plaintiff in an action for review of a judgment rendered upon sustaining a demurrer to the complaint in the original action establishes the sufficiency of the original complaint. It is conclusive on that question on an appeal from the judgment of review. *Board Comrs. Knox County v. Montgomery*, 109 Ind. 69, 9 N. E. 590.

68. Writ of error generally, see the title "Writ of Error."

69. See the following: U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638. Ariz.—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. Ill.—*Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600; *Gould's Estate v. Watson*, 80 Ill. App. 242. Ia.—*McKinney v. Western Stage Co.*, 4 Iowa 420. Kan.—*Dobbs v. State*, 63 Kan. 321, 65 Pac. 658. Ky.—*Case v. Ribelin*, 1 J. J. Marsh. 29. Md.—*Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

limited to the correction of errors of fact alone;<sup>70</sup> it does 'not lie'<sup>71</sup> for

**Mo.**—*Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *State v. Clarkson*, 88 Mo. App. 553; *State v. White*, 75 Mo. App. 257; *Marble v. Vanhorn*, 53 Mo. App. 361; *State v. Heinrich*, 14 Mo. App. 146. **N. C.**—*Roughton v. Brown*, 53 N. C. 393. **Va.**—*Richardson's Exrs. v. Jones*, 12 Gratt. (53 Va.) 53. **W. Va.**—*Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

[a] "The material difference (1) between writs of error and writs of error coram nobis is that the former are for the correction of errors of law committed by the lower court, and must issue from the superior court and be tried upon the record as sent up to it, while the latter is for the correction of errors of fact, which necessitates a new record, and is brought and tried in the court where the original suit was tried." *Wills v. Wills*, 104 Tenn. 382, 58 S. W. 301. (2) Thus "if the defendant be dead, and his death be pleaded in the action, but the court disregard it and render judgment, that is error of law, because the court having the fact before it in the record has rendered a judgment contrary to law, . . . and a writ of error in an appellate court would correct it; but where the death is not presented, and judgment is rendered, that is error in fact, to be corrected by writ of error coram nobis." *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316. See also *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428.

[b] "The object of this writ is to bring before the court errors of fact which would have produced a different judgment had such facts been before the court upon the first hearing, and which fact or facts the party was prevented from showing by accident, fraud, or mistake, unmixed with fault upon his part." *Gallena v. Sudheimer*, 9 Heisk. (Tenn.) 189.

[c] A proceeding by a writ of error coram nobis is not for the purpose of bringing up the former case, but to reverse a former judgment. *Elliot v. McNairy*, 1 Baxt. (Tenn.) 342.

70. See the following: **U. S.**—*Phillips v. Russell*, Hempst. 62, 19 Fed. Cas. No. 11,105a; *Ledgerwood v. Pickett's Heirs*, 15 Fed. Cas. No. 8,175.

**Ariz.**—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. **Ill.**—*Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600; *Baubien v. Hamilton*, 4 Ill. 213; *Utley v. Cameron*, 87 Ill. App. 71; *Estate of Gould v. Watson*, 80 Ill. App. 242. **Kan.**—*Dobbs v. State*, 63 Kan. 321, 65 Pac. 658. **Ky.**—*Case v. Ribelin*, 1 J. J. Marsh. 29. **Md.**—*Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Bridendolph v. Zeller's Exrs.*, 3 Md. 325, 333; *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428. **Miss.**—*Land v. Williams*, 12 Smed. & M. 362, 51 Am. Dec. 117; *Fellows v. Griffin*, 9 Smed. & M. 362. See also *Miss. and Tenn. R. Co. v. Wynne*, 42 Miss. 315. **Mo.**—*State v. Clarkson*, 88 Mo. App. 553; *State v. White*, 75 Mo. App. 257. **N. C.**—*Roughton v. Brown*, 53 N. C. 393; *Williams v. Edwards*, 34 N. C. 118. **Tenn.**—*Hillman v. Chester*, 12 Heisk. 34; *Jones v. Pearce*, 12 Heisk. 281; *Crawford v. Williams*, 1 Swan 341. **Eng.**—*King v. Jones*, 2 Ld. Raym. 1525, 92 Eng. Reprint 489; *Castledine v. Mundy*, 4 Barn. & Ad. 90, 110 Eng. Reprint 389; *Birch v. Trist*, 8 East 412, 103 Eng. Reprint 401.

See 2 Tidd's Pr. 1136.

[a] The matter of fact which is meant in this connection is such a character of fact as would, if known, disable the court from rendering the judgment. It is not the office nor within the purview of a writ of error coram nobis to give a new trial merely because certain facts in the nature of evidence going to the merits of the case were undiscovered by a litigant in time for use at the original trial. Such . . . is not what is meant by latent matter of fact unknown to the court or party affected. *Marble v. Vanhorn*, 53 Mo. App. 361.

71. **U. S.**—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638. **Ariz.**—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. **Ill.**—*Utley v. Cameron*, 87 Ill. App. 71; *Estate of Gould v. Watson*, 80 Ill. App. 242. **Md.**—*Hawkins v. Bowie*, 9 Gill & J. 428. **Miss.**—*Fellows v. Griffin*, 9 Smed. & M. 362. **N. C.**—*Williams v. Edwards*, 34 N. C. 118. **Tenn.**—*Dinsmore v. Boyd*, 6 Lea 689; *Hillman v. Chester*, 12 Heisk. 34; *Crawford v. Williams*, 1 Swan 341. **Eng.**—*Birch v. Trist*, 8 East 412, 103 Eng. Reprint 401.



the correction of errors of law. It is not a writ of right.<sup>72</sup> Nor is such a writ a supersedeas in itself, though under some circumstances it may operate as such.<sup>73</sup>

The remedy by writ of error coram nobis is now practically obsolete, the same relief being obtained in most jurisdictions by motion in the same court and cause.<sup>74</sup>

**2. Grounds for.**—The matter of fact, which the remedy by writ of error coram nobis is designed to reach, may consist of some defect in the process,<sup>75</sup> or a misprision or default of the clerk,<sup>76</sup> or the death of a party before judgment,<sup>77</sup> or the coverture of the defendant,<sup>78</sup> or some fraud, accident or mistake, which, unmixed with any fault

[a] "The reason that on error coram nobis, an error of the court in deciding a question of law or adjudicating a question of fact, cannot be taken advantage of, is, that a trial court cannot, after the term has passed, review its decisions." *Utley v. Cameron*, 87 Ill. App. 71.

[b] Errors committed in a divorce proceeding cannot be corrected by writ of error coram nobis. *Wills v. Wills*, 104 Tenn. 382, 58 S. W. 301.

72. *Tyler v. Morris*, 10 N. C. 487, 34 Am. Dec. 395; *Comstock v. Van Schoonhoven*, 3 How. Pr. (N. Y.) 258. And see *Higbie v. Comstock*, 1 Den. (N. Y.) 652, holding that a writ in the nature of a writ of error coram nobis is not demandable as of right.

73. N. Y.—*Ferris v. Douglass*, 20 Wend. 626. N. C.—*Tyler v. Morris*, 10 N. C. 487, 34 Am. Dec. 395. Eng. *Birch v. Trist*, 8 East 412, 103 Eng. Reprint 401.

74. U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 242, 8 L. ed. 638. Ariz.—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. Ill.—*Life Assn. of America v. Fasset*, 102 Ill. 315; *McKindley v. Buck*, 43 Ill. 488; *Sloo v. Bank*, 2 Ill. 428; *McPherson v. Wood*, 52 Ill. App. 170. N. Y.—*Smith v. Kingsley*, 19 Wend. 620.

See *supra*, XIII and XIV.

75. U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638. Ill.—*Gould's Estate v. Watson*, 80 Ill. App. 242. Md.—*Hawkins v. Bowie*, 9 Gill & J. 428. Mo.—*Marble v. Vanhorn*, 53 Mo. App. 361.

As to equitable relief from judgments on this ground, see *supra*, XV.

76. U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 242, 8 L. ed. 638. Ill.—*Brady v. Washington Ins. Co.*, 82 Ill. App. 380; *Gould's Estate v. Wat-*

son, 80 Ill. App. 242. Md.—*Hawkins v. Bowie*, 9 Gill & J. 428. Mo.—*Marble v. Vanhorn*, 53 Mo. App. 361.

[a] The failure of the clerk to strike from the regular calendar a cause placed on the short trial calendar which resulted in its being eventually reached on the regular calendar, unknown to the applicant, and dismissed for want of prosecution, is a ground for a writ of error coram nobis. *Brady v. Washington Ins. Co.*, 82 Ill. App. 380.

77. U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638. Ariz.—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. Ill.—*Life Assn. of America v. Fasset*, 102 Ill. 315; *Gould's Estate v. Watson*, 80 Ill. App. 242; *McPherson v. Wood*, 52 Ill. App. 170. Ky. *Case v. Ribelin*, 1 J. J. Marsh. 29. Md. *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. Miss.—See *Miss. and Tenn. R. Co. v. Wynne*, 42 Miss. 315. Mo. *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Marble v. Vanhorn*, 53 Mo. App. 361. Pa.—*Day v. Hamburgh*, 1 Browne 75. Tex.—*Pullen v. Baker*, 41 Tex. 419; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336. Va.—*Richardson's Exrs. v. Jones*, 12 Gratt. (53 Va.) 53. W. Va.—*Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

See 2 Tidd's Pr. 1136.

78. U. S.—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638. Ariz.—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. Ill.—*Life Assn. v. Fasset*, 102 Ill. 315; *Gould's Estate v. Watson*, 80 Ill. App. 242. Ky.—*Case v. Ribelin*, 1 J. J. Marsh. 29. Md.—*Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. Mo. *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Marble v. Vanhorn*, 53 Mo. App. 361. N. C.—See *Roughton*

of the applicant, resulted in the judgment complained of.<sup>79</sup> It is also a sufficient ground for the issuance of this writ that the judgment complained of was had against a party who was not *sui juris*, and was not represented by a guardian *ad litem*,<sup>80</sup> as in the case of an infant.<sup>81</sup> The insanity of a defendant has been held not to be a ground for this writ,<sup>82</sup> though upon this proposition there are authorities to the contrary.<sup>83</sup> Newly discovered evidence cannot be made the basis of this writ.<sup>84</sup>

As a general qualification to all these grounds, it must be noticed that facts which were known, or, by reasonable diligence might have been ascertained, prior to the trial, will avail nothing on this writ.<sup>85</sup> Moreover, nothing may be assigned as error of fact which is contradictory to the record,<sup>86</sup> nor which was presented to the court and passed upon at the time of trial.<sup>87</sup>

### 3. Proceedings To Obtain. — a. *In General.* — In the absence of

*v. Brown*, 53 N. C. 393. **Tex.**—*Mokey v. Brackett*, 28 Tex. 413. **Va.**—*Richardson's Exrx. v. Jones*, 12 Gratt. (53 Va.) 53. **W. Va.**—*Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. **Eng.**—*King v. Jones*, 2 Ld. Raym. 1525, 92 Eng. Reprint 489.

See 2 Tidd's Pr. 1136.

79. *Dinsmore v. Boyd*, 6 Lea (Tenn.) 689; *Tucker v. James*, 12 Heisk. (Tenn.) 333; *Crawford v. Williams*, 1 Swan (Tenn.) 341.

80. *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64, slave.

81. **U. S.**—*Pickett's Heirs v. Legerwood*, 7 Pet. 144, 242, 8 L. ed. 638. **Ariz.**—*Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367. **Ill.**—*Life Assn. of America v. Fasset*, 102 Ill. 315; *Gould's Estate v. Watson*, 80 Ill. App. 242. **Md.** *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681. **Mo.**—*Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Marble v. Vanhorn*, 53 Mo. App. 361. **N. C.**—See *Roughton v. Brown*, 53 N. C. 393. **Tex.** *Milan Co. v. Robertson*, 47 Tex. 222. **Va.** *Richardson's Exrx. v. Jones*, 12 Gratt. (53 Va.) 53. **W. Va.**—*Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

See 2 Tidd's Pr. 1136.

[a] An exception is sometimes made to this ground, *i. e.*, infancy, where the action was one in ejectment. See *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 147, 8 L. ed. 638, where the court say, "The cases for error *coram nobis* are . . . , error in fact, as when the defendant, being under age, sued by attorney, in any other action but ejectment."

82. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

83. *Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367; *Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600. See also *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64.

84. *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Asbell v. State*, 62 Kan. 209, 61 Pac. 690.

85. *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Marble v. Vanhorn*, 53 Mo. App. 361.

86. **Ala.**—*Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253. **Ill.**—*Utley v. Cameron*, 87 Ill. App. 71. **Mo.**—*Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64. **N. C.**—*Williams v. Edwards*, 34 N. C. 118. **Tenn.**—*Crawford v. Williams*, 1 Swan 341.

87. **Ill.**—*Utley v. Cameron*, 87 Ill. App. 71; *McPherson v. Wood*, 52 Ill. App. 170. **Kan.**—*Dobbs v. State*, 63 Kan. 321, 65 Pac. 658. **Mo.**—*Marble v. Vanhorn*, 53 Mo. App. 361. **N. C.**—*Williams v. Edwards*, 34 N. C. 118. **Tenn.** *Crawford v. Williams*, 1 Swan 341. **Va.** *Richardson's Exrx. v. Jones*, 12 Gratt. (53 Va.) 53.

[a] "The fact upon which the error is predicated, in order to avail under this writ, must be matter not part of the issues tried by the court, but something aliunde, which, if presented to the court at the trial, would have absolutely precluded the judgment as rendered." *Gould v. Watson*, 80 Ill. App. 242.

[b] This is on the principle that, should a contrary rule prevail, "it

statutes to the contrary, this writ will, in a proper case, lie in any court of record,<sup>88</sup> and, it has been held, even in a court of inferior jurisdiction,<sup>89</sup> although, as to this last proposition, there is authority to the contrary.<sup>90</sup> There is no limitation as to the time within which the writ may be had<sup>91</sup> except where expressly provided by statute.<sup>92</sup> Moreover, statutes limiting the time within which judgments may be set aside on motion for irregularities,<sup>93</sup> and statutes limiting the time for suing out writs of error, have no application to the writ *coram nobis*.<sup>94</sup>

After an appeal it is too late to bring a writ of error *coram nobis*.<sup>95</sup>

would render the litigation interminable, as each party might say from time to time, that then he or she had fuller proof, which would establish the fact to be contrary to the last finding." *Williams v. Edwards*, 34 N. C. 118. See also *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Marble v. Vanhorn*, 53 Mo. App. 361.

[c] "The matter of fact must not have been known to the court, for, if it was known, and yet the court acted erroneously or illegally, it is an error of law in the court, and should in that proceeding be taken to a higher tribunal for reversal, instead of making application to the court itself." *Marble v. Vanhorn*, 53 Mo. App. 361.

[d] Where issue was joined as to the question of the defendant's infancy or coverture, and it was found that the party is of full age, or not a feme covert; in such a case the verdict concludes all the parties on that point. *Williams v. Edwards*, 34 N. C. 118.

88. *Roughton v. Brown*, 53 N. C. 393.

89. In *Breckinridge v. Coleman*, 7 B. Mon. (Ky.) 331, it is said that "the authority of a justice of the peace for that purpose (to issue a writ of error *coram nobis*), wherever it would be the appropriate remedy to issue such a writ, independent of any statutory provision, we apprehend is unquestionable. The writ is authorized by the common law and demandable as a matter of right, and is applicable as a remedy to a magistrate's court, as well as to the circuit court."

90. *The People v. Court of Com. Pleas*, 20 Johns. (N. Y.) 22.

91. *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153. See also *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38.

92. See generally the statutes and

the following: *Breckinridge v. Coleman*, 7 B. Mon. (Ky.) 331; *Whaley v. Stout*, 2 J. J. Marsh. (Ky.) 147; *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29.

[a] In *Tennessee* it has been said that "it is clear from the language of the Code that a writ of error *coram nobis* can only be had within a year after the rendition of the original judgment." *Elliott v. McNairy & Co.*, 1 Baxt. (Tenn.) 342.

[b] A statute limiting the time for bringing a writ of *coram nobis* for correction of errors in replevin or forthcoming bonds, does not apply to a writ to correct a judgment invalid on account of coverture of defendant. *Breckinridge v. Coleman*, 7 B. Mon. (Ky.) 331.

93. In *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153, where the ground of the writ was infancy, it was said that a statute of this sort did not apply "for the reason that the entering of a judgment against an infant is not an irregularity, but an error."

94. U. S.—*Strode v. Stafford Justices*, 1 Brock 162, 23 Fed. Cas. No. 13,537. Mo.—*Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153. Va.—See *Eubank v. Rall's Exr.*, 4 Leigh (31 Va.) 308.

[a] The reason for this is that "the error complained of here is not one of law but of fact." *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153.

[b] In *Eubank v. Rall's Exr.*, 4 Leigh (31 Va.) 308, the court said: "Nor was there any bar to the motion arising from the statute of limitations of writs of error and supersedeas, for that act if it applies to writs of error *coram nobis*, . . . was neither pleaded nor relied on in the court below."

95. N. C.—*Latham v. Hodges*, 35 N. C. 267. Tenn.—*Welsh v. Harman*, 8 Yerg. 103. Eng.—*Lambell v. Pretty*



b. *Parties.*—This writ may be brought only by a party or privy to the record,<sup>96</sup> or by one injured by the judgment, who will consequently derive advantage from its reversal.<sup>97</sup> It need not be brought in the names of all the parties to the judgment.<sup>98</sup> Where the ground for the writ is coverture, the husband must, in those jurisdictions where the wife may not sue alone, be joined with the wife.<sup>99</sup>

c. *Application and Order.*—The writ can only be issued on petition or motion to the court having jurisdiction,<sup>1</sup> and cause shown by affidavit.<sup>2</sup> The application must show that the facts urged as error would, if presented at the trial, have resulted in a different judgment.<sup>3</sup>

A petition for a writ of error coram nobis is amendable upon good cause shown.<sup>4</sup>

A notice of making application for the writ is usually required.<sup>5</sup>

John, 1 Str. 690, 93 Eng. Reprint 786.

96. *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253.

[a] Where the defendant died before the judgment was entered, a writ of error coram nobis in the name of his administrator is the proper practice. *Devereux v. Roper*, 1 Phila. (Pa.) 182, citing *Meggot v. Broughton*, Cro. Eliz. 106, 78 Eng. Reprint 364.

97. *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253.

98. *Roughton v. Brown*, 53 N. C. 393, holding that only the parties as to whom there is error of fact need join. The court said: "As to the second ground of objection; we are aware that an ordinary writ of error must be brought in the names of all the parties to the judgment, and if one or more of them be unwilling to join in it, there must be a summons and severance of such objecting party or parties. . . . Without stopping to inquire, whether this rule, in relation to writs of error for matter of law, may not be altered by an equitable construction of the 27th section of the 4th chapter of the Revised Code, which gives to one or more defendants the right to appeal, alone, from a judgment against him or them and others, we do not find any direct authority that the rule ever has been applied to writs of error coram nobis, and we do not perceive any reason why it should be so applied. The usual instances of error in fact, requiring the intervention of this writ, are those of judgments against infants and femes covert, where the fact of such infancy or coverture does not appear on the record. In such cases, it is manifest that the judgment, if otherwise proper, will be erroneous only as

to them and not as to the other defendants. Why, then, should the other defendants be parties to the writ, when they cannot have any interest in reversing the judgment?"

99. *Roughton v. Brown*, 53 N. C. 393. See generally the title "*Husband and Wife.*"

1. *Ferris v. Douglass*, 20 Wend. (N. Y.) 626; *Comstock v. Van Schoonhoven*, 3 How. Pr. (N. Y.) 258.

[a] *Entitling.*—Such petition or motion should not regularly be entitled in any suit. *Swain v. Heartt*, 2 How. Pr. (N. Y.) 90; *Maher v. Comstock*, 1 How. Pr. (N. Y.) 175.

2. *Ferris v. Douglass*, 20 Wend. (N. Y.) 626.

[a] An affidavit to the petition, made by one styling himself agent for the petitioners, is insufficient, unless it appear in the affidavit or petition that the facts relied on are peculiarly within the knowledge of such agent, or good cause shown for the employment of an agent. *Reid v. Hoffman*, 6 Heisk. (Tenn.) 440.

3. *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

4. *Baxter v. Grandstaff*, 3 Tenn. Ch. 244, especially where the amendment is not a material change of the original ground of application, but only an addition in the details.

[a] Such amendments should be "very guardedly awarded." *Baxter v. Grandstaff*, 3 Tenn. Ch. 244.

5. *Conn.*—*Wetmore v. Plant*, 5 Conn. 541. *Ia.*—*Mears v. Garretson*, 2 Gr. 316. *N. Y.*—*Ferris v. Douglass*, 20 Wend. 626; *Comstock v. Van Schoonhoven*, 3 How. Pr. 258; *Maher v. Comstock*, 1 How. Pr. 175.

[a] But a statute requiring notice

**Order.** — The writ issues only by order of the court.<sup>6</sup>

**4. Hearing and Determination.** — If the errors assigned on the writ be disputed, an issue is made up and tried by a jury.<sup>7</sup> Relief will not be granted to a party who has acquiesced in the judgment complained of,<sup>8</sup> or has been guilty of an unreasonable delay in seeking his remedy.<sup>9</sup>

The judgment upon a writ of error coram nobis is, that the judgment complained of be affirmed or recalled.<sup>10</sup> It is only the proceedings complained of, however, that are reversed.<sup>11</sup>

**5. Appeal.** — Judgments in coram nobis proceedings are considered final in their nature,<sup>12</sup> and as such are usually appealable.<sup>13</sup>

**XVII. JUDGMENT AS ESTOPPEL.** — A. COLLATERAL IMPEACHMENT. — **1. General Statement.** — An attack upon a judgment must be made in one of two ways, that is, either directly or collaterally.

**2. Definitions and Distinctions.** — a. *Direct Attack Defined and Illustrated.* — A direct attack on a judgment is an attempt to amend, correct, reform, vacate or enjoin the execution of the same in a proceeding provided by law for that purpose.<sup>14</sup> It contemplates, as a

of an application for a writ of error coram nobis against "faulty replevin and forthcoming bonds, or any faulty or erroneous execution" does not embrace a case where the writ is sought on the ground of death of a party (*Breckenridge v. Coleman*, 7 B. Mon. [Ky.] 331), and failure to give this notice, even in the face of such a statute, has been held to be fatal only when a supersedeas issued with the writ, *Combs v. Carter*, 1 Dana (Ky.) 178; *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29.

**6.** *Ferris v. Douglass*, 20 Wend. (N. Y.) 626; *Maher v. Comstock*, 1 How. Pr. (N. Y.) 175.

**7. Ky.**—*Cook v. Conway*, 3 Dana 454; *Case v. Ribelin*, 1 J. J. Marsh. 29. *Miss.*—*Fellows v. Griffin*, 9 Smed. & M. 362. *Tenn.*—*Crawford v. Williams*, 1 Swan 341.

[a] But if the error assigned be undisputed, but it is sought to raise the question whether the fact can be inquired into, or whether, if true, it can affect the judgment previously rendered, a plea in nullo est erratum should be pleaded and the question submitted to the court. *Shoffet v. Menifee*, 4 Dana (Ky.) 150 (such a plea is in the nature of a demurrer); *Case v. Ribelin*, 1 J. J. Marsh. (Ky.) 29.

**8.** *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

**9.** *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

**10. Ala.**—*Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253. *Miss.*—*Fellows v. Griffin*, 9 Smed. & M. 362. *N. Y.* *Dewitt v. Post*, 11 Johns. 460. *Tenn.* *Crawford v. Williams*, 1 Swan 341.

**11.** Therefore the plaintiff may, after reversal, continue the original action without commencing de novo. *Dewitt v. Post*, 11 Johns. (N. Y.) 460.

[a] After satisfaction of a judgment, the court, on writ of error coram nobis, can do no more than vacate its former judgment. It cannot in that proceeding order the money to be refunded. *Bigham v. Brewer*, 4 Sneed (Tenn.) 432.

**12.** *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428.

**13.** *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428. See also *Life Assn. of America v. Fasset*, 102 Ill. 315. But see *Tyler v. Morris*, 10 N. C. 487, 34 Am. Dec. 395, holding that the refusal of the lower court to grant the writ was not reversible by the supreme court on appeal.

**14. Ark.**—*Hall v. Huff*, 182 S. W. 535. *Cal.*—*Hanson v. Hanson*, 78 Cal. xix, 20 Pac. 736; *People v. Mullan*, 65 Cal. 396, 4 Pac. 348. *Colo.*—*Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512. *Ill.*—*Cigler v. Keinath*, 167 Ill. App. 65. *Ind.* *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211; *Harmon v. Moore*, 112 Ind. 221, 13 N. E. 718;

rule, some proceeding in the action in which the judgment was rendered either by a motion or other proceeding before the court whose judgment is attacked or by some proceeding in error therefrom;<sup>15</sup> as for example by motion for new trial,<sup>16</sup> motion to open or vacate the judgment,<sup>17</sup> writ of certiorari,<sup>18</sup> audita querela,<sup>19</sup> by appeal,<sup>20</sup> or writ of error,<sup>21</sup> and generally proceedings to enjoin the enforcement<sup>22</sup> of the

*Earle v. Earle*, 91 Ind. 27. **Ia.**—*Stewart Lumber Co. v. Downs*, 142 Iowa 420, 120 N. W. 1067. **Ky.**—*Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Baker v. Baker, Deedes & Co.*, 162 Ky. 683, 694, 173 S. W. 109; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378; *Dennis v. Alves*, 117 S. W. 287. **Miss.**—*McKinney v. Adams*, 95 Miss. 832, 50 So. 474. **Mo.**—*Reineman v. Larkin*, 222 Mo. 156, 121 S. W. 307; *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628. **Okla.**—*Continental Gin Co. v. De Bord*, 34 Okla. 66, 123 Pac. 159. **Ore.**—*Morrill v. Morrill*, 20 Ore. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155; *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537. **Tenn.**—*Pope v. Harrison*, 16 Lea 82. **Tex.**—*Estey & Camp v. Williams* (Tex. Civ. App.), 133 S. W. 470; *Schneider v. Sellers*, 25 Tex. Civ. App. 226, 61 S. W. 541. **Wash.**—*Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862.

15. **Cal.**—*Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *People v. Mullan*, 65 Cal. 396, 4 Pac. 348. **Ia.**—*In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982. **Tex.**—*Buchanan v. Bilger*, 64 Tex. 589.

16. See the title "New Trial."

17. **Ark.**—*Hall v. Huff*, 182 S. W. 535. **Cal.**—*Norton v. Atehison, T. & S. F. R. Co.*, 97 Cal. 388, 30 Pac. 585, 32 Pac. 452; *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089. But see *People v. Norris*, 144 Cal. 422, 77 Pac. 998. **Colo.**—*Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. **Ia.**—*In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982; *Spencer v. Berns*, 114 Iowa 126, 86 N. W. 209. **Mo.**—*State ex rel. Potter v. Riley*, 219 Mo. 667, 118 S. W. 647; *Smith v. Young*, 136 Mo. 65, 117 S. W. 628; *Lacy v. Williams*, 27 Mo. 280. **N. D.**—*Atwood v. Roan*, 26 N. D. 622, 145 N. W. 587.

See *supra*, XIV.

[a] An application to set aside an allowance of a claim against decedent's estate, made before payment of the claim and before final settlement of

the administration, is a direct attack. *In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982.

[b] Though made at a subsequent term, where the statute provides for a motion after the term. *Hall v. Huff* (Ark.), 182 S. W. 535.

18. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Wade v. Scott* (Tex. Civ. App.), 145 S. W. 675; *Kalteyer v. Wipff* (Tex. Civ. App.), 49 S. W. 1055; *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

See generally the title "Certiorari."

[a] **Certiorari Collateral.**—A petition for certiorari to quash a judgment of an inferior court rendered on irregular service of process was deemed a collateral attack in *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414.

19. See the title "Audita Querela."

20. **Idaho.**—*O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20. **La.**—*Succession of Fortier*, 51 La. Ann. 1562, 26 So. 554. **Mo.**—*Reineman v. Larkin*, 222 Mo. 156, 121 S. W. 307.

See generally the title "Appeals."

21. *Gibbens v. Bourland* (Tex. Civ. App.), 145 S. W. 274. See generally the title "Writ of Error."

22. **Colo.**—*Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824. **Ga.**—*Williams v. Lancaster*, 113 Ga. 1020, 39 S. E. 471. **Ind.**—*Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *Davis v. D. M. Osborne & Co.*, 156 Ind. 86, 59 N. E. 279; *Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; *Johnson v. State*, 80 Ind. 220; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. **Ia.**—*Brakke v. Hoskins*, 98 Iowa 233, 67 N. W. 235. **Kan.**—*McNeill v. Edie*, 21 Kan. 108. **Minn.**—*Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452. **Miss.**—*McKinney v. Adams*, 95 Miss. 832, 50 So. 474. **Mo.**—*Engler v. Knoblauch*, 131 Mo. App. 481, 110 S. W. 16; *Missouri, K. & T. Ry. Co. v. Warden*, 73 Mo. App. 117. **Ohio.**—*Waite v. Ellis*, 5 Ohio N. P. 415. **Ore.**—*Morrill v. Morrill*, 20 Ore. 96, 25



judgment, or to modify, vacate or annul it on some equitable ground.<sup>23</sup>

b. *Collateral Attack Defined.*—Any attempt to impeach a judgment other than by such direct proceedings is a collateral attack. It may be defined, therefore, to be an effort to avoid, defeat, evade, or deny the force and effect of the judgment in some incidental proceed-

Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155. **Tex.**—San Bernando Townsite Co. v. Hocker (Tex. Civ. App.), 176 S. W. 644; Holt v. Love (Tex. Civ. App.), 131 S. W. 857; Shanley v. York (Tex. Civ. App.), 118 S. W. 146.

As to enjoining the enforcement of judgments, see *supra*, XV, and the title "Judgments and Decrees, Enforcement of."

[a] **For Want of Service.**—A suit to restrain the enforcement of a judgment on the ground of want of service of summons is a direct attack. Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824.

[b] **An intervention by equity** to prevent an injustice resulting from further execution is not a collateral attack. Shanley v. York (Tex. Civ. App.), 118 S. W. 146.

[c] **An attempt to stay supplementary proceedings** after judgment on a note, on the ground that a suit is pending to compel the judgment creditor to surrender the note is a collateral attack. McCray v. Whitney, 56 Ind. App. 94, 104 N. E. 979.

In some jurisdictions such proceedings are deemed collateral. See *infra*, XVI, B. 4, a, (II).

23. **U. S.**—Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066. **Ark.** Monroe County v. Brown, 117 Ark. 524, 177 S. W. 40; Desha County v. Newman, 33 Ark. 788. **Cal.**—Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Le Mesnager v. Variel, 144 Cal. 463, 77 Pac. 988; Bergin v. Haight, 99 Cal. 52, 56, 33 Pac. 760. **Colo.**—Weiss v. Ahrens, 24 Colo. App. 531, 135 Pac. 987; Symes v. Charpiot, 17 Colo. App. 463, 69 Pac. 311. **Conn.**—Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688. **Ill.**—Dibble v. Winter, 247 Ill. 243, 93 N. E. 145; Reizer v. Mertz, 223 Ill. 555, 79 N. E. 283. **Ind.**—Young v. Wiley, 183 Ind. 449, 107 N. E. 278; Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687; Soules v. Robinson, 60 N. E.

726; Cotterell v. Koon, 151 Ind. 182, 51 N. E. 235; Kirby v. Kirby, 142 Ind. 419, 41 N. E. 809; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211; Penrose v. McKenzie, 116 Ind. 35, 18 N. E. 384; Harmon v. Moore, 112 Ind. 221, 13 N. E. 718; Deputy v. Dollarhide, 42 Ind. App. 554, 86 N. E. 344; Graham v. Loh, 32 Ind. App. 183, 69 N. E. 474. **Ia.**—Linsley v. Strang, 149 Iowa 690, 126 N. W. 941, 128 N. W. 932; Kwentsky v. Sirovy, 142 Iowa 385, 121 N. W. 27; Stewart Lumber Co. v. Downs, 142 Iowa 420, 120 N. W. 1067. **La.**—Klein v. Dennis, 36 La. Ann. 284. **Minn.**—Vaule v. Miller, 69 Minn. 440, 72 N. W. 452. **Miss.**—McKinney v. Adams, 95 Miss. 832, 50 So. 474; Sivley v. Summers, 57 Miss. 712; Crawford v. Redus, 54 Miss. 700. **Mont.** Jenkins v. Carroll, 42 Mont. 302, 112 Pac. 1064. **N. Y.**—Ford v. Clendenin, 215 N. Y. 10, 109 N. E. 124; Warren v. Union Bank, 157 N. Y. 259, 51 N. E. 1036; Forrester v. Strauss, 18 N. Y. Supp. 41. **N. C.**—Houser v. W. R. Bonsal & Co., 149 N. C. 51, 62 S. E. 776; Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431. **N. D.**—Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292. **Okla.** Jefferson v. Gallagher, 150 Pac. 1071. **Ore.**—Title Guarantee & Abstract Co. v. Nasburg, 58 Ore. 190, 113 Pac. 2. **S. C.**—New York Life Ins. Co. v. Mobley, 90 S. C. 552, 73 S. E. 1032. **Tex.** McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380; Buchanan v. Bilger, 64 Tex. 589; Patrucio v. Selkirk (Tex. Civ. App.), 160 S. W. 635; Holt v. Love (Tex. Civ. App.), 131 S. W. 857; Le Master v. Dalhart Real Estate Agency, 56 Tex. Civ. App. 302, 121 S. W. 185; Lane v. Moon, 46 Tex. Civ. App. 625, 103 S. W. 211; Carpenter v. Anderson, 33 Tex. Civ. App. 484, 77 S. W. 291; De Cordova v. Rodgers (Tex. Civ. App.), 67 S. W. 1042; Schneider v. Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541; International & G. N. R. Co. v. Moore (Tex. Civ. App.), 32 S. W. 379. **Utah.**—Doyle v. West Temple Terrace Co., 43 Utah 277, 135 Pac. 103; Mosby v. Gisborn, 17 Utah 257, 54 Pac.

ing not provided by law for the express purpose of attacking it.<sup>24</sup> The proceeding usually has an independent purpose and contemplates

121. Wash.—*Noble v. Aune*, 50 Wash. 73, 96 Pac. 688.

[a] A counterclaim filed in an action on the judgment seeking to set it aside because of jurisdictional defects is a direct attack. *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452; *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292.

[b] A cross-complaint seeking to vacate a decree setting aside a will, on the ground of fraud, is a direct attack upon that decree, when filed in a suit brought by the contestant of the will to quiet title to decedent's lands. *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 809.

[c] An answer and cross-bill setting up fraud and perjury in the judgment sued upon constitute a direct attack. *Patruccio v. Selkirk* (Tex. Civ. App.), 160 S. W. 635.

[d] A cross-bill to set aside a judgment on which a creditor's bill is based, on the ground that the defendant in the prior action at law was prevented through no fault of his own from presenting a good defense which he had, is a direct attack. *Congregation of the Resurrection v. Laibe*, 152 Ill. App. 417.

[e] The contest of a foreign will by a bill filed for that purpose is a direct attack. *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 115.

[f] Contradicting Recitals.—A suit brought for the very purpose of establishing by evidence aliunde, the untruthfulness of the recitals as to service, and to have the judgment declared void, is a direct attack. *Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413.

[g] An action to quiet title to land, attacking a divorce decree through which the adverse claimant's title was derived, is a direct attack upon such decree where the grounds set up are that it was not only based on stipulation obtained by fraud and duress practiced on the plaintiff, but also that it was altered after being passed. *Kwentsky v. Sirovy*, 142 Iowa 385, 121 N. W. 27.

[h] Correcting Judgment. — An equitable proceeding by a third party to correct a judgment as to its amount

on the ground of fraud and collusion is a direct attack. *Stewart Lumber Co. v. Downs*, 142 Iowa 420, 120 N. W. 1067.

[i] An action of trespass to try title which amounts to a petition to cancel a prior judgment on the ground of fraud, is a direct attack. *Graham v. East Texas Land & Improvement Co.* (Tex. Civ. App.), 50 S. W. 579.

24. U. S.—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959. Ala.—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *Friedman v. Shamblin*, 117 Ala. 454, 23 So. 821. Ariz.—*Tube City Min. & Mill. Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203. Ark.—*Clay v. Barnes*, 181 S. W. 503. Colo.—*Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824. Haw.—*Carey v. Hawaiian Lumber Co. Ltd.*, 21 Haw. 311. Ill.—*Cigler v. Keinath*, 167 Ill. App. 65. Ind.—*Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; *Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344; *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526; *City of Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007. Ky.—*City of Paducah v. Paducah Traction Co.*, 168 Ky. 198, 181 S. W. 1093; *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Shields' Admrs. v. Chesser*, 167 Ky. 532, 180 S. W. 968; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 694, 173 S. W. 109; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378. Miss.—*McKinney v. Adams*, 95 Miss. 832, 50 So. 474. Mo.—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Lovitt v. Russell*, 138 Mo. 474, 40 S. W. 123; *Truesdail v. McCormick*, 126 Mo. 39, 28 S. W. 885; *Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152; *Mueller v. Grunher*, 145 Mo. App. 611, 123 S. W. 469; *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628. Mont.—*Burke v. Interstate Sav. & Loan Assn.*, 25 Mont. 315, 64 Pac. 879. Neb.—*Dryden v. Parrotte*, 61 Neb. 329, 85 N. W. 287. N. D.—*Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737. Okla.—*Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372; *Continental Gin Co. v. De Bord*, 34 Okla. 66, 123 Pac. 159. Ore.—*Meinert v. Harder*, 39 Ore. 609, 65 Pac. 1056;

other relief than the overthrowing of the judgment,<sup>25</sup> though that may be necessary.<sup>26</sup>

**3. General Rule as to Collateral Attack.**—Orders, judgments and decrees of a court having jurisdiction of the subject-matter and the parties, however erroneous, being valid, binding and conclusive determinations of the matters in controversy, cannot in the absence of fraud or collusion be impeached in a collateral proceeding.<sup>27</sup>

*Morrill v. Morrill*, 22 Ore. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155. **Tex.**—*Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Estey & Camp v. Williams* (Tex. Civ. App.), 133 S. W. 470; *Schneider v. Sellers*, 25 Tex. Civ. App. 226, 61 S. W. 541. **Wash.** *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559.

[a] **Matters Dehors the Record.**—An attack upon a judgment for want of jurisdiction in the court to render it, predicated upon matters de hors the record is collateral. **Cal.**—*Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. **Ind.** *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13; *Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; *Cully v. Shirk*, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414; *Harmon v. Moore*, 112 Ind. 221, 13 N. E. 718; *Reid v. Mitchell*, 93 Ind. 469; *City of Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007. **Ky.**—*Thomas v. Ireland*, 88 Ky. 581, 11 S. W. 653; *Newcomb's Exrs. v. Newcomb*, 13 Bush 544, 26 Am. Rep. 222.

[b] **Res judicata and collateral attack** are sometimes confused. *Res judicata* is concerned only with final judgments on the merits and, admitting the validity of the prior judgment, it is concerned merely with the scope claimed for it as an adjudication. Collateral attack applies to every order made in the proceeding whether upon the merits or not, as well as to the final judgment, and denies any validity whatever to such orders and judgment. See *Bitzer v. Mercke*, 111 Ky. 299, 63 S. W. 771, and the title "*Res Judicata*."

**25. U. S.**—*Cohen v. Portland Lodge* No. 142, 152 Fed. 357, 81 C. C. A. 483; *Compton v. Jesup*, 68 Fed. 263, 15 C. C. A. 397, 31 U. S. App. 486. **Ala.** *Friedman v. Shamblin*, 117 Ala. 454, 23 So. 821. **Ark.**—*Clay v. Barnes*, 181 S. W. 303. **Cal.**—*Stambach v. Emerson*, 139 Cal. 282, 72 Pac. 991; *Lynch v.*

*Rooney*, 112 Cal. 279, 44 Pac. 565. **Colo.**—*Hughes v. Webster*, 52 Colo. 475, 122 Pac. 789. **Idaho.**—*O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20. **Ill.** *Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10. **Ind.**—*Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; *Exchange Bank v. Ault*, 102 Ind. 322, 1 N. E. 562; *Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344. **Ky.** *City of Paducah v. Paducah Traction Co.*, 168 Ky. 198, 181 S. W. 1093; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 694, 173 S. W. 109; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378; *Alford v. Guffy*, 115 S. W. 216. **La.**—*Meyer v. Moss*, 110 La. 132, 34 So. 332; *Slidell v. Germania Nat. Bank*, 27 La. Ann. 354. **Md.**—*Richardson v. State*, 2 Gill 439. **Mo.**—*Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152. **N. Y.**—*Wilcox v. Supreme Council*, 151 App. Div. 297, 136 N. Y. Supp. 377. **N. C.**—*Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569. **Ore.**—*Meinert v. Harder*, 39 Ore. 609, 65 Pac. 1056. **Tenn.**—*Reeves v. Hager*, 101 Tenn. 712, 50 S. W. 760. **Tex.**—*Newman v. Mackey*, 37 Tex. Civ. App. 85, 83 S. W. 31. **Wash.**—*Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

**26.** *O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20; *Wilcox v. Supreme Council*, 151 App. Div. 297, 136 N. Y. Supp. 377.

**27. U. S.**—*Ex parte Roe*, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. ed. 1217; *Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. ed. 1105; *United States v. Walker*, 109 U. S. 258, 3 Sup. Ct. 277, 27 L. ed. 927; *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Christmas v. Russell*, 5 Wall. 290, 304, 18 L. ed. 475; *Voorhees v. Jackson*, 10 Pet. 343, 9 L. ed. 448; *Lively v. Pierson*, 218 Fed. 401, 134 C. C. A. 189; *United States v. Rothstein*, 187 Fed. 268, 109 C. C. A. 521; *Harper v. Rankin*, 141 Fed. 626, 72 C. C. A. 320 (petition for certiorari denied, 200 U. S. 621); *Ryan v. Staples*, 76 Fed. 721, 23



4. What Proceedings Are Collateral. — a. *Proceedings Involving Enforcement of Judgment.* — (I.) In General. — All proceedings taken

- C. C. A. 541; Kansas City, Ft. S. & M. R. Co. v. Morgan, 76 Fed. 429, 21 C. C. A. 468; Foltz v. St. Louis & S. F. R. Co., 60 Fed. 316, 8 C. C. A. 635. Ala.—City of Huntsville v. Phillips, 191 Ala. 524, 67 So. 664; Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729; Pollard v. American Freehold Land Mtg. Co., 103 Ala. 289, 16 So. 801; McLaughlin v. Hardwick (Ala. App.), 70 So. 305; Hinds v. Wiles, 12 Ala. App. 596, 68 So. 556. Alaska.—*In re Decker's Estate*, 3 Alaska 106; Sylvester's Admr. v. Wilson's Admr., 2 Alaska 325; White's Guardians v. Martin, 2 Alaska 495. Ariz.—Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203. Ark.—Citizen's Bank v. Commercial Nat. Bank, 107 Ark. 142, 155 S. W. 102; Lewis v. St. Louis, I. M. & S. Ry. Co., 107 Ark. 41, 154 S. W. 198; Hall v. Morris, 94 Ark. 519, 127 S. W. 718; Boyd v. Roane, 49 Ark. 397, 5 S. W. 704; Evans v. Percifull, 5 Ark. 424. Cal. Cellulose Package Mfg. Co. v. Calhoun, 166 Cal. 513, 137 Pac. 238. Colo. Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512; People v. Board of Comrs., 7 Colo. App. 229, 42 Pac. 1032. D. C.—Degge v. Baxter, 41 App. Cas. 169; Morse v. United States, Use of Hine, 29 App. Cas. 433; Richmond & Danville R. Co. v. Gorman, 7 App. Cas. 91. Fla.—Lucy v. Deas, 59 Fla. 552, 52 So. 515. Ga.—Bowen v. Gaskins, 144 Ga. 1, 85 S. E. 1007; Flanders v. Sutton, 143 Ga. 764, 85 S. E. 914; Hood v. Hood, 143 Ga. 616, 85 S. E. 849; Wade v. Hurst, 143 Ga. 26, 84 S. E. 65. Haw.—Paris v. Kealooha, 11 Haw. 450. Ill.—Barrett v. Chicago Terminal Transfer R. Co., 271 Ill. 642, 111 N. E. 563; Kuzak v. Anderson, 267 Ill. 609, 108 N. E. 662; O'Brien v. People, 216 Ill. 354, 75 N. E. 108; People v. Talmadge, 194 Ill. 67, 61 N. E. 1049; Davies v. Gibbs, 174 Ill. 272, 51 N. E. 220; Clark v. Kern, 146 Ill. 348, 35 N. E. 60; People v. Seelye, 146 Ill. 189, 32 N. E. 458; Harris v. Lester, 80 Ill. 307; Buckmaster v. Ryder, 12 Ill. 207; Swiggart v. Harber, 5 Ill. 364, 39 Am. Dec. 418; Buckmaster v. Jackson, 4 Ill. 104; The American Bonding Co. v. Reid, 168 Ill. App. 646; Kanorowski v. People, 113 Ill. App. 468; Bermudez Asphalt Pav. Co. v. Gibson, 106 Ill. App. 16; Koren v. Roemheld, 7 Ill. App. 646. Ind.—Young v. Wiley, 183 Ind. 449, 107 N. E. 278; Frankel v. Voss (Ind. App.), 109 N. E. 55. Ia.—Commercial State Bank v. Pierce, 158 N. W. 481; Tucker v. Stewart, 147 Iowa 294, 126 N. W. 183; Smith v. Keeley, 146 Iowa 660, 125 N. W. 669; Ruppert v. McLachlan, 122 Iowa 343, 98 N. W. 153. Ky.—Villier v. Watson's Admx., 168 Ky. 631, 182 S. W. 869; Paducah v. Paducah Traction Co., 168 Ky. 198, 181 S. W. 1093; Torian v. Caldwell, 167 Ky. 670, 181 S. W. 373; Shields' Admx. v. Chesser, 167 Ky. 532, 180 S. W. 968; Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797; Cox v. Interstate Coal Co., 157 Ky. 373, 163 S. W. 231; Bamberger v. Green, 146 Ky. 258, 142 S. W. 384; Duff v. Hagins, 146 Ky. 792, 143 S. W. 378; Barnett v. Bauer Cooperage Co., 145 Ky. 163, 140 S. W. 146; Sublett v. Gardner, 144 Ky. 190, 137 S. W. 864; Buchanan v. Henry, 143 Ky. 628, 137 S. W. 222; Staples v. Shiver, 122 S. W. 826; Feltner v. Huff, 118 S. W. 936; Dennis v. Alves, 117 S. W. 287; Derr v. Wilson, 84 Ky. 14; Paul v. Smith, 82 Ky. 451; Bennett v. Tierney, 78 Ky. 580; Com. v. Morrison, 4 Bibb 336; Melloy v. Speed, 4 Bibb 85; Bustard v. Gates, 4 Dana 429; Luckett v. Gwathmey, Litt. Sel. Cas. 121; Miller v. Farmers' Bank, 25 Ky. L. Rep. 373, 75 S. W. 218; Berry v. Foster, 22 Ky. L. Rep. 745, 58 S. W. 709; Sorrell v. Samuels, 20 Ky. L. Rep. 1498, 49 S. W. 762. Me.—Toothaker v. Greer, 92 Me. 546, 43 Atl. 498. Md. Mister v. Thomas, 122 Md. 445, 89 Atl. 844; Emmert v. Middlekauff, 118 Md. 399, 84 Atl. 540; Clark v. Southern Can. Co., 116 Md. 85, 81 Atl. 271. Mich.—Haven v. Owens, 121 Mich. 51, 79 N. W. 938, 80 Am. St. Rep. 477. Minn.—State v. Ries, 123 Minn. 397, 143 N. W. 981; Schmitt v. Dahl, 88 Minn. 506, 93 N. W. 665; Breault v. Merrill & Ring Lumb. Co., 72 Minn. 143, 75 N. W. 122; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 197 (*affirmed*, 80 Minn. 248, 83 N. W. 156, 384). Mo.—Harter v. Petty, 266 Mo. 296, 181 S. W. 39; Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Rosenheim v. Hartsock, 90 Mo. 357, 2 S. W. 173; Lewis v. Morrow, 89 Mo. 174, 1 S. W. 93; Hardin v. Lee, 51 Mo.

with a view to enforcing the judgment or decree are collateral thereto, and attacks made upon the judgment in the course of such proceedings are collateral.<sup>28</sup>

241; *Martin v. McLean*, 49 Mo. 361; *Ball v. Farmers' & Traders' Bank*, 188 Mo. App. 383, 174 S. W. 196; *Potter v. Whitten*, 161 Mo. App. 118, 142 S. W. 453. **Neb.**—*In re Nelson's Est.*, 81 Neb. 363, 115 N. W. 1087; *Becker v. Linton*, 80 Neb. 655, 114 N. W. 928; *Banking House of A. Cas-tetter v. Dukes*, 70 Neb. 648, 97 N. W. 805; *Dryden v. Parrotte*, 61 Neb. 339, 85 N. W. 287; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190; *Douglas County v. Keller*, 48 Neb. 317, 67 N. W. 195; *Ripley v. Larson*, 43 Neb. 687, 62 N. W. 39; *Smithson v. Smithson*, 37 Neb. 535, 56 N. W. 300, 40 Am. St. Rep. 504; *Taylor v. Coots*, 32 Neb. 30, 48 N. W. 964; *Miles v. Ballantine*, 4 Neb. (Unof.) 171, 93 N. W. 708. **N. J.**—*Palmer v. Board*, 77 N. J. L. 143, 71 Atl. 285; *Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201; *In re Dreier's Estate*, 83 N. J. Eq. 618, 92 Atl. 51; *Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815. **N. C.**—*Johnson v. Whilden*, 88 S. E. 223. **Okla.** *Coblentz v. Cochran*, 44 Okla. 158, 143 Pac. 658; *Bowen v. Carter*, 42 Okla. 565, 144 Pac. 170. **Pa.**—*In re Gottesfeld*, 245 Pa. 314, 91 Atl. 494; *In re Metzger's Estate*, 242 Pa. 69, 88 Atl. 915; *Merchants' & Mechanics' Bank v. Poore*, 231 Pa. 362, 80 Atl. 525; *Haines v. Hall*, 209 Pa. 104, 58 Atl. 125; *Dauberman v. Hain*, 196 Pa. 435, 46 Atl. 442; *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517; *Kennedy v. Baker*, 159 Pa. 146, 28 Atl. 252; *Sweeney v. Girolo*, 154 Pa. 609, 26 Atl. 600; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679. **R. I.**—*Watson Co. v. Citizens' Concrete Co.*, 28 R. I. 472, 68 Atl. 310. **S. D.**—*Green v. Sabin*, 12 S. D. 496, 81 N. W. 904. **Tenn.**—*Puckett v. Wynns*, 132 Tenn. 513, 178 S. W. 1184. **Tex.**—*White v. Bedell* (Tex. Civ. App.), 173 S. W. 624; *Hill & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67; *Blunt v. Houston Oil Co.* (Tex. Civ. App.), 146 S. W. 248; *Minchew v. Case* (Tex. Civ. App.), 143 S. W. 366; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158. **W. Va.**—*Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933. **Wis.**—*Cody v. Cody*, 98 Wis. 445, 74 N. W. 217. **Wyo.**—*Holt v. City of*

*Cheyenne*, 22 Wyo. 212, 137 Pac. 876.

[a] **Collateral Attacks Not Encour-aged.**—Collateral attacks upon judicial proceedings should not be encouraged, because if successful, the tendency is generally to bring courts into disrepute and property rights thereby afterward become wrested from innocent purchasers. *Jewett v. Iowa Land Co.*, 64 Minn. 531, 67 N. W. 639.

[b] "This rule has its foundation (1) in the policy of the law and is intended to give permanency to all judicial transactions and rights acquired thereunder." *Harris v. Lester*, 80 Ill. 307. (2) In *Crawford v. McDonald*, 88 Tex. 626, 630, 33 S. W. 325, the court said: "On grounds of public policy the courts in order to protect property rights, apply the rule afore-said, which precludes inquiry into facts dehors the record for the purpose of showing the invalidity of the judgment and therefore for all practical purposes in such collateral attack the judgment is held valid."

28. **U. S.**—*Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518; *Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751; *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152; *Cushman v. Warren-Scharf Asphalt Pav. Co.*, 220 Fed. 857, 135 C. C. A. 289; *Tucker v. Hubbert*, 196 Fed. 849, 117 C. C. A. 365; *Kaill v. Board of Directors*, 194 Fed. 73, 114 C. C. A. 151; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *Anderson v. Elliott*, 101 Fed. 609, 41 C. C. A. 521. **Ark.**—*Ex parte Woods*, 3 Ark. 532. **Cal.**—*Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259. **Colo.**—*People v. Board of Comrs.*, 7 Colo. App. 229, 42 Pac. 1032. **Conn.**—*Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7. **Del.**—*Mitchell, Vance & Co. v. Garrett, Ferris & Co.*, 5 Houst. 34. **D. C.**—*Collins v. McBlair*, 29 App. Cas. 354; *Clark v. Barber*, 21 App. Cas. 274; *Willett v. Otterback*, 9 Mackey 324. **Ga.**—*Evans v. Callaway*, 140 Ga. 538, 79 S. E. 116. **Ill.**—*Aldridge v. Matthews*, 257 Ill. 202, 100 N. E. 536; *Spring Creek Drainage Dist. v. Joliet*, 238 Ill. 521, 87 N. E. 394; *Glover v. People*, 188 Ill. 576, 59 N. E. 429;

*Perisho v. People*, 185 Ill. 334, 56 N. E. 1134; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468; *Town of Lyons v. Coodeslag*, 89 Ill. 529; *Ray v. Cook*, 31 Ill. 396; *Cigler v. Keimath*, 167 Ill. App. 65. **Ind.**—*Wilson v. Fahnstock*, 44 Ind. App. 35, 86 N. E. 1037. **Ia.** *Capital Food Co. v. Globe Coal Co.*, 116 N. W. 808; *Kerr v. Kennedy*, 119 Iowa 239, 93 N. W. 353. **Ky.**—*Shields' Admrs. v. Chesser*, 167 Ky. 532, 180 S. W. 968; *Rogers v. Rogers*, 15 B. Mon. 364; *Couchman v. Bush*, 27 Ky. L. Rep. 108, 83 S. W. 1136. **Md.**—*James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. 386. **Mich.**—*Morley Bros. v. Stringer*, 133 Mich. 690, 95 N. W. 978; *Griffin v. McGavin*, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564; *Reynolds v. Reynolds*, 115 Mich. 378, 73 N. W. 425. **Miss.**—*Wright v. Edwards Hotel & City Ry. Co.*, 101 Miss. 470, 58 So. 332. **Mo.**—*Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152. **Neb.**—*Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 74 N. W. 620; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190. **N. J.**—*Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. **N. Y.**—*Guliano v. White-rack*, 9 Misc. 562, 30 N. Y. Supp. 415, 24 Civ. Proc. 55, 1 Ann. Cas. 75, 62 N. Y. St. 84. **N. C.**—*Brown v. Harding*, 86 S. E. 1010. **Ohio.**—*Cleveland Cooperative Stove Co. v. Mehling*, 21 Ohio Cir. Ct. 60, 11 Ohio Cir. Dec. 400. **Pa.**—*Appeal of Plains Tp.*, 206 Pa. 556, 56 Atl. 60; *Hughes v. Schreiner*, 202 Pa. 488, 52 Atl. 30; *Blau v. Bernagozzi*, 54 Pa. Super. 111. **R. I.** *Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625. **Tex.**—*Brown v. Foster Lumber Co. (Tex. Civ. App.)*, 178 S. W. 787. **Wash.**—*State v. Oregon Ry. & Nav. Co.*, 123 Pac. 3; *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117. **W. Va.** *Central District & Printing Tel. Co. v. Parkersburg, etc. Ry. Co.*, 85 S. E. 65.

[a] **A creditor's bill to enforce the judgment.** *Glover v. People*, 188 Ill. 576, 59 N. E. 429; *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 74 N. W. 620.

[b] **An application for execution is collateral to the judgment.** *Lee v. Watkins*, 3 Abb. Pr. (N. Y.) 243, 13 How. Pr. 178.

[c] **In supplementary proceedings the validity of a judgment, not void,**

cannot be questioned. *Toogood v. Russell*, 3 Neb. (Unof.) 189, 91 N. W. 249; *Clinkscale v. Hall*, 15 S. C. 602.

[d] **Garnishment proceedings based on the judgment are collateral to it.** *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500.

[e] **When presented for classification as a demand against the estate of a deceased defendant, the judgment cannot be attacked for irregularities in the proceedings.** *Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152; *Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625.

[f] **Writ of Restitution.**—An application for a writ of restitution and to quash a writ of assistance is a collateral attack upon the judgment. *Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380.

[g] **Motion to quash execution on a judgment is collateral thereto.** *Haywards v. Pimentel*, 107 Cal. 386, 40 Pac. 545; *Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078.

[h] **An affidavit of illegality filed on a levy of execution, is collateral to the judgment upon which execution issued.** *Miller v. A. M. Watson & Co.*, 135 Ga. 408, 69 S. E. 555; *Bedingfield v. First Nat. Bank*, 4 Ga. App. 197, 61 S. E. 30.

[i] **In a proceeding to collect an assessment no inquiry can be made into the validity of the assessment unless it is void.** *Aldridge v. Matthews*, 257 Ill. 202, 100 N. E. 536; *Glover v. People*, 188 Ill. 576, 59 N. E. 429; *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Clark v. Kern*, 146 Ill. 348, 35 N. E. 60.

[j] **Actions to collect taxes assessed are collateral to the proceedings in which the assessment was made.** *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116.

[k] **Where a purchaser at a judicial sale seeks to avoid the purchase on the ground that the judicial proceedings were irregular, it amounts to a collateral attack upon the order of sale.** *Ill.*—*Wing v. Dodge*, 80 Ill. 564. **N. J.** *Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815. **N. Y.**—*Matter of Dolan*, 88 N. Y. 309; *Herbert v. Smith*, 6 Lans. 493. **Pa.**—*Richter v. Fitzsimmons*, 4 Watts 251.

[l] **Criminal proceedings against the marshal based upon his attempt to execute the judgment constitute a col-**



A contempt proceeding based upon disobedience of the provisions of a judgment or decree is a collateral proceeding.<sup>29</sup>

(II.) Enjoining Enforcement of Judgment. — A proceeding to enjoin the enforcement of the judgment is regarded in many jurisdictions as a direct attack upon the judgment;<sup>30</sup> in some states, however, it is considered collateral, and, as such, cannot prevail in the absence of want of jurisdiction, fraud, or some other defect rendering the judgment void.<sup>31</sup>

(III.) Mandamus Proceedings. — An attack upon a judgment is collateral where made in proceedings for a writ of mandamus to compel obedience to it,<sup>32</sup> or to compel action in aid of its execution, as for

lateral attack on the judgment. *Anderson v. Elliott*, 101 Fed. 609, 41 C. C. A. 521.

29. *State ex rel. Tuthill v. Giddings*, 98 Minn. 102, 107 N. W. 1048; *Ray v. New York Bay Extension Ry. Co.*, 155 N. Y. 102, 49 N. E. 662, 20 App. Div. 539, 47 N. Y. Supp. 301; *Ketchum v. Edwards*, 6 App. Div. 160, 39 N. Y. Supp. 1012.

[a] Attachment for contempt for violating an injunction is collateral to the original decree. *Drury v. Ewing*, 7 Fed. Cas. No. 4,095.

[b] Enforcing Collateral Agreements.—An attempt to enforce agreements made in connection with the original action but which are not concluded by the judgment therein does not constitute a collateral attack on the judgment. *Thayer v. Mowry*, 36 Me. 287.

[c] Agreement To Discontinue.—An action brought for breach of an agreement to discontinue a suit does not constitute a collateral attack upon the judgment. *Smith v. Palmer*, 6 Cush. (Mass.) 513. But see *Farrington v. Bullard*, 40 Barb. (N. Y.) 512.

[d] A suit to charge as trustees persons who fraudulently combined to purchase at an execution sale is not a collateral attack on the decree. *Fisher v. Wood*, 65 Tex. 199.

30. See *supra*, XVII, A, 2, a.

31. *Colo.*—*Mentzer v. Ellison*, 7 Colo. App. 315, 43 Pac. 464. *Ind.*—*Davis v. D. M. Osborne & Co.*, 156 Ind. 86, 59 N. E. 279; *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12; *Krug v. Davis*, 85 Ind. 309; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. *Ia.*—*Lang v. Dunn*, 145 Iowa 363, 124 N. W. 192. *Miss.*—*A. B. Smith Co. v. Holmes County Bank*, 18 So. 847. *Mo.*—*School Dist. No. 58 v. Chappel*, 155 Mo. App. 498,

135 S. W. 75; *Missouri, K. & T. Ry. Co. v. Warden*, 73 Mo. App. 117. *Neb.* *Gillilan v. Murphy*, 49 Neb. 779, 69 N. W. 98. *Okla.*—*Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372. *S. C.*—*Kirk v. Duren*, 45 S. C. 597, 23 S. E. 954. *Tex.*—*Lester v. Atwood*, 166 S. W. 389; *Cariker v. Dill* (Tex. Civ. App.), 140 S. W. 843; *Loan & Deposit Co. v. Campbell*, 27 Tex. Civ. App. 52, 65 S. W. 65. *Va.*—*Hudson v. Yost*, 88 Va. 347, 13 S. E. 436.

As to ground for enjoining the enforcement of judgment see *supra*, XV, and the title "Judgments and Decrees, Enforcement of."

As to grounds of collateral attack, see *infra*, XVII, A, 7.

[a] Enjoining Writ of Possession. A bill to enjoin the execution of a writ of possession issued in an ejectment suit, treated as collateral to the judgment in ejectment. See *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706.

32. *Appeal of Plains Tp.*, 206 Pa. 556, 56 Atl. 60.

[a] An attempt by writ of mandamus to compel auditors to audit the judgment is a collateral proceeding. *Town of Lyons v. Cooledge*, 89 Ill. 529.

[b] Mandamus to compel a company to operate its cars on a certain track is collateral to an order of the board of supervisors for the removal of the track as a nuisance. *Wright v. Edwards Hotel & City Ry. Co.*, 101 Miss. 470, 58 So. 332.

[c] Execution of Deed.—Where certain premises are acquired by decree quieting title thereto, a proceeding by mandamus to force the board of trustees to execute and deliver a deed to such premises is collateral to the decree. *Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751.

example by requiring the levy of a tax or assessment to pay the judgment,<sup>33</sup> or the issuance of warrants for the same purpose.<sup>34</sup>

(IV.) Actions on Judgment. — All actions brought directly upon the judgment are collateral to it.<sup>35</sup>

b. *Vacating or Setting Aside in Equity.* — A suit in equity to vacate or annul a judgment, which is, in most jurisdictions, regarded as a direct proceeding,<sup>36</sup> is in some states held to be a collateral one.<sup>37</sup>

33. **U. S.**—*Chanute v. Trader*, 132 U. S. 210, 10 Sup. Ct. 67, 33 L. ed. 345; *United States v. Knox County Court*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152; *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Davenport v. United States*, 9 Wall. 409, 19 L. ed. 701; *Supervisors v. United States*, 4 Wall. 435, 18 L. ed. 419; *Tucker v. Hubbert*, 196 Fed. 849, 117 C. C. A. 365; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429. **Colo.** *Rio Grande County v. Burpee*, 24 Colo. 57, 48 Pac. 339; *People v. Board of Comrs.*, 7 Colo. App. 229, 42 Pac. 1032. **Ill.**—*Spring Creek Drainage Dist. v. Joliet*, 238 Ill. 521, 87 N. E. 394. **Ia.** *Edmundson v. Independent School Dist.*, 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224. **Kan.**—*Equitable Inv. Trust Co. v. Board of Comrs.*, 86 Kan. 708, 121 Pac. 1097; *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439. **Neb.**—*Stenberg v. State*, 48 Neb. 209, 67 N. W. 190. **N. M.**—*Territory ex rel. Coler v. Board of Comrs.*, 14 N. M. 134, 89 Pac. 252; *United States Trust Co. v. Territory*, 10 N. M. 416, 62 Pac. 987. **N. Y.**—*People v. Buffalo*, 21 N. Y. Supp. 598. **N. C.**—*Bear v. Brunswick County*, 122 N. C. 434, 29 S. E. 719. **S. D.**—*Howard v. Huron*, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493. **Tex.**—*City of Sherman v. Langham*, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961; *Harkness v. Hutcherson*, 90 Tex. 383, 38 S. W. 1120. **Wash.**—*Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570.
34. **U. S.**—*Kaill v. Board of Directors*, 194 Fed. 73, 114 C. C. A. 151. **Cal.**—*Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259. **Neb.**—*Stenberg v. State*, 48 Neb. 299, 67 N. W. 190.
35. **U. S.**—*Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518; *Framleroy v. Linn*, 210 U. S. 230, 28 Sup. Ct. 64, 52 L. ed. 1039; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *Cushman v. Warren-Scharf Asphalt Pav. Co.*, 220 Fed. 857, 135 C. C. A. 289; *Hatcher v. Hendrie & Bolthaff Mfg. & Supply Co.*, 133 Fed. 267, 68 C. C. A. 19; *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293. **Colo.**—*People v. McKelvey*, 19 Colo. App. 131, 74 Pac. 533. **Conn.**—*Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7. **Del.**—*Mitchell, Vance & Co. v. Garrett, Ferris & Co.*, 5 Houst. 34. **D. C.**—*Clark v. Barber*, 21 App. Cas. 274. **Ga.**—*Porter v. Rountree*, 111 Ga. 369, 36 S. E. 761. **Haw.**—*Kapiolani's Est. v. Ateherley*, 14 Haw. 651. **Ill.** *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; *Calhoun v. Ross*, 60 Ill. App. 309. **Ky.**—*Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Rogers v. Rogers*, 15 B. Mon. 364. **Mass.**—*Pearse v. Hill*, 163 Mass. 493, 40 N. E. 765; *Hawes v. Hathaway*, 14 Mass. 233. **Mich.**—*Cole v. Potter*, 135 Mich. 326, 97 N. W. 774, 106 Am. St. Rep. 398; *Central Nat. Bank v. Graham*, 118 Mich. 488, 76 N. W. 1042. **Mo.**—*Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152; *Wise v. Loring*, 54 Mo. App. 258. **N. J.**—*Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. **N. Y.** *Schwabe v. Herzog*, 161 App. Div. 712, 146 N. Y. Supp. 644. **N. C.**—*Brown v. Harding*, 86 S. E. 1010. **Pa.**—*Hughes v. Schreiner*, 202 Pa. 488, 52 Atl. 30; *Toomey v. Rosansky*, 11 Pa. Super. 506. **Tex.**—*Young v. Bank of Miami (Tex. Civ. App.)*, 175 S. W. 1102.
- [a] *Assumpsit* on the judgment. *Bermudez Asphalt Pav. Co. v. Gibson*, 106 Ill. App. 6.
- [b] *Debt* on a judgment. *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468; *Newman v. Mackey*, 37 Tex. Civ. App. 85, 83 S. W. 31.
- [c] *An action to recover costs* awarded by a judgment is a collateral proceeding. *Maxwell v. Quimby*, 90 Mo. App. 469.
36. See *supra*, XVII, A, 2, a.
37. *Harrod v. Harrod*, 167 Ky. 308,

c. *Actions Growing Out of the Proceedings.*—(I.) Generally. Attempts to assail a judgment are collateral to it when made in actions involving the enforcement of some obligation growing out of the judgment itself or out of the proceedings in the case in which the judgment was rendered.<sup>38</sup> Thus an action on a bond is collateral to the proceeding in which the bond was given,<sup>39</sup> and an action for dam-

180 S. W. 797; *Johnson v. Jones*, 2 Neb. 126.

[a] In *Baker v. Baker*, *Eccles & Co.*, 162 Ky. 683, 694, 173 S. W. 109, a separate action was filed attacking the validity of a domestic judgment and the point was made that the procedure constituted a direct and not a collateral attack upon the judgment. In overruling that contention the court said: "We are also clear that the attack made on this Kentucky judgment was a collateral attack, as a direct attack on a judgment can only be made in the manner pointed out in the Code; that is to say, by prosecuting an appeal or by proceedings had under the Code and in the manner pointed out in sections 344, 414 and 518 for the modification or vacation of judgments. An attack made on a judgment in any other way is a collateral attack."

[b] A suit instituted at a subsequent term, to vacate or annul the judgment, is a collateral attack. *Einstein v. Strother* (Mo. App.), 182 S. W. 122.

[c] **Distinction Between Parties and Third Persons.**—In *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303, the court held that where a bill in chancery is filed to set aside an administrator's sale, the proceeding should not, perhaps, be regarded as collateral to the former suit so far as it relates to the parties to that suit, but as to purchasers, whose title derived from the sale is sought to be divested, it is as purely collateral as an action of ejectment.

[d] Where acts done pursuant to an order are attempted to be annulled by a suit in equity, this constitutes a collateral attack upon the order. *Cody v. Cody*, 98 Wis. 445, 74 N. W. 217.

38. **U. S.**—*Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000. **Ala.**—*Hinds v. Wiles*, 12 Ala. App. 596, 68 So. 556. **Cal.** *Bostic v. Love*, 16 Cal. 69. **Colo.** *Hughes v. Webster*, 52 Colo. 475, 122 Pac. 789. **Ill.**—*Davies v. Coryell*, 37

Ill. App. 505. **Md.**—*Clark v. Southern Can. Co.*, 116 Md. 85, 81 Atl. 271. **N. J.** *Brantingham v. Brantingham*, 12 N. J. Eq. 160. **N. D.**—*Leach v. Rolette County*, 29 N. D. 593, 151 N. W. 768.

[a] In an action on a note given in payment of a judgment any attempt to impeach the judgment is a collateral attack. *Mitchell v. State Bank*, 2 Ill. 526; *Wallace v. Usher*, 4 Bibb (Ky.) 508.

[b] **Enforcing Stockholder's Liability.**—Attacks upon a judgment against a corporation are collateral thereto when made in an action to enforce the stockholder's liability determined by the judgment. *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293.

[c] A proceeding to cancel a mortgage is collateral to a judgment, the satisfaction of which was a part of the consideration for the mortgage. *Mathias v. Miller*, 164 Ill. App. 113.

[d] A supplemental petition to assess the cost of land condemned is collateral to the condemnation proceedings. *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053.

[e] A suit for the price of property sold pursuant to a judgment is collateral to the judgment. *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773.

[f] A proceeding to redeem from a mortgage foreclosure is collateral to the foreclosure decree. *Cohen v. Portland Lodge*, 152 Fed. 357, 81 C. C. A. 483.

39. *Ruckman v. State*, 44 Okla. 160, 143 Pac. 1050; *State ex rel. Hankin v. Holt*, 42 Okla. 472, 141 Pac. 969.

[a] **Appeal Bond.**—An action on an appeal bond is collateral to the judgment rendered in the case in which the bond was given. **Cal.**—*Bostic v. Love*, 16 Cal. 69. **Colo.**—*Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291. **Ill.**—*Trogon v. Cleveland Stone Co.*, 53 Ill. App. 206; *Davis v. Coryell*, 37 Ill. App. 505. **Ind.**—*Sturgis v. Rogers*, 26 Ind. 1.

[b] **Action on Administrator's Bond.**



ages on the ground that a prior judgment had been fraudulently obtained, is a collateral attack upon such judgment.<sup>40</sup>

(II.) Criminal Prosecutions.—But the state in prosecuting a party for criminal conduct, such as fraud or perjury, in obtaining the judgment does not collaterally attack it.<sup>41</sup>

d. *Recovering Money Paid in Satisfaction*.—A proceeding to recover money paid in satisfaction of a judgment is collateral thereto.<sup>42</sup>

e. *Second Action on Same Subject-Matter*.—Another action on the same subject-matter is collateral to the prior judgment.<sup>43</sup>

f. *Revivor of Judgment*.—Attacks made upon a judgment in proceedings to revive it by seire facias or otherwise, are deemed collateral.<sup>44</sup>

An answer to complaint on an administrator's bond is collateral to the judgment of the probate court settling the administrator's account. *Bonner v. Common*, 71 Ark. 480, 77 S. W. 692.

[c] An action on the bond of a trustee appointed pursuant to a decree in equity is collateral to the decree (*Richardson v. State*, 2 Gill [Md.] 439), and to the order ratifying the trustee's audit. *State v. Graham*, 115 Md. 520, 81 Atl. 31.

[d] A suit on clerk's bond for exacting illegal fees is not a collateral attack on the judgment for costs. *State v. Stevens*, 163 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482.

[e] *Determining Nature of Judgment*.—In an action on an attachment bond, the rule against collateral attack is not violated by a mere examination of the face of the attachment judgment to determine its nature. *Downs v. American Surety Co. (Minn.)*, 156 N. W. 5.

40. *Conn.*—*Peck v. Woodbridge*, 3 Day 30. *Ind.*—*Schultz v. Schultz*, 136 Ind. 323, 36 N. E. 126; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223. *Kan.*—*Horne v. Schinstock*, 80 Kan. 136, 101 Pac. 996. *Mo.*—*New Madrid County v. Phillips*, 125 Mo. 61, 28 S. W. 321. *Ore.*—*Purdy v. Winters' Estate*, 156 Pac. 285.

41. *United States v. Bradford*, 148 Fed. 413, since in such case the validity of judgment or decree so obtained is not questioned.

42. *Ala.*—*Hinds v. Wiles*, 12 Ala. App. 596, 68 So. 556. *Conn.*—*Brunson v. Bacon*, 1 Root 210; *Peck v. Woodbridge*, 3 Day 30; *Carter v. First Ecclesiastical Society*, 3 Conn. 455. *Me.*—*Morton v. Chandler*, 7 Greenl. 44. *Mass.*—*Loring v. Mansfield*, 17 Mass.

394; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218. *Mo.*—*New Madrid County v. Phillips*, 125 Mo. 61, 28 S. W. 321. *Tex.*—*Brooks v. Powell (Tex. Civ. App.)*, 29 S. W. 809.

[a] Where taxes were paid in accordance with an assessment an action to recover the taxes so paid was considered collateral to the assessment. *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140, 31 C. C. A. 427; *Cresswell Ranch & Cattle Co. v. Roberts (Tex.)*, 27 S. W. 737.

43. *U. S.*—*Morris v. Travelers' Ins. Co.*, 189 Fed. 211. *Ariz.*—*Tube City Min. & Mill. Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203. *Cal.*—*Stambaugh v. Emerson*, 139 Cal. 282, 72 Pac. 991. *Colo.*—*Affolter v. Rough & Ready Irrigating Ditch Co.*, 60 Colo. 519, 154 Pac. 738. *N. Y.*—*Smith v. Kelly*, 2 Hall 217; *Murray v. Murray*, 5 Johns. Ch. 60. *Ore.*—*Johnstone v. Chapman Timber Co.*, 156 Pac. 286.

[a] *Second Probate*.—A petition to reprobate a will upon the assumption that it has never been probated is a collateral proceeding. *In re Warfield's Will*, 22 Cal. 51, 83 Am. Dec. 49.

[b] Where the effect of a decree as *res judicata* was sought to be avoided in an action at law by showing that the parties to the prior suit were mistaken as to the facts involved therein, this was regarded as a collateral attack on the prior decree. *Corbett v. Craven*, 196 Mass. 319, 82 N. E. 37.

As to merger or bar, see *infra*, XVII. B.

As to *res judicata*, see the title "*Res Judicata*."

44. *U. S.*—*Blankenship v. King*, 157

*g. Judgment as Basis of Title or Right.* — (I.) In General. — Whenever a judgment is introduced in evidence or relied upon in another proceeding as the basis of a right or title, any objection drawing in question its validity is a collateral attack,<sup>45</sup> unless its validity is put in issue by the pleadings in such a way as to constitute a direct attack upon it.<sup>46</sup>

(II.) In Particular Proceedings. — Falling under the rule are the numerous cases wherein judgments are attacked when the titles or rights acquired through them are asserted as a basis of action or as a defense in such actions or proceedings as ejectment,<sup>47</sup> trespass to try

Fed. 676, 85 C. C. A. 348; *Foster v. Crawford*, 80 Fed. 991; *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. 790. Colo.—*Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027. Del.—*Frankel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. D. C.—*Willett v. Otterback*, 9 Mackey 324. Ga.—*Weaver v. Webb*, Galt & Kellogg, 3 Ga. App. 726, 60 S. E. 367. Ill.—*Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 829; *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188. Kan.—*Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 329. Mo.—*Reyburn v. Handlan*, 165 Mo. App. 412, 147 S. W. 846; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111. Mont.—*Haupt v. Simington*, 27 Mont. 480, 71 Pac. 672. Neb.—*Bussing v. Taggart*, 73 Neb. 787, 103 N. W. 430. N. C.—*Smathers v. Sprouse*, 144 N. C. 637, 57 S. E. 392. Pa.—*Gees v. Shannon*, 20 Watts 71. Tex.—*Gallagher v. Teuscher & Co. (Tex. Civ. App.)*, 186 S. W. 409.

But see *Waterman v. Bash*, 46 Wash. 122, 89 Pac. 556.

[a] Where want of service in the original action was urged by way of defense to a petition to revive it, this was considered not a collateral attack upon the judgment, in *Kaufman & Sons v. Foster*, 89 Miss. 388, 42 So. 667.

45. U. S.—*American Exp. Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525; *Western Glass Co. v. Schmertz Wire-Glass Co.*, 185 Fed. 788, 109 C. C. A. 1; *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421; *Rhino v. Emery*, 65 Fed. 826. Ark.—*Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983. Colo.—*Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438. Ga.—*Hood v. Hood*, 143 Ga. 616, 85 S. E. 849. Ill.—*Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304; *Pestel v. Primm*, 109 Ill. 353. Ind.—*Clark v. Merriam*, 83

Ind. 58. Ky.—*Shields' Admrs. v. Chesser*, 167 Ky. 532, 180 S. W. 968; *Barnett v. Bauer Cooperage Co.*, 145 Ky. 163, 140 S. W. 146; *Dennis v. Alves*, 117 S. W. 287. Me.—*International Wood Co. v. Nat. Assur. Co.*, 99 Me. 415, 59 Atl. 544. Mo.—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628. Pa.—*Cierlinski v. Rys.*, 225 Pa. 312, 74 Atl. 172. Tenn.—*Pope v. Harrison*, 16 Lea 82. Tex.—*Blaske v. Settegast*, 58 Tex. Civ. App. 10, 123 S. W. 220. Wis.—*Cody v. Cody*, 98 Wis. 445, 74 N. W. 217.

[a] A suit to enjoin trespass on land is collateral to the judgment through which title to the land was acquired. *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378.

[b] A bill to restore a lost deed is collateral to the decree under which the original deed was made. *Pestel v. Primm*, 109 Ill. 353.

[c] A suit for infringement of patent is collateral to the proceedings for the issuance of the patent. *Western Glass Co. v. Schmertz Wire-Glass Co.*, 185 Fed. 788, 109 C. C. A. 1.

46. See *Morse v. Pickler*, 28 S. D. 612, 134 N. W. 809.

[a] Where fraud practiced in the prior judgment relied upon as the basis of title, is directly pleaded by the defendant as a ground for cancelling it, the proceedings are considered a direct attack. *Graham v. East Texas Land & Imp. Co. (Tex. Civ. App.)*, 50 S. W. 579. To the same effect *Doyle v. West Temple Terrace Co.*, 43 Utah 277, 135 Pac. 103. And see *Ia.*—*Kwentsky v. Sirovy*, 142 Iowa 385, 121 N. W. 27. N. J.—*Cowlen v. Bloomberg*, 69 N. J. L. 462, 55 Atl. 36. Wash.—*Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534.

47. U. S.—*Voorhees v. Jackson*, 10

title,<sup>48</sup> trespass,<sup>49</sup> action to quiet title,<sup>50</sup> or to remove a cloud on title,<sup>51</sup>

Pet. 449, 9 L. ed. 490; *Eltonhead v. Allen*, 119 Fed. 126, 55 C. C. A. 671; *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625. **Ala.**—*Roman v. Morgan*, 162 Ala. 133, 50 So. 273. But see *Shamlin v. Hall*, 123 Ala. 541, 26 So. 285. **Conn.**—*Brewster v. Denison*, 1 Root 231. **Ill.**—*Kruse v. Wilson*, 79 Ill. 333. **Ky.**—*Feltner v. Huff*, 118 S. W. 936; *Dennis v. Alves*, 117 S. W. 287. **Mass.** *Cutts v. Haskins*, 9 Mass. 543. **Mich.** *James E. Scripps' Corporation v. Parkinson*, 153 N. W. 29; *In re Phillips*, 158 Mich. 155, 122 N. W. 554; *Haven v. Owen*, 121 Mich. 51, 79 N. W. 938, 80 Am. St. Rep. 477. **Minn.**—*Miller v. Natwick*, 110 Minn. 448, 125 N. W. 1022. **Mo.**—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Jones v. Edeman*, 223 Mo. 312, 122 S. W. 1047. **Pa.** *Collins v. Phillips*, 236 Pa. 386, 84 Atl. 854; *Cierlinski v. Rys.*, 225 Pa. 312, 74 Atl. 172; *Randal v. Gould*, 225 Pa. 42, 73 Atl. 986; *Brundred v. Egbert*, 164 Pa. 615, 30 Atl. 503; *Kennedy v. Baker*, 159 Pa. 146, 28 Atl. 252; *Toomey v. Rosansky*, 11 Pa. Super. 506. **Tex.** *Brooks v. Powell* (Tex. Civ. App.), 29 S. W. 809.

[a] An attack on a tax judgment in an ejectment suit is collateral. *Partition v. Smith*, 94 Ark. 588, 127 S. W. 983.

[b] A purchaser of land subject to the lien of a judgment cannot thus attack the validity of the judgment. *Ross v. Dewey*, 215 Pa. 526, 64 Atl. 674.

[c] An order of an orphan's court authorizing an administrator's sale is collaterally impeached when drawn in question in ejectment to contest the title acquired by virtue of the decree. *Newby v. Blakely*, 85 N. J. L. 728, 90 Atl. 318.

[d] **Partition Decree.**—*Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634.

43. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Hollingsworth v. Wm. Cameron & Co.* (Tex. Civ. App.), 160 S. W. 644; *Gibson v. Oppenheimer* (Tex. Civ. App.), 154 S. W. 694; *Blunt v. Houston Oil Co.* (Tex. Civ. App.), 146 S. W. 248; *Jameson v. O'Neill* (Tex. Civ. App.), 145 S. W. 680; *Mangum v. Kenley* (Tex. Civ. App.), 145 S. W. 316; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158; *Gibbs v. Scales*, 54 Tex. Civ. App. 96, 118 S. W.

188; *Holland v. Ferris* (Tex. Civ. App.), 107 S. W. 102; *Parker v. W. L. Moody & Co.*, 43 Tex. Civ. App. 492, 96 S. W. 650; *Scudder v. Cox*, 35 Tex. Civ. App. 416, 80 S. W. 872.

[a] Where title of purchaser at an executor's sale is attacked in trespass to try title brought by the devisees, the judgment of probate upon which the sale was made is thereby collaterally impeached. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325.

49. **Ky.**—*Barnett v. Bauer Cooperage Co.*, 145 Ky. 163, 140 S. W. 146. **Me.**—*Toothaker v. Greer*, 92 Me. 546, 43 Atl. 498. **N. Y.**—*Russell v. Gray*, 11 Barb. 541.

50. **U. S.**—*Doran v. Kennedy*, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. ed. 996; *Carpenter v. M. J. & M. M. Consolidated*, 212 Fed. 868, 129 C. C. A. 388; *North Star Lumber Co. v. Johnson*, 196 Fed. 56. **Ala.**—*Friedman v. Shamblin*, 117 Ala. 454, 23 So. 821. **Ark.**—*Clay v. Barnes*, 181 S. W. 303; *O'Barr v. Sanders*, 113 Ark. 449, 169 S. W. 249. **Cal.**—*Newlove v. Mercantile Trust Co.*, 156 Cal. 657, 105 Pac. 971. **Idaho.**—*O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20. **Ind.**—*Benbow v. Studebaker*, 51 Ind. App. 450, 99 N. E. 1033. **Ia.**—*Ostley v. Secor*, 94 N. W. 571. **Ky.**—*Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384. **Mo.** *Skillman v. Clardy*, 256 Mo. 297, 165 S. W. 1050; *Davidson v. Laclede Land & Imp. Co.*, 253 Mo. 223, 161 S. W. 686. **Nev.**—*Daly v. Lahontan Mines Co.*, 151 Pac. 514. **N. C.**—*Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569. **N. D.**—*Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737. **Tex.**—*W. C. Belcher Land Mtg. Co. v. Bush* (Tex. Civ. App.), 67 S. W. 444.

[a] **As Against Tax Sale.**—An action to quiet title against a tax sale is collateral to the tax judgment. *O'Barr v. Sanders*, 113 Ark. 449, 169 S. W. 249; *Crittenden Lumb. Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836; *Hall v. Morris*, 94 Ark. 519, 127 S. W. 718.

[b] **When Direct.**—A complaint to quiet title of heirs as against one who by fraud procures a sale of decedent's estate is a direct attack on the decree. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760.

51. **U. S.**—*Butterfield v. Miller* 195



partition proceedings,<sup>52</sup> an application to register title,<sup>53</sup> an action of replevin.<sup>54</sup>

h. *Habeas Corpus* proceedings are collateral to the order or judgment under which the person is detained.<sup>55</sup>

5. **Judgments Within the Rule.**—a. *Courts Rendering the Judgment.*—(I.) Generally.—The proceedings of courts of general jurisdiction or which exercise a general jurisdiction over a particular class of cases are of course invulnerable collaterally.<sup>56</sup> Within this rule are

Fed. 200, 115 C. C. A. 152; *Indiana & Arkansas Lumb. & Mfg. Co. v. Brinkley*, 164 Fed. 963, 91 C. C. A. 91. **Ga.** *Rodgers v. McCune*, 143 Ga. 657, 85 S. E. 837. **Ill.**—*Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145; *Jones v. Williams*, 185 Ill. App. 499.

52. **U. S.**—*Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421. **Colo.**—*Kavanaugh v. Hamilton*, 53 Colo. 157, 125 Pac. 512. **Ill.**—*Wetmore v. Henry*, 259 Ill. 80, 102 N. E. 189; *Clark v. Zaleski*, 253 Ill. 63, 97 N. E. 272; *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145. **Ind.**—*Threlkeld v. Allen*, 133 Ind. 429, 32 N. E. 576. **Mo.** *Mueller v. Grunker*, 145 Mo. App. 611, 123 S. W. 469. **S. C.**—*Sanders v. Price*, 56 S. C. 1, 33 S. E. 731. **Tex.**—*Estey & Camp v. Williams* (Tex. Civ. App.), 133 S. W. 470.

[a] A suit for partition among heirs is collateral to the decree of a foreign court admitting the will to probate. *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628.

[b] An attack by a junior judgment creditor upon the senior judgment is collateral when made in a proceeding for the partition of the lands subject to the lien of the judgment. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

53. *Kuzak v. Anderson*, 267 Ill. 609, 108 N. E. 662.

54. *Treharne v. Matson*, 46 Ind. App. 705, 93 N. E. 553; *Thurston v. Boardman*, 1 Wils. (Ind.) 433; *Martin v. Miller*, 103 Miss. 754, 60 So. 772.

[a] **Replevin against the purchaser at an attachment sale**, brought by the defendant in the attachment suit, to recover the property from such purchaser, is a collateral proceeding. *Treharne v. Matson*, 46 Ind. App. 705, 93 N. E. 553.

55. **U. S.**—*United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. ed. 274; *Ex parte*

*Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Tobias Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Ex parte Lee Kow*, 161 Fed. 592; *Ex parte Lung Wing Wun*, 161 Fed. 211; *Ex parte Farley*, 40 Fed. 66; *Ex parte Houghton*, 7 Fed. 657; *In re Callicot*, 8 Blatchf. 89, 4 Fed. Cas. No. 2,323. **Cal.**—*In Matter of Corryell*, 22 Cal. 178. **Ga.**—*Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120. **Haw.**—*Ex parte Smith*, 14 Hawaii 245. **Ill.**—*Ex parte Smith*, 16 Ill. 347. **Ind.** *Miller v. Snyder*, 6 Ind. 1. **Mo.**—*State ex rel. Gardiner v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012; *In re Woolbridge*, 30 Mo. App. 612. **Nev.**—*Ex parte Winston*, 9 Nev. 71. **Ohio.**—*Children's Home v. Fetter*, 106 N. E. 761. **Ore.**—*Barton v. Sanders*, 16 Ore. 51, 16 Pac. 921, 8 Am. St. Rep. 261. **Phil. Isl.** *Trono Felipe v. Director of Prisons*, 24 Phil. Isl. 121. **Tex.**—*Ex parte Koen*, 58 Tex. Crim. 279, 125 S. W. 401. **Eng.** *In the Matter of Clark*, 2 Ad. & El. (N. S.) 619, 42 E. C. L. 835.

See 10 STANDARD PROC. 940-942.

[a] **An order of commitment of a juvenile delinquent**, unless void, cannot be assailed in a *habeas corpus* proceeding for custody of the child. *Children's Home v. Fetter* (Ohio), 106 N. E. 761.

[b] **Commitment for Contempt.**—*Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391.

[c] Where a party was imprisoned for contempt for refusal to obey a writ of mandamus and instituted *habeas corpus* proceedings this was considered a collateral attack on the mandamus. *In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578.

56. **U. S.**—*Briscoe v. Dist. of Columbia*, 221 U. S. 547, 31 Sup. Ct. 679, 55 L. ed. 848; *United States v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123; *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039; *Secombe v. Milwaukee & St. P. R. Co.*,

county courts,<sup>57</sup> superior courts,<sup>58</sup> circuit courts,<sup>59</sup> and district courts.<sup>60</sup>

(II.) Courts of Equity.—The adjudications of a court of equity are subject to the rules governing collateral attack.<sup>61</sup>

23 Wall. 108, 23 L. ed. 67. **Ala.**—Martin v. Martin, 173 Ala. 106, 55 So. 632; Goodwater Warehouse Co. v. Street, 137 Ala. 621, 34 So. 903; State v. Mobile & G. R. R. Co., 108 Ala. 29, 18 So. 801. **Ark.**—Clay v. Barnes, 181 S. W. 303. **Cal.**—Fresno Estate Co. v. Fiske, 157 Pac. 1127. **Ill.**—Kantorowski v. People, 113 Ill. App. 468. **Ind.**—Bateman v. Miller, 118 Ind. 345, 21 N. E. 292; Herren v. Clifford's Admr., 18 Ind. 411, 567; Horner v. State Bank, 1 Ind. 130. **Ky.**—Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797. **Mo.**—Cooper v. Gunter, 215 Mo. 558, 114 S. W. 943. **N. J.**—Palmer v. Board of Chosen Freeholders, 77 N. J. L. 143, 71 Atl. 285; Podesta v. Binns, 69 N. J. Eq. 387, 60 Atl. 815. **W. Va.**—Pleasants County Court v. Brammer, 68 W. Va. 25, 69 S. E. 450. **Ore.**—Claypool v. O'Neill, 65 Ore. 511, 133 Pac. 349. **Va.**—Shanks v. Calvert Mortgage & Deposit Co., 89 S. E. 99.

[a] The commissioner's court as to establishing of stock law districts is one of general jurisdiction within the rule. McLaughlin v. Hardwick (Ala. App.), 70 So. 305.

57. **Ark.**—Monroe County v. Brown, 118 Ark. 524, 177 S. W. 40; Cope v. Collins, 37 Ark. 649. **Colo.**—Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512; United States Fidelity & Guaranty Co. v. People, 44 Colo. 557, 98 Pac. 828; Ross v. Newsom, 25 Colo. App. 393, 138 Pac. 1015. **Ill.**—Glover v. People, 188 Ill. 576, 59 N. E. 429; Barnett v. Wolf, 70 Ill. 76; Moffitt v. Moffitt, 69 Ill. 641. **Mo.**—Bingham v. Kollman, 256 Mo. 573, 165 S. W. 1097; State ex rel. Brown v. Wilson, 216 Mo. 215, 115 S. W. 549; Sparks v. Jasper County, 213 Mo. 218, 112 S. W. 265; Hartzfeld v. Taylor, 207 Mo. 236, 105 S. W. 599; State v. Edwards, 192 Mo. App. 413, 182 S. W. 816. **N. Y.**—In re Ward's Estate, 59 Misc. 328, 112 N. Y. Supp. 282. **N. D.**—Shane v. Peoples, 25 N. D. 188, 141 N. W. 737. **Okla.**—Rogers v. Duncan, 156 Pac. 678. **Ore.**—Sappingfield v. Sappingfield, 67 Ore. 156, 135 Pac. 333. **Tex.**—White v. Bedell (Tex. Civ. App.), 173 S. W. 624; Wheeler v. Powell (Tex. Civ. App.), 114 S. W. 689. **W. Va.**—Pleas-

ants County Court v. Brammer, 68 W. Va. 25, 69 S. E. 450.

58. **Ariz.**—Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203. **Cal.**—In re McNeil's Estate, 155 Cal. 333, 100 Pac. 1086. **Pa.**—In re Metzger's Estate, 242 Pa. 69, 88 Atl. 915. **Wash.**—State ex rel. Neal v. Kauffman, 86 Wash. 172, 149 Pac. 656.

59. **Ill.**—Kenney v. Greer, 13 Ill. 432. **Ind.**—Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526. **Mo.**—Bryan v. McCaskill, 175 S. W. 961; Potter v. Whitten, 161 Mo. App. 118, 142 S. W. 453.

[a] District of Columbia Circuit Court.—Ex parte Tobias Watkins, 3 Pet. (U. S.) 193, 7 L. ed. 650.

[b] Circuit Court of Baltimore City. Bernstein, Cohen & Co. v. Stansbury, 119 Md. 316, 86 Atl. 349.

[c] A justice transcript filed with circuit court which has the effect of a judgment of the circuit court, is, unless void on its face, conclusive collaterally. Young v. Zacher, 226 Ill. 327, 80 N. E. 945.

60. **Mont.**—Burke v. Interstate Savings & Loan Assn., 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416. **N. J.**—McDevitt v. Connell, 71 N. J. Eq. 119, 63 Atl. 504. **N. Y.**—Hennessy v. Sweeney, 28 Civ. Proc. 332, 57 N. Y. Supp. 901. **Tex.**—Blaske v. Settegast, 58 Tex. Civ. App. 10, 123 S. W. 220.

61. **U. S.**—Bryan v. Kennet, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. ed. 908; Lively v. Pieton, 218 Fed. 401, 134 C. C. A. 189. **Ala.**—Martin v. Martin, 173 Ala. 106, 55 So. 632. **Ark.**—Clay v. Barnes, 181 S. W. 303; O'Barr v. Sanders, 113 Ark. 449, 169 S. W. 249. **Cal.**—In re James' Estate, 99 Cal. 374, 33 Pac. 1122. **D. C.**—Merillat v. Hensey, 34 App. Cas. 398, 401. **Ga.**—Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187. **Ill.**—Kuzak v. Anderson, 267 Ill. 609, 108 N. E. 662; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; Agnew v. Lichten, 19 Ill. App. 79. **Ia.**—Poole v. Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634. **Md.**—Estep v. Watkins, 1 Bland 486. **Miss.**—Lake v. Perry, 95 Miss. 550, 49 So. 569. **N. Y.**—Gomez v. Gomez, 81 Hun 566, 31 N. Y. Supp. 206. **N. C.**—Covington v. Ingram, 64 N. C. 123. **Ohio.**—Sauer v. Cincinatti

(III.) Criminal Courts.—Judgments in criminal cases are as conclusive collaterally as those in civil cases.<sup>62</sup>

(IV.) Probate Courts.—Judgments and decrees of probate courts are entitled to the same immunity from collateral attack<sup>63</sup> as are those of

St. Ry. Co., 5 Ohio N. P. 108. **Va.** Lemmon v. Herbert, 92 Va. 653, 24 S. E. 249. **W. Va.**—Linn v. Collins, 87 S. E. 934.

[a] **Exceptions to Administrator's Account.**—Where the heirs except to certain items in an administrator's annual account, it is a collateral attack upon the order of court under which the administrator claimed credit for the sums paid out. Massey v. Doke (Ark.), 185 S. W. 271.

62. **U. S.**—*Ex parte* Tobias Watkins, 3 Pet. 193, 7 L. ed. 650; United States v. Rothstein, 187 Fed. 268, 109 C. C. A. 521. **Ala.**—Gandy v. State, 86 Ala. 20, 5 So. 420. **Fla.**—McDonald v. Smith, 68 Fla. 77, 66 So. 430. **Ga.**—Holloman v. City of Tifton, 3 Ga. App. 293, 59 S. E. 828. **Ill.**—Kanasowski v. People, 113 Ill. App. 468. **Ind.**—Myers v. State, 92 Ind. 390. **Ky.**—Board of Prison Comrs. v. De Moss, 157 Ky. 289, 163 S. W. 183; Underwood v. Com., 32 Ky. L. Rep. 32, 105 S. W. 151. **N. Y.**—*In re* Patrick, 136 App. Div. 450, 120 N. Y. Supp. 1006. **Pa.**—*In re* Gottesfeld, 245 Pa. 314, 91 Atl. 494. **Tex.**—Johnson v. State, 39 Tex. Crim. 625, 48 S. W. 70.

[a] A judgment sentencing accused to hard labor on the streets in addition to fining him is not subject to collateral attack. Flowers v. State, 4 Ala. App. 221, 59 So. 238.

[b] A conviction of a misdemeanor cannot be contradicted in a collateral proceeding. Holder v. St. Louis & S. F. Ry. Co., 155 Mo. App. 664, 135 S. W. 507.

[c] An action to recover a fine paid upon conviction attacking the conviction as illegal is a collateral proceeding. United States v. Rothstein, 187 Fed. 268, 109 C. C. A. 521.

[d] A suit in equity in the nature of a bill for discovery, considered collateral to a conviction for violating the anti-pool law, see International Harvester Co. v. Com., 170 Ky. 41, 185 S. W. 102.

[e] Disbarment proceedings are collateral to a judgment convicting the attorney of crime. *In re* Gottesfeld, 245 Pa. 314, 91 Atl. 494.

63. **U. S.**—Christianson v. King County, 239 U. S. 356, 36 Sup. Ct. 114; Doran v. Kennedy, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. ed. 996; Magruder v. Drury, 235 U. S. 166, 35 Sup. Ct. 77, 59 L. ed. 151; Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32; Wood v. City of Mobile, 99 Fed. 615; State Nat. Bank of Maysville v. Ellison, 75 Fed. 354. **Ala.**—Powell v. Union Bank & Trust Co., 173 Ala. 332, 56 So. 123; Mayer v. Kornegay, 163 Ala. 371, 50 So. 880; Barclift v. Treece, 77 Ala. 528; Acklen v. Goodman, 77 Ala. 521; Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757; Gray's Admrs. v. Cruise, 36 Ala. 559; Ikelheimer v. Chapman's Admrs., 32 Ala. 676; Lyon v. Odom, 31 Ala. 234. **Alaska.**—*In re* Decker's Estate, 3 Alaska 106; White's Guardians v. Martin, 2 Alaska 495; Sylvester's Admr. v. Willson's Admr., 2 Alaska 325. **Ark.**—Flowers v. Reece, 92 Ark. 611, 123 S. W. 773; Hare v. Shaw, 84 Ark. 32, 104 S. W. 931; Washington v. Govan, 73 Ark. 612, 84 S. W. 792; James v. Gibson, 73 Ark. 440, 84 S. W. 485; Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602; West v. Waddill, 33 Ark. 575; George v. Norris, 23 Ark. 121; Borden v. State, 11 Ark. 519, 44 Am. Dec. 217. **Colo.**—United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 Pac. 828. **Conn.**—Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 482. **D. C.**—Richmond & Danville R. Co. v. Gorman, 7 App. Cas. 91. **Ga.**—Reynolds v. Norvell, 129 Ga. 512, 59 S. E. 299. **Haw.**—*In re* Kapukini, 12 Hawaii 22; Paris v. Kealoha, 11 Hawaii 450. **Idaho.**—Clark v. Rossier, 10 Idaho 348, 78 Pac. 358. **Ill.**—Dickinson v. Belden, 268 Ill. 105, 108 N. E. 1011; Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 N. E. 734; Salomon v. The People, 191 Ill. 290, 61 N. E. 83; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Larimer v. Snell, 181 Ill. App. 50. **Ia.**—Wallace v. Tinney, 145 Iowa 478, 122 N. W. 936. **Md.**—Mister v. Thomas, 122 Md. 445, 89 Atl. 844. **Me.**—Chadwick v. Stilphen, 105 Me. 242, 74 Atl. 50; Appeal of Mudgett, 103 Me. 367, 69 Atl. 575. **Mass.**—Conners v. Cunard S. S. Co., 204 Mass.



other courts. This rule applies to surrogate courts,<sup>64</sup> orphan's courts,<sup>65</sup> and courts of ordinary.<sup>66</sup>

(V.) Appellate Courts.—The judgments of appellate tribunals are subject to the general rules governing collateral attack.<sup>67</sup>

(VI.) Inferior Courts.—Equally conclusive collaterally are the orders and judgments of inferior tribunals having jurisdiction over the

- 310, 90 N. E. 601; *Tobin v. Larkin*, 187 Mass. 279, 72 N. E. 985; *Peters v. Peters*, 8 Cush. 529; *Jenison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258. Mich.—*James E. Scripps' Corp. v. Parkinson*, 153 N. W. 29; *Benjamin v. Early*, 123 Mich. 93, 81 N. W. 973. Minn.—*Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *Hadley v. Bourdeaux*, 90 Minn. 177, 95 N. W. 1109. Mo.—*Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561; *Carter v. Carter*, 237 Mo. 624, 141 S. W. 873; *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129; *Einstein v. Strother* (Mo. App.), 182 S. W. 122; *Crump v. Hart*, 189 Mo. App. 572, 176 S. W. 1089; *State ex rel. Gardiner v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012; *Nelson v. Troll*, 173 Mo. App. 51, 156 S. W. 16; *Deweese v. Yost*, 161 Mo. App. 10, 143 S. W. 72; *Mueller v. Grunker*, 145 Mo. App. 611, 123 S. W. 469. Neb.—*Herter v. Herter*, 97 Neb. 260, 149 N. W. 795. N. C.—*Fann v. North Carolina R. Co.*, 155 N. C. 136, 71 S. E. 81. Okla.—*Homer v. McCurtain*, 40 Okla. 406, 138 Pac. 807; *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934. Pa.—*Orphan's Court of Dauphin County v. Groff*, 14 Serg. & R. 181. S. D.—*Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. Tex.—*White v. Bedell* (Tex. Civ. App.), 173 S. W. 624; *Waterman Lumber & Supply Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360; *Wilkin v. Simmons* (Tex. Civ. App.), 151 S. W. 1145; *Stephenson v. Wiess* (Tex. Civ. App.), 145 S. W. 287; *Minchew v. Case* (Tex. Civ. App.), 143 S. W. 366; *Caruthers v. Hadley* (Tex. Civ. App.), 134 S. W. 757; *Ross v. Martin* (Tex. Civ. App.), 128 S. W. 718; *Farmer v. Saunders*, 60 Tex. Civ. App. 197, 128 S. W. 941; *Kueck v. Dixon* (Tex. Civ. App.), 127 S. W. 910; *Edwards v. Gates* (Tex. Civ. App.), 120 S. W. 585; *Holland v. Ferris* (Tex. Civ. App.), 107 S. W. 102; *Murphy v. Sisters of the Incarnate Word*, 43 Tex. Civ. App. 638, 97 S. W. 135. Vt.—*Sparrow v. Watson*, 87 Vt. 366, 89 Atl. 468. Va.—*Avant v. Cook*, 86 S. E. 903. Wash.—*State ex rel. Neal v. Kauffman*, 86 Wash. 172, 149 Pac. 656.
- [a] When acting as a juvenile court the probate court's proceedings are not subject to collateral attack. *Children's Home v. Fetter* (Ohio), 106 N. E. 761.
- [b] "The county court, having full jurisdiction of matters of probate and guardianship, is a court of limited, but not of inferior, jurisdiction. It is a court of record, and its judgments are to be upheld by the same presumptions applicable to the judgments of other courts of record." *People v. Medart*, 166 Ill. 345, 46 N. E. 1095.
64. *Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201; *Flatauer v. Loser*, 211 N. Y. 15, 104 N. E. 1123; *Pietraroia v. New Jersey & H. R. Ry. & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120; *Childs v. Childs*, 150 App. Div. 656, 135 N. Y. Supp. 972.
65. Md.—*Whiting v. Shipley*, 127 Md. 113, 96 Atl. 285. N. J.—*Newby v. Blakely*, 85 N. J. L. 728, 90 Atl. 318; *Plume v. Howard Sav. Inst.*, 46 N. J. L. 211; *Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815. Pa.—*Rice v. Braden*, 243 Pa. 141, 89 Atl. 877; *Cierlinski v. Rys.*, 225 Pa. 312, 74 Atl. 172; *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517; *Lex's Appeal*, 97 Pa. 289; *Dresher v. Allentown Water Co.*, 52 Pa. 225, 91 Am. Dec. 150.
66. *Ex parte Tobias Watkins*, 3 Pet. 193, 7 L. ed. 650; *Bowen v. Gaskins*, 144 Ga. 1, 85 S. E. 1007; *Sturtevant v. Robinson*, 133 Ga. 564, 66 S. E. 890.
- [a] In the administration of estates, the court of ordinary is one of general jurisdiction and its judgment unless void cannot be collaterally attacked. *Laramore v. Dudley* (Ga.), 88 S. E. 682.
67. Ark.—*Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184. Ill.—*Miller v. Pence*, 115 Ill. 576, 4 N. E. 496. Ind.—*State v. Benson*, 70 Ind. 481; *Atkinson v. Maris*, 40 Ind. App. 718, 81 N. E. 745. Mo.—*State ex rel. Brown v. Broadus*, 216 Mo. 336, 115 S. W. 1018. Ore.—*Taylor v. Taylor*,

subject-matter and the parties, such as justice's courts,<sup>68</sup> recorder's courts,<sup>69</sup> juvenile courts,<sup>70</sup> court of quarter sessions,<sup>71</sup> circuit courts, when of inferior jurisdiction,<sup>72</sup> and fiscal courts.<sup>73</sup>

(VII.) Federal Courts. — The rule applies with equal force to the decisions of the various federal courts.<sup>74</sup>

54 Ore. 560, 103 Pac. 524. **Va.**—*Bryan v. Nash*, 110 Va. 329, 66 S. E. 69.

[a] **Court of Civil Appeals.**—*Vineyard v. Heard* (Tex. Civ. App.), 167 S. W. 22.

[b] **Supreme court of the state.** Texas & P. Ry. Co. v. Smith, 91 Fed. 483, 33 C. C. A. 648.

68. **U. S.**—*Baltimore & Ohio Ry. v. Hostetter*, 240 U. S. 620, 36 Sup. Ct. 475. **Ala.**—*Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414. **Ark.**—*Citizens' Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102. **Cal.**—*McFall v. Buckeye Grangers' Warehouse Assn.*, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47; *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122; *Aucker v. McCoy*, 56 Cal. 524; *Guthrie v. Carney*, 19 Cal. App. 144, 124 Pac. 1045. **Ill.**

*Horn v. Metzger*, 234 Ill. 240, 84 N. E. 893; *Young v. Zacher*, 226 Ill. 327, 80 N. E. 945; *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468. **Ind.**—*Brackney v. State*, 182 Ind. 343, 106 N. E. 532; *Baltimore & O. R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137.

**Ia.**—*Lang v. Dunn*, 145 Iowa 363, 124 N. W. 192; *Gilman v. Heitman*, 137 Iowa 336, 113 N. W. 932. **Ky.**—*Willis v. Tones*, 141 Ky. 431, 132 S. W. 1043.

**Mich.**—*American Copying Co. v. Stern*, 148 Mich. 281, 111 N. W. 766; *Miller v. Smith*, 115 Mich. 427, 73 N. W. 418, 69 Am. St. Rep. 583; *Smith v. Pearce*, 52 Mich. 370, 18 N. W. 111; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188; *Reed v. Gage*, 33 Mich. 179.

**Minn.**—*Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452. **Mo.**—*Daugherty v. Brown*, 91 Mo. 26, 3 S. W. 210; *Zimmerman v. Snowden*, 88 Mo. 218; *Fulkerson v. Davenport*, 70 Mo. 541;

*Franse v. Owens*, 25 Mo. 329; *Hammett v. Hatton* (Mo. App.), 176 S. W. 1078; *School Dist. No. 58 v. Chappel*, 155 Mo. App. 498, 135 S. W. 75; *State ex rel. Polster v. Miles*, 149 Mo. App. 638, 129 S. W. 731; *Richards v. Heger*, 122 Mo. App. 512, 99 S. W. 802; *Wilson v. Coleman*, 88 Mo. App. 564;

*Wise v. Loring*, 54 Mo. App. 258; *State v. Farrelly*, 36 Mo. App. 282; *Klein v.*

*Wielandy*, 15 Mo. App. 581. **Neb.** *David Bradley & Co. v. Matley*, 83 Neb. 589, 119 N. W. 958. **N. Y.**—*Feinberg v. Kuteosky*, 147 App. Div. 393, 132 N. Y. Supp. 9. **Pa.**—*Appeal of Plains*, 206 Pa. 556, 56 Atl. 60. **S. C.**—*Williams v. Columbia Mills Co.*, 100 S. C. 363, 85 S. E. 160; *Long v. Cummings*, 91 S. C. 521, 75 S. E. 134. **Tex.** *Waples Painter Co. v. Ross*, 176 S. W. 47; *Clayton v. Hurt*, 88 Tex. 595, 32 S. W. 876; *Rule v. Richards* (Tex. Civ. App.), 149 S. W. 1073; *Eubanks v. Sites* (Tex. Civ. App.), 146 S. W. 952; *Estey & Camp v. Williams* (Tex. Civ. App.), 133 S. W. 470; *Beaty v. Thos. Goggan & Bro.* (Tex. Civ. App.), 131 S. W. 631; *Burns v. Barker*, 31 Tex. Civ. App. 82, 71 S. W. 328; *Brooks v. Powell* (Tex. Civ. App.), 29 S. W. 809. **W. Va.**—*Bumgarner v. First Nat. Bank*, 70 W. Va. 787, 74 S. E. 996; *Pocahontas Wholesale Grocery Co. v. Gillespie*, 63 W. Va. 578, 60 S. E. 597.

[a] **City court sitting in chancery.** *Pollard v. American Freehold Land Mortg. Co.*, 103 Ala. 289, 295, 16 So. 801.

69. *Hayward v. Pimentel*, 107 Cal. 386, 40 Pac. 545.

70. *Brana v. Brana* (La.), 71 So. 519; *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560.

71. *Northrup v. Pike Tp.*, 242 Pa. 1, 88 Atl. 781; *Powell v. City of Scranton*, 227 Pa. 604, 76 Atl. 505.

72. *Love v. Dorman*, 91 S. C. 384, 74 S. E. 829.

73. *Fox v. Lantrip*, 169 Ky. 759, 185 S. W. 136; *Ray v. Woodruff*, 168 Ky. 563, 182 S. W. 662; *Hurt v. Morgan County*, 166 Ky. 364, 179 S. W. 255; *Barnett v. Gilbert*, 164 Ky. 564, 175 S. W. 1029; *Kenton County v. Jameson*, 150 Ky. 440, 150 S. W. 528; *Desha's Adms. v. Harrison County*, 141 Ky. 692, 133 S. W. 545; *Grayson County v. Rogers* (Ky.), 122 S. W. 866; *McDonald's Admx. v. Franklin County Court*, 125 Ky. 205, 100 S. W. 861; *Bennett v. Tiernay*, 78 Ky. 580.

74. *Ex parte Roe*, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. ed. 1217; *United States v. Rothstein*, 187 Fed. 268, 109

(VIII.) **Quasi-judicial Tribunals.** — There are, moreover, certain boards and officers exercising quasi-judicial functions to whose proceedings touching matters within their jurisdiction, this immunity from collateral attack extends,<sup>76</sup> such as boards of equalization,<sup>76</sup> common councils,<sup>77</sup> township trustees,<sup>78</sup> boards of arbitrators,<sup>79</sup> county supervisors,<sup>80</sup> county commissioners,<sup>81</sup> county boards<sup>82</sup> to examine into claims against

C. C. A. 521; *Edelstein v. United States*, 149 Fed. 636, 79 C. C. A. 328, writ of error denied, 205 U. S. 543, 27 Sup. Ct. 791, 51 L. ed. 922.

[a] **Court of Claims.**—*Butler v. Indian Protective Assn.*, 34 App. Cas. (D. C.) 284.

[b] **Supreme Court of District of Columbia.**—*Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123; *Manson v. Duncanson*, 166 U. S. 533, 541, 17 Sup. Ct. 647, 41 L. ed. 1105.

When questioned in state courts, see *infra*, XVIII.

75. **Ia.**—*Appeal of Head*, 141 Iowa 651, 118 N. W. 884. **Kan.**—*Lownsberry v. Bakestraw*, 14 Kan. 151. **Miss.** *Wright v. Edwards Hotel & City R. Co.*, 101 Miss. 470, 58 So. 332. **Neb.**—*Campbell v. Youngson*, 80 Neb. 322, 114 N. W. 415.

[a] **Even though no appeal to the courts** is taken from the decisions of these special tribunals, their judgments are conclusive collaterally. *M'Leod v. Receveur*, 71 Fed. 455, 18 C. C. A. 188.

[b] **Board of Drain Commissioners.** *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66.

[c] **Order of County Superintendent.**—Where an order of the county superintendent of schools changing the boundaries of a school district has been affirmed on appeal to the county commissioners it is not subject to collateral attack. *School Dist. No. 116 v. Wolf*, 78 Kan. 805, 98 Pac. 237.

76. *M'Leod v. Receveur*, 71 Fed. 455, 18 C. C. A. 188.

77. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *City of Ft. Wayne v. Cody*, 43 Ind. 197.

78. **Colo.**—*Riley v. Lemieux*, 24 Colo. App. 184, 132 Pac. 699. **Ind.**—*Daly v. Gubbins*, 170 Ind. 105, 82 N. E. 659; *Cole v. State*, 131 Ind. 591, 31 N. E. 458. **Kan.**—*Bonnewell v. Lowe*, 81 Kan. 196, 106 Pac. 1002. **Mo.**—*Muligan v. Martin*, 125 Mo. App. 630, 102 S. W. 59.

79. *School Dist. No. 58 v. Chappel*, 155 Mo. App. 498, 135 S. W. 75, in changing boundaries of school districts.

80. **Cal.**—*Langdon v. Koster*, 157 Cal. 39, 106 Pac. 209. **Ind.**—*Chicago & A. Ry. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *Terre Haute & L. R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429. **Ia.** *Appeal of Head*, 141 Iowa 651, 118 N. W. 884. **Mich.**—*Derosia v. Loree*, 158 Mich. 64, 122 N. W. 357. **Miss.** *Wright v. Edwards Hotel & City R. Co.*, 101 Miss. 470, 58 So. 332. **Neb.** *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687, 124 N. W. 118.

[a] **In laying out a public road** the board of supervisors exercises judicial functions and its order approving the report of viewers cannot be collaterally attacked. *Siskiyau County v. Gamlich*, 110 Cal. 94, 42 Pac. 468.

81. **Ala.**—*Kirby v. Commissioners' Court*, 186 Ala. 611, 65 So. 163; *McLaughlin v. Hardwick* (Ala. App.), 70 So. 305 (proceeding to establish stock law districts); *Golden v. State*, 10 Ala. App. 235, 64 So. 517. **Ind.**—*Southern Indiana Ry. Co. v. Railroad Commissioners*, 172 Ind. 113, 87 N. E. 966; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Harrod v. Littell*, 51 Ind. App. 418, 99 N. E. 817. **Me.**—*Blaisdell v. Inhabitants of Town of York*, 110 Me. 500, 87 Atl. 361. **Md.** *Pettit v. County Commissioners*, 123 Md. 128, 90 Atl. 993. **Mass.**—*Bartlett v. New York C. & H. R. R. Co.*, 81 N. E. 204. **Mo.**—*State v. Wiethaupt*, 165 Mo. App. 634, 148 S. W. 429. **Wash.**—*Thomas v. Whatecom County*, 82 Wash. 113, 143 Pac. 881; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241.

82. *State v. Young*, 81 Mo. 90; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190; *State v. Vincent*, 46 Neb. 408, 65 N. W. 50; *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376; *State v. Merrell*, 43 Neb. 575, 61 N. W. 754; *Sioux County v. Jameson*, 43 Neb. 265, 61 N. W. 596; *State v. Churchill*, 37 Neb. 702, 56 N. W. 484; *State v. Buffalo Co.*, 6



the county, the federal land department,<sup>83</sup> commissioners of immigration,<sup>84</sup> and courts martial.<sup>85</sup>

(IX.) **Foreign Courts.**—The right to collaterally attack the judgments of a foreign or sister state is discussed elsewhere in this article.<sup>86</sup>

b. *Nature of the Adjudication.*—(I.) **In General.**—This prohibition against collateral impeachment applies to all kinds of judgments and decrees, whether made upon consideration of the merits or not.<sup>87</sup>

(II.) **Default Judgments.**—Since the doctrine of collateral attack is not concerned with issues, a judgment by default is just as conclusive collaterally as any other form of judgment.<sup>88</sup>

Neb. 454; *Brown v. Otoe Co.*, 6 Neb. 111.

83. *Van Patten v. Boyd*, 20 N. M. 250, 150 Pac. 917.

[a] **Land Commission of Hawaii.** *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 32 Sup. Ct. 94, 56 L. ed. 202.

84. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040; *Ex parte Lee Kow*, 161 Fed. 592; *Ex parte Lung Wing Wun*, 161 Fed. 211.

See the title "Immigration."

85. *Swain v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *In re Brodie*, 128 Fed. 665, 63 C. C. A. 419. See generally the title "Courts Martial."

86. See *infra*, XVIII.

87. See the cases in sections following.

88. **U. S.**—*American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525; *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. ed. 859; *Anderson v. Elliott*, 101 Fed. 609, 41 C. C. A. 521; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140, 31 C. C. A. 427; *Ouseley v. Lehigh Val. Tr. & Safe-Dep. Co.*, 84 Fed. 602. **Ala.** *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414. **Ariz.**—*Tube City Min. & Mill. Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203. **Cal.**—*Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138; *In re Newman's Estate*, 75 Cal. 213, 16 Pac. 887; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. **Colo.**—*Munson v. Pawnee Cattle Co.*, 53 Colo. 337, 126 Pac. 275. **Fla.**—*Einsteinstein v. Davidson*, 35 Fla. 342, 17 So.

563. **Ill.**—*Kuzak v. Anderson*, 267 Ill. 609, 108 N. E. 662; *Town of Lyons v. Cooledge*, 89 Ill. 529; *French v. Baker*, 21 Ill. App. 432. **Ind.**—*Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. **Ia.**—*Lang v. Dunn*, 145 Iowa 363, 124 N. W. 192; *Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153; *Warthen v. Himstreet*, 112 Iowa 605, 84 N. W. 702. **La.**—*State v. Judge of Third Dist. Ct.*, 30 La. Ann. 229. **Mich.**—*Griffin v. McGavin*, 117 Mich. 372, 75 N. W. 1061. **Minn.**—*West Duluth Land Co. v. Bradley*, 75 Minn. 275, 77 N. W. 964. **Mo.**—*Cooper v. Gunter*, 215 Mo. 558, 114 S. W. 943. **Miss.**—*Bennett Bros. v. Dempsey*, 94 Miss. 406, 48 So. 901. **Mo.**—*Bryan v. McCaskill*, 175 S. W. 961; *Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078; *Wise v. Loring*, 54 Mo. App. 258; *Klein v. Wielandy*, 15 Mo. App. 581. **N. H.**—*Pendexter v. Cole*, 66 N. H. 270, 20 Atl. 331. **N. Y.**—*Trowbridge v. Hayes*, 21 Misc. 234, 45 N. Y. Supp. 635; *Dreyfuss v. Seale & Co.*, 41 N. Y. Supp. 875. **Ohio.**—*Righter v. Thornton*, 6 Ohio Dec. 7, 30 W. L. Bul. 32. **Pa.** *Brundred v. Egbert*, 164 Pa. 615, 30 Atl. 503; *Orr v. Mercer County Mut. F. Ins. Co.*, 114 Pa. 387, 6 Atl. 696. **S. D.**—*Mach v. Blanchard*, 15 S. D. 432, 90 N. W. 1042. **Tenn.**—*Fogg v. Gibbs*, 8 Baxt. 464. **Tex.**—*Williams v. Abilene Independent Tel. & Tel. Co.* (Tex. Civ. App.), 168 S. W. 402; *Rule v. Richards* (Tex. Civ. App.), 149 S. W. 1073; *Bomar v. Morris*, 59 Tex. Civ. App. 378, 126 S. W. 663; *Thorp v. Gordon* (Tex. Civ. App.), 43 S. W. 323. **Eng.**—*Schidsby v. Westenholz*, 6 L. R. Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. 93, 19 W. R. 587.

[a] **Foreign Default Judgment.** *Ouseley v. Lehigh Val. Tr. & Safe Dep. Co.*, 84 Fed. 602. See *infra*, XVIII.

(III.) **Decrees Pro Confesso.** — The same is true of decrees pro confesso.<sup>89</sup>

(IV.) **Consent Judgments.** — Consent judgments and decrees are likewise invulnerable to collateral attack when jurisdiction appears and no invalidating fraud or collusion is present.<sup>90</sup>

(V.) **Judgments by Confession.** — Judgments by confession, also, come within the rule, and unless for some reason void, they are not open to attack in any but a direct proceeding.<sup>91</sup>

(VI.) **On Demurrer.** — Judgments entered on demurrer are not assailable collaterally.<sup>92</sup>

(VII.) **Of Dismissal.** — The court having proper jurisdiction of the subject-matter and the parties, its order dismissing the cause cannot be impeached in a collateral proceeding.<sup>93</sup>

89. **U. S.**—*Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751; *Butterfield v. Miller*, 195 Fed. 200, 115 C. C. A. 152; *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625. **Ala.**—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *Roman v. Morgan*, 162 Ala. 133, 50 So. 273. **Ill.**—*Sielbeck v. Grothmann*, 248 Ill. 435, 94 N. E. 67. **Ky.**—*Barnett v. Bauer Cooperage Co.*, 145 Ky. 163, 140 S. W. 146. **Pa.**—*Day v. Allen*, 224 Pa. 385, 73 Atl. 456.

90. **U. S.**—*Mayor, etc. of City of Helena v. United States*, 104 Fed. 113, 43 C. C. A. 429. **Ark.**—*Lewis v. St. Louis, I. M. & S. Ry.*, 107 Ark. 41, 154 S. W. 198; *Williams v. Alexander*, 90 Ark. 591, 119 S. W. 1130; *Denton v. Roddy*, 34 Ark. 642. **Ga.**—*Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133. **Ill.**—*Glos v. Brown*, 194 Ill. 307, 62 N. E. 622; *Aldrich v. Housh*, 71 Ill. App. 607. **Ind.**—*Biddle v. Pierce*, 13 Ind. App. 239, 41 N. E. 475. **Ky.**—*Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378. **Md.**—*State v. Maryland Elect. Rys. Co.*, 126 Md. 300, 95 Atl. 43. **Mo.**—*Haley v. Branham*, 192 Mo. App. 125, 180 S. W. 423. **Neb.**—*Wabaska Elect. Co. v. City of Blue Springs*, 84 Neb. 577, 122 N. W. 21. **S. C.**—*Jones & Parker r. Webb*, 8 S. C. 202. **Tex.**—*Frishy v. Withers*, 61 Tex. 134; *Hartford Fire Ins. Co. v. King*, 31 Tex. Civ. App. 636, 73 S. W. 71. **Eng.**—*Ribble River Joint Committee v. Croston Urban Dist. Council*, 66 L. J. Q. B. 384 (1897), 1 Q. B. 251, 45 W. R. 318.

91. **U. S.**—*Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105; *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421; *Wright v. Wright*, 103 Fed. 580. **Ark.**—*Scott v. Pleasants*, 21 Ark. 361. **Cal.**

*Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526. **Del.**—*Solomon v. Loper*, 4 Harr. 187. **D. C.**—*United States Elec. Lighting Co. v. Leiter*, 8 Mackey 575. **Ga.**—*Jackson v. Tift*, 15 Ga. 557. **Haw.**—*Carey v. Hawaiian Lumber Mills, Ltd.*, 21 Hawaii 311. **Ill.**—*Desnoyers Shoe Co. v. First Nat. Bank*, 188 Ill. 312, 58 N. E. 994; *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bush v. Hanson*, 70 Ill. 480; *Goodwin v. Mix*, 38 Ill. 115; *Chase v. Tuckwood*, 86 Ill. App. 70; *Perisho v. Perisho*, 71 Ill. App. 222. **Ia.**—*Gilman v. Heitman*, 137 Iowa 336, 113 N. W. 932; *Foster v. Bowman*, 55 Iowa 237, 7 N. W. 513. **N. C.**—*Hooks v. Moses*, 30 N. C. 88. **Pa.**—*Merchants' & Mechanics' Bank v. Poore*, 231 Pa. 362, 80 Atl. 525; *Lenning's Appeal*, 93 Pa. 301; *Thompson's Appeal*, 57 Pa. 175; *Braddee v. Brownfield*, 4 Watts 474. **Va.**—*Irvine v. Randolph Lumber Corp.*, 111 Va. 408, 69 So. 350. **Wis.**—*Halfhill v. Malick*, 145 Wis. 200, 129 N. W. 1086; *Mayer Boot, etc. Co. v. Falk*, 89 Wis. 216, 61 N. W. 562.

92. *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387.

93. **U. S.**—*Franklin County v. German Sav. Bank*, 142 U. S. 93, 12 Sup. Ct. 147, 35 L. ed. 948; *Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177; *Haug v. Great Northern Ry. Co.*, 102 Fed. 74, 42 C. C. A. 167. **Cal.**—*Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800; *In re Newman's Estate*, 75 Cal. 213, 16 Pac. 887. **Ia.**—*Sawyer v. Kelley*, 148 Iowa 644, 127 N. W. 977. **Kan.**—*Houston v. Clark*, 36 Kan. 412, 13 Pac. 739. **Ky.**—*Shields' Adams v. Chesser*, 167 Ky. 532, 180

(VIII.) **Orders and Decrees Made After Judgment.**—The rule against collateral attack protects all orders affecting the judgment, such as those modifying or correcting it,<sup>94</sup> vacating and setting it aside,<sup>95</sup> or reviving the judgment.<sup>96</sup>

(IX.) **As Affected by Nature of Proceeding.**—(A.) **GENERALLY.**—The rules as to collateral attack apply to adjudications made in every sort of judicial proceedings,<sup>97</sup> illustrations of some of which will be found in the notes.<sup>98</sup>

S. W. 968. **Md.**—Clark *v.* Southern Can. Co., 116 Md. 85, 81 Atl. 271. **Mo.** State *ex rel.* Potter *v.* Riley, 219 Mo. 667, 118 S. W. 647.

[a] **Refusal To Dismiss a Bill.** Trombly *v.* Klersy, 146 Mich. 648, 110 N. W. 44.

[b] **Dismissal of Appeal.**—Texas & P. Ry. Co. *v.* Smith, 91 Fed. 483, 33 C. C. A. 648; Cariker *v.* Dill (Tex. Civ. App.), 140 S. W. 843.

94. **U. S.**—Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83. **Ark.**—King *v.* Clay, 34 Ark. 291. **Cal.**—Galvin *v.* Palmer, 134 Cal. 426, 66 Pac. 572. **N. Y.**—Woodruff *v.* H. B. Claflin Co., 133 App. Div. 874, 118 N. Y. Supp. 48.

[a] **Nunc pro tunc order amending the judgment.** Pulitzer Pub. Co. *v.* Allen, 134 Mo. App. 229, 113 S. W. 1159.

95. **U. S.**—United States *v.* Rothstein, 187 Fed. 268, 109 C. C. A. 521; *In re* Heffron Co., 216 Fed. 642. **Ind.** Beavers *v.* Bess, 58 Ind. App. 287, 108 N. E. 266. **Me.**—International Wood Co. *v.* National Assur. Co., 99 Me. 415, 59 Atl. 544. **Ore.**—Flynn *v.* Davidson, 157 Pac. 788.

[a] **Vacating the lien of a judgment.** *In re* Heffron Co., 216 Fed. 642.

96. **D. C.**—Willett *v.* Otterback, 9 Mackey 324; Collins *v.* McBlair, 29 App. Cas. 354. **Ill.**—Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740. **Pa.** Collins *v.* Phillips, 236 Pa. 386, 84 Atl. 854; Dauberman *v.* Hain, 196 Pa. 435, 46 Atl. 442. **Va.**—White's Admr. *v.* Palmer, 110 Va. 490, 66 S. E. 44.

97. See the sections following.

98. **Attachment for Contempt.** State *v.* Dickman, 175 Mo. App. 543, 157 S. W. 1012.

**Award of Arbitrators.**—**Ala.**—Georgia Home Ins. Co. *v.* Kline, 114 Ala. 366, 21 So. 958; Edmundson *v.* Wilson, 108 Ala. 118, 19 So. 367. **Mo.**—Tiffany *v.* Coffey, 142 Mo. App. 210, 125 S. W. 1173; Downing *v.* Lee, 98 Mo.

App. 604, 73 S. W. 721. **N. Y.**—Silverman *v.* Doran, 23 Misc. 96, 51 N. Y. Supp. 731. **N. D.**—Caldwell *v.* Brooks Elevator Co., 10 N. D. 575, 88 N. W. 700. **Pa.**—Brock *v.* Lawton, 210 Pa. 195, 59 Atl. 997.

[a] **Appointment of Trustees.** Clark *v.* Inhab. of Andover, 207 Mass. 91, 92 N. E. 1013; Rothenberger *v.* Garrett, 224 Mo. 191, 123 S. W. 574.

[b] **A decree settling a trustee's account is not assailable collaterally.** Childs *v.* Childs, 150 App. Div. 656, 135 N. Y. Supp. 972.

[c] **Empowering Trustee To Sue.** An order empowering a trustee to bring action to recover amount due on stock cannot be attacked collaterally. Jeffery *v.* Selwyn (App. Div.), 159 N. Y. Supp. 430.

[d] **Appointment of a successor to a trustee under a will.** Clarke *v.* Inhab. of Andover, 207 Mass. 91, 92 N. E. 1013.

[e] **Confirming Execution Sales.**—Ebner *v.* Heid, 2 Alaska 600; Torian *v.* Caldwell, 167 Ky. 670, 181 S. W. 373.

[f] **Orders Confirming Sales.**—"The court entertains the opinion that, without doing violence to any principle of law, an order of confirmation may be regarded as a final adjudication touching the regularity taken in the execution of final process. If confirmations are not thus respected . . . an order of confirmation under the present code is an idle ceremony, and the statutes which require such approval were enacted to no purpose." Mathews *v.* Eddy, 4 Ore. 225, 234.

[g] **Injunction.**—Lockett & Williams *v.* Gress Mfg. Co., 8 Ga. App. 772, 70 S. E. 255.

[h] **Mandamus.**—O'Connor *v.* Board of Trustees, 247 Ill. 54, 93 N. E. 124.

[i] **Quo Warranto.**—*Ex parte* Henshaw, 73 Cal. 486, 15 Pac. 110.

[j] **Partition.**—**Ark.**—Green *v.* Holzer, 118 Ark. 533, 177 S. W. 903. **Cal.** Hall *v.* Brittain, 171 Cal. 424, 153 Pac.



(B.) PROCEEDINGS IN REM OR QUASI IN REM.—The rules as to collateral attack are applicable with full force to proceedings in rem and quasi in rem,<sup>99</sup> such as adjudications of insanity,<sup>1</sup> removal of the disabilities

996; *Linahan v. Hathaway*, 51 Cal. 251. **D. C.**—*Bursey v. Lyon*, 30 App. Cas. 597. **Ill.**—*Nickrains v. Wink*, 161 Ill. 76, 43 N. E. 741; *Benefield v. Albert*, 182 Ill. 655, 24 N. E. 634. **Ind.**—*Long v. Schowe*, 181 Ind. 13, 103 N. E. 785. **Ky.**—*Gains v. Johnston*, 12 Ky. L. Rep. 779, 15 S. W. 246. **Mich.**—*James E. Scripps' Corp. v. Parkinson*, 153 N. W. 29. **Mo.**—*State v. Edwards*, 192 Mo. 413, 182 S. W. 816. **Neb.**—*Weddle v. Specht*, 97 Neb. 693, 151 N. W. 160; *Staats v. Wilson*, 76 Neb. 204, 107 N. W. 230. **N. Y.**—*McAuliff v. Hughes*, 128 App. Div. 355, 112 N. Y. Supp. 486. **Pa.**—*Day v. Allen*, 224 Pa. 385, 73 Atl. 456. **Tex.**—*Baker v. Stephenson* (Tex. Civ. App.), 174 S. W. 970; *Caruthers v. Hadley* (Tex. Civ. App.), 134 S. W. 757. **Va.**—*Wright v. Johnson*, 108 Va. 855, 62 S. E. 948.

[k] **Partition of Decedent's Lands.** Upon application of the administrator with the written consent of one of the heirs the court may order the sale of the lands of the decedent for partition, and such decree is conclusive collaterally. *Conniff v. McFarlin*, 178 Ala. 160, 59 So. 472.

[l] **Ejectment.**—*Barrett v. Chicago Terminal Trans. R. Co.*, 271 Ill. 642, 111 N. E. 563.

[m] **Forfeiture.**—**Ky.**—*Clark County v. Ecton*, 150 Ky. 774, 150 S. W. 1016. **Okla.**—*Ruckman v. State*, 44 Okla. 160, 143 Pac. 1050; *State ex rel. Hankin v. Holt*, 42 Okla. 472, 141 Pac. 969.

[n] **Quieting Title.**—**U. S.**—*Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751. **Colo.**—*Austin v. King*, 25 Colo. App. 363, 138 Pac. 57. **Ill.**—*Buckmaster v. Ryder*, 12 Ill. 207. **Ind.**—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278. **Ia.**—*Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153. **Kan.**—*Hungate v. Hetzer*, 83 Kan. 265, 111 Pac. 183. **Neb.**—*Howell v. Ross*, 69 Neb. 1, 94 N. W. 955. **S. D.**—*Phillips v. Phillips*, 43 S. D. 231, 83 N. W. 91. **Tex.**—*Blaske v. Settegast*, 58 Tex. Civ. App. 10, 123 S. W. 220.

[o] **Replevin.**—*McDaniel v. Fox*, 77 Ill. 343.

[p] A decree establishing priority in water rights cannot be impeached

in a statutory proceeding for confirmation of a change of the point of diversion. *Consolidated Home Supply Ditch & Reservoir Co. v. Town of Evans*, 59 Colo. 482, 149 Pac. 834.

[q] **Proceedings to annex territory to a city.** *Ogle v. City of Belleville*, 238 Ill. 389, 87 N. E. 353; *Powell v. Seranton*, 227 Pa. 604, 76 Atl. 505.

[r] **An order of the board of supervisors removing a nuisance is not impeachable collaterally.** *Wright v. Edwards Hotel & City R. Co.*, 101 Miss. 470, 58 So. 332.

[s] **Order Putting Local Option in Force.**—*State ex rel. Retonaz v. Mitchell* (Mo. App.), 115 S. W. 1098.

99. **U. S.**—*Doran v. Kennedy*, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. ed. 996; *Cooper v. Reynolds' Lessee*, 10 Wall. 308, 19 L. ed. 931; *Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177; *Needham v. Wilson*, 47 Fed. 97; *Otis v. Rio Grande*, 1 Woods 279, 18 Fed. Cas. No. 10,613; *Bragg v. Lorio*, 1 Woods 209, 4 Fed. Cas. No. 1,800. **Ala.**—*Rucker v. Tennessee Coal, Iron & Ry. Co.*, 176 Ala. 456, 58 So. 465; *Shearer v. City Nat. Bank*, 115 Ala. 352, 22 So. 151. **Ark.**—*Crittenden-Lumb. Co. v. McDougal*, 101 Ark. 590, 142 S. W. 836; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983; *Kelley v. Laconia Levee Dist.*, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638. **Del.**—*Franckel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. **D. C.**—*Bursey v. Lyon*, 30 App. Cas. 597. **La.**—*Pasteur v. Lewis*, 39 La. Ann. 5, 1 So. 307. **Neb.**—*Wyman v. Searle*, 88 Neb. 26, 128 N. W. 801. **N. J.**—*Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201. **N. C.**—*Corpening v. Kincaid*, 82 N. C. 202. **Ohio.**—*Hamilton v. Merrill*, 25 Ohio St. 11. **Pa.**—*Shryock v. Buchanan*, 121 Pa. 248, 15 Atl. 480. **Tex.**—*Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Scott v. Scott* (Tex. Civ. App.), 170 S. W. 273.

[a] **Directing Payment by Guardian.**—An order directing a guardian to make payment from funds in his hands of commissions to his predecessor is in rem and binding collaterally. *Scott v. Scott* (Tex. Civ. App.), 170 S. W. 273.

1. **U. S.**—*Chaloner v. Sherman*, 215 Fed. 867, 132 C. C. A. 96. **Alaska.**

of minority,<sup>2</sup> naturalization proceedings,<sup>3</sup> assignment of dower<sup>4</sup> or homestead,<sup>5</sup> proceedings for registration of title,<sup>6</sup> and other proceedings hereinafter discussed.<sup>7</sup>

(C.) PROBATE DECISIONS. — (1.) *Generally.* — Decisions of a probate upon matters pending before it are not collaterally impeachable.<sup>8</sup>

(2.) *Probate of Wills.* — The decree of a probate court admitting a will to probate if valid on its face may not be drawn in question in a collateral proceeding.<sup>9</sup>

White's Guardian *v.* Martin, 2 Alaska 495. **Ind.**—Soules *v.* Robinson, 158 Ind. 97, 62 N. E. 999. **Kan.**—Foran *v.* Healy, 73 Kan. 633, 86 Pac. 470. **Ky.**—Frazer *v.* Frazer, 25 Ky. L. Rep. 882, 76 S. W. 546. **La.**—Gentile *v.* Foley, 3 La. Ann. 146. **Mich.**—*In re* Phillips, 158 Mich. 155, 122 N. W. 554. **Mo.**—Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206; Payne *v.* Burdette, 84 Mo. App. 332. **N. Y.**—Searles *v.* Harvey, 6 Hun 658. **Pa.**—Johnston *v.* Given, 4 Walk. 341.

[a] Commitment of insane person to an asylum. Napa State Hospital *v.* Dasso, 153 Cal. 698, 96 Pac. 355; *Ex parte* Lewis, 11 Cal. App. 530, 105 Pac. 774.

2. Removing Disabilities of a Minor. Lake *v.* Perry, 95 Miss. 550, 49 So. 569; Cunningham *v.* Robison (Tex.), 136 S. W. 441; Lemons *v.* Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.), 134 S. W. 742; Buckley *v.* Herder (Tex. Civ. App.), 133 S. W. 703.

3. **U. S.**—Johannessen *v.* United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; Gagnon *v.* United States, 193 U. S. 451, 24 Sup. Ct. 510, 48 L. ed. 745; Spratt *v.* Spratt, 4 Pet. 393, 7 L. ed. 897; United States *v.* Stoller, 180 Fed. 910.

[a] Naturalization of Minor.—State *v.* Brandhorst, 156 Mo. 457, 56 S. W. 1094.

[b] Admission of Indian to Citizenship.—Raymond *v.* Raymond, 1 Ind. Ter. 334, 37 S. W. 202.

4. Agnew *v.* Lichten, 19 Ill. App. 79; Conway *v.* Robinson (Mo.), 178 S. W. 154.

5. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Rodgers *v.* McCune, 143 Ga. 657, 85 S. E. 837 (decree protecting the homestead).

6. Registering Title.—A judgment in a proceeding to register title under the Torrens Act is conclusive collaterally where the court has jurisdiction. State *ex rel.* Coburn *v.* Ries, 123 Minn.

397, 143 N. W. 981; Henry *v.* White, 123 Minn. 182, 143 N. W. 324.

7. See the sections following, and generally the title "Proceedings in Rem."

8. See *supra*, XVII, A, 5, a, (IV). [a] Allowance of Attorney's Fees. United States F. & G. Co. *v.* People, 44 Colo. 557, 98 Pac. 828.

9. Ala.—Blacksher Co. *v.* Northrup, 176 Ala. 190, 57 So. 743; Brock's Admr. *v.* Frank, 51 Ala. 85. Ark.—Turley *v.* Evins, 109 Ark. 115, 158 S. W. 1080. Cal.—Del Campo *v.* Camarillo, 154 Cal. 647, 98 Pac. 1049; Tracy *v.* Muir, 151 Cal. 363, 90 Pac. 832; Clark's Estate, 148 Cal. 108, 82 Pac. 760. Colo.—*In re* Hayes' Estate, 55 Colo. 340, 135 Pac. 449. Ga.—Barton *v.* Johnson, 137 Ga. 332, 73 S. E. 516; Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691; Robertson *v.* Hill, 127 Ga. 175, 56 S. E. 289. Idaho.—Connolly *v.* Probate Court, 25 Idaho 35, 136 Pac. 205. Ill.—Wetmore *v.* Henry, 259 Ill. 80, 102 N. E. 189; Lawrence *v.* Lawrence, 255 Ill. 365, 99 N. E. 675; Slick *v.* Brooks, 253 Ill. 58, 97 N. E. 250; Dibble *v.* Winter, 247 Ill. 243, 93 N. E. 145. Ia.—Hawk *v.* Day, 148 Iowa 47, 126 N. W. 955. Ky. Houser *v.* Paducah Lands Co., 157 Ky. 252, 162 S. W. 1113; Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188; Maynard *v.* Hatcher, 32 Ky. L. Rep. 720. La.—Succession of Desina, 135 La. 402, 65 So. 556. Mo.—Stevens *v.* Oliver, 200 Mo. 492, 98 S. W. 492. Neb.—Herter *v.* Herter, 97 Neb. 260, 149 N. W. 795; Higgins *v.* Vandever, 85 Neb. 89, 122 N. W. 843; Kolterman *v.* Chilvers, 82 Neb. 216, 117 N. W. 405. N. H.—Glover *v.* Baker, 76 N. H. 393, 83 Atl. 916. N. J.—Crawford *v.* Lees, 84 N. J. Eq. 324, 93 Atl. 201. N. Y.—*In re* Work's Estate, 151 App. Div. 707, 136 N. Y. Supp. 218; O'Gorman *v.* Pfeiffer, 145 App. Div. 237, 130 N. Y. Supp. 77; Drake

(3.) *Appointing or Removing Representative.*—Orders appointing or removing personal representatives are likewise conclusive in a collateral proceeding when made by a probate court possessing jurisdiction.<sup>10</sup>

*v. Peehin*, 169 N. Y. Supp. 474. **Ore.**—*Sappingfield v. Sappingfield*, 67 Ore. 156, 135 Pac. 333. **Tex.**—*Dean v. Furrh*, 58 Tex. Civ. App. 495, 124 S. W. 431; *Locust v. Randle*, 46 Tex. Civ. App. 544, 102 S. W. 946. **Va.**—*Saunders v. Link*, 114 Va. 285, 76 S. E. 327; *Avant v. Cook* (Va. App.), 86 S. E. 903. **Wash.**—*State ex rel. Neul v. Kauffman*, 86 Wash. 172, 149 Pac. 656.

See the title "Wills."

[a] **Foreign Probate.**—See *Cal.*—*In re Zollikofer's Will*, 167 Cal. 195, 138 Pac. 995. **Ky.**—*Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113. **La.**—*Bissell v. Bodcaw Lumber Co.*, 134 La. 839, 64 So. 792. See also *infra*, XVIII, and the title "Wills."

[b] **In a widow's action for her share of the estate**, it is not permissible to attack the surrogate's decree determining that testator was at the time of his death an inhabitant of the county, and that he died possessed of personal property and leaving a will which had been probated. *Flatauer v. Loser*, 211 N. Y. 15, 104 N. E. 1123.

**10. U. S.**—*Christianson v. King County*, 239 U. S. 356, 36 Sup. Ct. 114; *American Car & Foundry Co. v. Anderson*, 211 Fed. 301, 127 C. C. A. 587; *Dayton Coal & Iron Co. v. Dodd*, 188 Fed. 597, 110 C. C. A. 395; *Seefeld v. Duffer*, 179 Fed. 214, 103 C. C. A. 32; *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293, 102 C. C. A. 345; *In re Agnew*, 225 Fed. 650. **Ala.**—*Milbra v. Sloss-Sheffield Steel & Iron Co.*, 182 Ala. 622, 62 So. 176; *Carr v. Illinois Cent. R. Co.*, 180 Ala. 159, 60 So. 277; *White v. Hill*, 176 Ala. 480, 58 So. 444; *Childs v. Davis*, 172 Ala. 266, 55 So. 540; *Louisville & N. R. Co. v. Perkins*, 152 Ala. 133, 44 So. 602; *Kling v. Connell*, 105 Ala. 590, 595, 17 So. 121; *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757; *Gray's Admr. v. Cruise*, 36 Ala. 559; *Ikelheimer v. Chapman's Admr.*, 32 Ala. 676; *Lyon v. Odom*, 31 Ala. 234; *Enzor v. Rushton* (Ala. App.), 69 So. 909. **Alaska.**—*In re Decker's Estate*, 3 Alaska 106. **Ariz.**—*Otero v. Otero*, 11 Ariz. 260, 90 Pac. 601. **Ark.**—*Bertig v. Higgins*, 89 Ark. 70, 115 S. W. 935; *Jacobs & Garrett v. Bentley*, 86 Ark. 186, 110 S. W. 594; *Lambert v. Tucker*,

83 Ark. 416, 104 S. W. 131. **Cal.**—*Luco v. Commercial Bank*, 70 Cal. 339, 11 Pac. 650; *Lucas v. Todd*, 28 Cal. 182; *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860; *Abrook v. Ellis*, 6 Cal. App. 451, 92 Pac. 396. **Colo.**—*Moore v. Ingram*, 46 Colo. 204, 102 Pac. 1070. **Conn.**—*Raughtigan v. Norwich Nickel & Brass Co.*, 86 Conn. 281, 85 Atl. 517; *Emery v. Cooley*, 83 Conn. 235, 76 Atl. 529. **D. C.**—*Richmond & Danville R. Co. v. Gorman*, 7 App. Cas. 91. **Ill.**—*Balsewicz v. Chicago, B. & Q. R. Co.*, 240 Ill. 238, 88 N. E. 734; *Salomon v. People*, 191 Ill. 290, 61 N. E. 83; *American Bonding Co. v. Reid*, 168 Ill. App. 646; *Chicago & Eastern Ill. Ry. v. Wolfrum*, 136 Ill. App. 161. **Ind.**—*Sample v. Adams*, 54 Ind. App. 680, 100 N. E. 573; *Craven v. State*, 50 Ind. App. 30, 97 N. E. 1021; *Williams v. Dougherty*, 39 Ind. App. 9, 78 N. E. 1067. **Ia.**—*In re Barrett's Estate*, 167 Iowa 218, 149 N. W. 247; *Erwin v. Fillenwarth*, 160 Iowa 210, 137 N. W. 502; *In re Brigham's Estate*, 144 Iowa 71, 120 N. W. 1054; *In re Wiltsey's Will*, 135 Iowa 430, 109 N. W. 776. **Kan.**—*Hanson v. Sward*, 92 Kan. 1, 140 Pac. 100; *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553; *Livermore v. Ayres*, 86 Kan. 50, 119 Pac. 549; *Ekblad v. Hanson*, 85 Kan. 541, 117 Pac. 1028; *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502. **Ky.**—*Chesapeake & O. R. Co. v. Banks' Admr.*, 142 Ky. 746, 135 S. W. 285; *Young's Admr. v. Chesapeake & O. R. Co.*, 136 Ky. 784, 125 S. W. 241; *McFarland's Admr. v. Louisville & N. R. Co.*, 130 Ky. 172, 113 S. W. 82; *Cunningham v. Clay's Admr.*, 112 S. W. 852. **La.**—*Succession of Landers*, 126 La. 371, 52 So. 545. **Md.**—*Whiting v. Shipley*, 127 Md. 113, 96 Atl. 285. **Mass.**—*Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601. **Mich.**—*Diem v. Drogmiller*, 158 Mich. 380, 122 N. W. 637; *Aekerman v. Pfent*, 145 Mich. 710, 108 N. W. 1084; *Benjamin v. Early*, 123 Mich. 93, 81 N. W. 973. **Minn.**—*Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235. **Mo.**—*Green v. Tittman*, 124 Mo. 372, 27 S. W. 391; *Bell v. Farmers' & Traders' Bank*, 188 Mo. App. 383, 174 S. W.



(4.) *Sale of Decedent's Property.*—Proceedings to sell the decedent's property are not subject to collateral impeachment for mere errors and irregularities.<sup>11</sup>

196; *Connor v. Paul*, 138 Mo. App. 13, 119 S. W. 1006; *Griesel v. Jones*, 123 Mo. App. 45, 99 S. W. 769. **Neb.** *Wilder v. Millard*, 93 Neb. 595, 141 N. W. 156; *Bradley v. Missouri P. Ry. Co.*, 51 Neb. 653, 71 N. W. 282; *Moore's Estate v. Moore*, 33 Neb. 509, 50 N. W. 443; *Missouri Pac. Ry. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401. **Nev.**—*Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753. **N. M.**—*Smith v. Steen*, 20 N. M. 436, 150 Pac. 927. **N. J.**—*In re Queen's Estate*, 82 N. J. Eq. 583, 89 Atl. 290. **N. Y.**—*Pietraroia v. New Jersey & H. R. Ry. & F. Co.*, 197 N. Y. 434, 91 N. E. 120; *Webster v. M. W. Kellogg Co.*, 168 App. Div. 443, 153 N. Y. Supp. 800; *Bacelli v. Delaware & H. R. Co.*, 138 App. Div. 623, 122 N. Y. Supp. 849; *In re Schmid*, 116 App. Div. 706, 102 N. Y. Supp. 80. **N. C.**—*Fann v. North Carolina R. Co.*, 155 N. C. 136, 71 S. E. 81; *Shober v. Wheeler*, 144 N. C. 403, 57 S. E. 152. **Ohio.**—*Union Sav. Bank & Trust Co. v. Western Union Tel. Co.*, 79 Ohio St. 89, 86 N. E. 478. **Ore.**—*Brown v. Truax*, 58 Ore. 572, 115 Pac. 597. **Pa.** *Zeigler v. Storey*, 220 Pa. 471, 69 Atl. 894; *In re Miller's Estate*, 216 Pa. 247, 65 Atl. 681. **S. C.**—*In re Brown's Estate*, 79 S. E. 791. **Tex.**—*Waterman Lumber & Supply Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360; *Steele's Unknown Heirs v. Belding* (Tex. Civ. App.), 148 S. W. 592; *Stephenson v. Wiess* (Tex. Civ. App.), 145 S. W. 287; *Waggoner v. Sneed* (Tex. Civ. App.), 138 S. W. 219; *Farmer v. Saunders*, 60 Tex. Civ. App. 197, 128 S. W. 941; *Kuck v. Dixon* (Tex. Civ. App.), 127 S. W. 910. **Wis.**—*Jenks v. Allen*, 151 Wis. 625, 139 N. W. 433; *Chandler v. Munkwitz Realty & Inv. Co.*, 148 Wis. 5, 134 N. W. 148; *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198.

[a] **Administratrix De Facto.**—An infant improperly appointed administratrix is such de facto and the appointment is not impeachable collaterally. *Tomblin v. Peck*, 73 W. Va. 336, 80 S. E. 450.

[b] **Administrator With the Will Annexed.**—*Young's Admr. v. Chesapeake & O. R. Co.*, 136 Ky. 784, 125

S. W. 241; *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569.

[c] **Administrator De Bonis Non.** *Dallinger v. Morse*, 208 Mass. 501, 94 N. E. 701.

[d] **Appointment of non-resident as administrator.** **Kan.**—*Livermore v. Ayres*, 86 Kan. 50, 119 Pac. 549. **Wash.** *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841. **W. Va.**—*Cicerello v. Chesapeake & O. R. Co.*, 65 W. Va. 439, 64 S. E. 621.

[e] **Appointment by Clerk.**—The appointment of an executor by a superior court clerk is not subject to collateral attack. *Batchelor v. Overton*, 158 N. C. 395, 74 S. E. 20.

[f] **By County Court.**—The appointment of an executor by the county court is voidable but conclusive collaterally. *Louisville & N. R. Co. v. Herb*, 125 Tenn. 408, 143 S. W. 1138.

[g] **A register's decree granting letters of administration may not be avoided in a collateral proceeding.** *Zeigler v. Storey*, 220 Pa. 471, 69 Atl. 894.

[h] **Though letters are afterwards revoked the appointment cannot be collaterally attacked as to acts done under it.** *Amberson v. Candler*, 17 N. M. 455, 130 Pac. 255.

**11. U. S.**—*Doran v. Kennedy*, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. ed. 996; *Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. ed. 1105; *Sheffey v. Davis Colliery Co.*, 135 C. C. A. 177, 219 Fed. 465. **Ala.**—*Rucker v. Tennessee Coal, Iron & Ry. Co.*, 176 Ala. 456, 58 So. 465; *Howell v. Hughes*, 168 Ala. 460, 53 So. 105; *Neville v. Kenney*, 125 Ala. 149, 28 So. 452. **Ark.** *Long v. Hoffman*, 103 Ark. 574, 148 S. W. 245; *Hoshall v. Brown*, 102 Ark. 114, 143 S. W. 1081; *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773; *Kelley v. Laconia Levee Dist.*, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638. **Cal.**—*In re Bazzuro's Estate*, 161 Cal. 71, 118 Pac. 434; *In re Devincenzi's Estate*, 119 Cal. 498, 51 Pac. 845; *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. **Colo.** *Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413. **Conn.**—*Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 483. **Ga.**—*Harden v. Sutton*, 143 Ga.

15. *Derees of Distribution.*—A decree ordering the distribution of decedent's estate is within the rule as to collateral attack.<sup>12</sup>

717, 85 S. E. 874; *Martin v. Dix*, 134 Ga. 481, 68 S. E. 80; *Cochran v. Bugg*, 131 Ga. 588, 62 S. E. 1048; *Adams v. Adams*, 113 Ga. 824, 39 S. E. 291. Ill. *Reinhardt v. Seaman*, 208 Ill. 448, 69 N. E. 847; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304; *Cassell v. Joseph*, 184 Ill. 378, 56 N. E. 413; *Robb v. Howell*, 180 Ill. 177, 54 N. E. 324; *Sloan v. Graham*, 85 Ill. 26; *Harris v. Lester*, 80 Ill. 307. Ind.—*Thomas v. Thompson*, 149 Ind. 391, 49 N. E. 268; *Boyer v. Robertson*, 149 Ind. 74, 48 N. E. 7; *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13; *Lantz v. Maffett*, 102 Ind. 23, 26 N. E. 195; *Gavin v. Graydon*, 41 Ind. 559. Ia.—*Rice v. Bolton*, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509; *Cheney v. McColloch*, 104 Iowa 249, 73 N. W. 580. Kan.—*J. B. Watkins Land-Mortg. Co. v. Mullen*, 62 Kan. 1, 61 Pac. 385. Ky.—*Roy v. Allen's Admr.*, 118 S. W. 981; *Disman v. Flippin's Admx.*, 116 S. W. 740; *Dennis v. Alves*, 132 Ky. 345, 113 S. W. 483; *Blackwell v. Townsend*, 91 Ky. 609, 16 S. W. 587; *Smith v. Hardesty*, 26 Ky. L. Rep. 1266, 83 S. W. 646; *Sorrell v. Samuels*, 20 Ky. L. Rep. 1498, 49 S. W. 762. Me.—*Lebroke v. Damon*, 89 Me. 113, 35 Atl. 1028. Mass.—*Perkins v. Fairfield*, 11 Mass. 227. Mich.—*King v. Nunn*, 99 Mich. 590, 58 N. W. 636; *Pratt v. Houghtaling*, 45 Mich. 457, 8 N. W. 72. Miss.—*Shannon v. Summers*, 86 Miss. 619, 38 So. 345. Mo.—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561; *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129; *Blickensderffer v. Hanna*, 231 Mo. 93, 132 S. W. 678; *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo. 414, 125 S. W. 486; *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674; *Covington v. Chamblin*, 156 Mo. 574, 57 S. W. 728; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976; *Grayson v. Weddle*, 63 Mo. 523; *Overton v. Johnson*, 17 Mo. 442. Mont.—*Plains Land & Imp. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847. Neb.—*Tindall v. Peterson*, 71 Neb. 160, 98 N. W. 688; *Holmes v. Columbia Nat. Bank*, 97 N. W. 26; *Haight v. Hayes*, 92 N. W. 297. N. J.—*Newby v. Blakely*, 85 N. J. L. 728, 90 Atl. 318. N. Y.—*Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667; *Mott v. Ft. Edward Waterworks Co.*, 79 App.

Div. 179, 79 N. Y. Supp. 1100. N. C. *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217; *Phillips v. Denton*, 158 N. C. 299, 73 S. E. 1006. Ohio.—*In re Seitz Estate*, 11 Ohio Cir. Ct. (N. S.) 204. Ore. *Yeaton v. Barnhart*, 152 Pac. 1192; *Smith v. Whiting*, 55 Ore. 393, 106 Pac. 791; *Lawrey v. Sterling*, 41 Ore. 518, 69 Pac. 460. Pa.—*Grubb v. Galloway*, 203 Pa. 236, 52 Atl. 176. S. C.—*Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217. S. D.—*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250; *Phillips v. Phillips*, 13 S. D. 231, 83 N. W. 94. Tenn.—*Puckett v. Wynns*, 132 Tenn. 513, 178 S. W. 1184. Tex.—*Macmanus v. Orkney*, 91 Tex. 27, 40 S. W. 715; *Wilkin v. Simmons* (Tex. Civ. App.), 151 S. W. 1145; *Wade v. Scott* (Tex. Civ. App.), 145 S. W. 675; *Ross v. Martin* (Tex. Civ. App.), 128 S. W. 718; *Salas v. Mundy*, 59 Tex. Civ. App. 407, 125 S. W. 633; *Millwee v. Phelps*, 53 Tex. Civ. App. 195, 115 S. W. 891. Wash.—*Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

[a] *Necessity of Sale.*—The court's decision that the debts of decedent are unpaid, that there is not sufficient personal estate to pay the same, and the order directing the sale of the real estate are within the court's jurisdiction to determine the facts and the heirs and legatees may not attack the proceedings collaterally. *Blickensderffer v. Hanna*, 231 Mo. 93, 132 S. W. 678.

[b] *Refusal To Sell.*—The decision of a probate court that certain debts were not a charge upon the estate of decedent and that a sale was not necessary is conclusive collaterally. *Mayer v. Kornegay*, 163 Ala. 374, 50 So. 880.

[c] *Mortgage of Decedent's Real Estate.*—*Stow v. Schiefferly*, 120 Cal. 609, 52 Pac. 1000.

12. U. S.—*C. A. Burton Mach. Co. v. Davies*, 123 C. C. A. 373, 205 Fed. 141; *Beard v. Roth*, 35 Fed. 397. Cal. *In re Learned's Estate*, 156 Cal. 309, 104 Pac. 315; *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75; *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *Crew v. Pratt*, 119 Cal. 139, 151, 51 Pac. 38; *The William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Lynch v. Rooney*, 112 Cal. 279, 44 Pac.

(6.) *Guardianship Proceedings*.—Probate orders relative to guardians of infants, insane persons or other incompetents are not open to attack in a collateral proceeding except for jurisdictional defects.<sup>13</sup>

(7.) *Adoption*.—Orders or decrees of adoption are not subject to

565. **D. C.**—Richmond & Danville R. Co. v. Gorman, 7 App. Cas. 91. **Ga.** Flanders v. Sutton, 143 Ga. 764, 85 S. E. 914. **Idaho**.—Connolly v. Probate Court, 25 Idaho 35, 136 Pac. 205. **Ill.** Dickinson v. Belden, 268 Ill. 105, 108 N. E. 1011. **Ia.**—Tucker v. Stewart, 147 Iowa 294, 126 N. W. 183. **Mo.**—Harter v. Petty, 266 Mo. 296, 181 S. W. 39; Nelson v. Barnett, 123 Mo. 564, 27 S. W. 520; Rowden v. Brown, 91 Mo. 429, 4 S. W. 129; Camden v. Plain, 91 Mo. 117, 4 S. W. 86; Einstein v. Strother (Mo. App.), 182 S. W. 122; Crump v. Hart, 189 Mo. App. 572, 176 S. W. 1089; Dewese v. Yost, 161 Mo. App. 10, 143 S. W. 72; Mueller v. Grunker (Mo. App.), 123 S. W. 469. **N. D.** Shane v. Peoples, 25 N. D. 188, 141 N. W. 737. **Pa.**—Rice v. Braden, 243 Pa. 141, 89 Atl. 877; *In re Metzger's Estate*, 242 Pa. 69, 88 Atl. 915; Ferguson v. Yard, 164 Pa. 586, 30 Atl. 517. **Vt.**—Sparrow v. Watson, 87 Vt. 366, 89 Atl. 468.

[a] A decree of distribution is a judicial construction of the will and its terms, unless directly attacked, are conclusive as to the rights of all heirs, devisees or legatees claiming any portion of the estate. *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132.

[b] Judgment of Escheat.—A judgment of probate that an estate escheat to the state is conclusive collaterally. *Christianson v. King County*, 239 U. S. 356, 36 Sup. Ct. 114.

[c] Order opening and amending the decree. *Woodruff v. H. B. Claffin Co.*, 133 App. Div. 874, 118 N. Y. Supp. 48.

13. **Cal.**—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156. **Ga.**—Sturtevant v. Robinson, 133 Ga. 564, 66 S. E. 890. **Haw.**—*In re Kapukini*, 12 Hawaii 22, guardian for spendthrift. **Ill.**—People v. Medart, 166 Ill. 348, 46 N. E. 1095; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463. **Ind.**—Dequindre v. Williams, 31 Ind. 444. **Ia.**—Wallace v. Tinney, 145 Iowa 478, 122 N. W. 936. **Kan.** Modern Woodmen v. Hester, 66 Kan. 129, 71 Pac. 279; Royal Neighbors v.

Hester, 66 Kan. 764, 71 Pac. 1129. **Ky.** Paslick v. Shary, 148 Ky. 642, 147 S. W. 369. **La.**—Succession of Gorrisson, 15 La. Ann. 27. **Mo.**—Cox v. Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; Mueller v. Grunker (Mo. App.), 123 S. W. 469. **Neb.**—Wirsig v. Scott, 79 Neb. 322, 112 N. W. 655. **Ore.**—State v. Thompson, 28 Ore. 296, 42 Pac. 1002. **R. I.**—Providence County Sav. Bank v. Hughes, 26 R. I. 73, 58 Atl. 254. **Tex.**—Minchew v. Case (Tex. Civ. App.), 143 S. W. 366. **Va.**—Durrett v. Davis, 24 Gratt. (65 Va.) 302. **Wis.**—*In re Stittgen*, 110 Wis. 625, 86 N. W. 563.

[a] Appointing Guardian for Insane Persons.—**Ala.**—Powell v. Union Bank & Trust Co., 173 Ala. 332, 56 So. 123; Craft v. Simon, 118 Ala. 625, 24 So. 380. **Cal.**—McGee v. Hayes, 127 Cal. 336, 59 Pac. 767; Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101. **Ill.** Searle v. Galbraith, 73 Ill. 269. **Ky.** Crown Real Estate Co. v. Rogers' Committee, 132 Ky. 790, 117 S. W. 275. **Minn.**—State *ex rel.* Raymond v. Lawrence, 86 Minn. 310, 90 N. W. 769. **Mo.**—Payne v. Burdette, 84 Mo. App. 332. **N. Y.**—*In re Bergmann*, 110 App. Div. 588, 97 N. Y. Supp. 346. **Tex.** Johnson v. Grace (Tex. Civ. App.), 94 S. W. 1064; Flynn v. Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245. **Va.**—Howard v. Landsberg's Committee, 108 Va. 161, 60 S. E. 769; Edmunds v. Venable, 1 Pat. & H. 121.

[b] Authorizing Sale.—*Pattee v. Thomas*, 58 Mo. 163; White v. Bedell (Tex. Civ. App.), 173 S. W. 624.

[c] Mortgage of Infant's Property. *Warren v. Union Bank of Rochester*, 157 N. Y. 259, 51 N. E. 1036.

[d] Adjudging Guardian Indebted to Ward.—*Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184.

[e] Appointment of Guardian of Non-resident Lunatic.—*Wallace v. Tinney*, 145 Iowa 478, 122 N. W. 936.

[f] A petition for the removal of a guardian is collateral to the decree appointing him. *In re Kapukini*, 12 Hawaii 22.



collateral attack except in accordance with the general rules herein-after discussed.<sup>14</sup>

(D.) DIVORCE PROCEEDINGS. — A divorce decree rendered by a court having jurisdiction of the res cannot be collaterally impeached.<sup>15</sup> And the same is true as to an award of alimony,<sup>16</sup> and a decree of separate maintenance.<sup>17</sup>

14. **Haw.**—*J. D. Paris v. Kealoha*, 11 Hawaii 450. **Ill.**—*Yockey v. Marion*, 269 Ill. 342, 110 N. E. 34; *Kennedy v. Borah*, 226 Ill. 243, 80 N. E. 767; *Munger v. Munger*, 134 Ill. App. 512. **Ind.**—*Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526. **Ky.**—*Villier v. Watson's Admx.*, 168 Ky. 631, 182 S. W. 869. **Miss.**—*Adams v. Adams*, 102 Miss. 239, 59 So. 84. **N. Y.**—*In re Ward's Estate*, 59 Misc. 328, 112 N. Y. Supp. 282. **Tenn.**—*Crocker v. Balch*, 104 Tenn. 6, 55 S. W. 307. **Wash.**—*Beatty v. Davenport*, 45 Wash. 555, 88 Pac. 1109. **Wis.**—*In re McCormick's Estate*, 108 Wis. 234, 84 N. W. 148.

15. **U. S.**—*Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347. **Ala.**—*Smith v. Gibson*, 191 Ala. 305, 68 So. 143; *Ex parte Edwards*, 183 Ala. 659, 62 So. 775; *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *Martin v. Martin*, 173 Ala. 106, 55 So. 632; *Pollard v. American Freehold Land Mtg. Co.*, 103 Ala. 289, 295, 16 So. 801. **Ark.**—*Whitford v. Whitford*, 100 Ark. 63, 139 S. W. 653. **Cal.**—*Flynn v. Flynn*, 171 Cal. 746, 154 Pac. 837; *In re McNeil's Estate*, 155 Cal. 333, 100 Pac. 1086; *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122. **D. C.**—*Thompson v. Thompson*, 35 App. Cas. 14. **Ga.**—*Hood v. Hood*, 143 Ga. 616, 85 S. E. 849. **Ill.**—*Jeffries v. Alexander*, 266 Ill. 49, 107 N. E. 146; *Long v. Barton*, 236 Ill. 551, 86 N. E. 127. **Ind.**—*Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151; *Beavers v. Bess*, 58 Ind. App. 287, 108 N. E. 266. **Ia.**—*Richardson v. King*, 157 Iowa 287, 135 N. W. 640; *Belknap v. Belknap*, 154 Iowa 213, 134 N. W. 734; *Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72. **Kan.**—*Cheever v. Kelly*, 96 Kan. 269, 150 Pac. 529; *Gordon v. Munn*, 87 Kan. 624, 125 Pac. 1. **Mich.**—*Austin v. Austin*, 173 Mich. 47, 138 N. W. 237. **Minn.**—*Sammons v. Pike*, 108 Minn. 291, 122 N. W. 168; *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108. **Miss.**—*Hester v. Hester*, 103 Miss. 13, 60 So. 6. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Hinkle v. Lovelace*, 204 Mo. 208, 102

S. W. 1015; *Davison v. Bankers' Life Assn.*, 166 Mo. App. 625, 150 S. W. 713. **Neb.**—*In re Nelson's Est.*, 81 Neb. 363, 115 N. W. 1087; *Cizek v. Cizek*, 99 N. W. 28; *Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W. 245. **N. Y.**—*Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028; *Simmonds v. Simmonds*, 78 Misc. 571, 138 N. Y. Supp. 639. **N. D.**—*Stenson v. H. S. Halverson Co.*, 28 N. D. 151, 147 N. W. 800. **Tex.**—*Douglas v. State*, 58 Tex. Crim. 122, 124 S. W. 933; *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 347. **Wash.**—*Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647; *Morgan v. Fidelity & Dep. Co.*, 66 Wash. 649, 120 Pac. 106. **Wyo.**—*Emelle v. Spinner*, 20 Wyo. 507, 126 Pac. 397.

**Foreign Divorce.**—See *infra*, XVIII.

[a] **Application for Support.**—In a widow's application for the setting apart of a year's support out of the estate of her deceased husband, an amendment to the objections to the allowance of the application setting up the invalidity of a prior divorce is a collateral attack upon the divorce. *Hood v. Hood*, 143 Ga. 616, 85 S. E. 849.

[b] **Petition for Homestead.**—Where in a suit to set off a homestead in deceased's lands it was incidentally sought to set aside a divorce, the attack was regarded as collateral. *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458. And see *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438.

[c] **Objections on a murder trial** to witness' testimony on the ground that she is the wife of defendant is a collateral attack on the decree divorcing them. *Douglas v. State*, 58 Tex. Crim. 122, 124 S. W. 933.

[d] **A suit for maintenance** is collateral to a divorce. *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347.

16. *Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625.

17. *Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625.

(E.) BANKRUPTCY, INSOLVENCY AND RECEIVERSHIP PROCEEDINGS. — Adjudications<sup>18</sup> and discharges<sup>19</sup> in bankruptcy and insolvency proceedings may not in a collateral proceeding, be questioned for mere irregularities which do not render them void. The appointment of a receiver,<sup>20</sup> and

18. **U. S.**—Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466; *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. ed. 83; *Sloan v. Lewis*, 22 Wall. 150, 22 L. ed. 832; *Michaels v. Post*, 21 Wall. 398, 22 L. ed. 520; *Larkin-Green Logging Co. v. Sabin*, 222 Fed. 814, 138 C. C. A. 240; *Corbett v. Riddle*, 209 Fed. 811, 126 C. C. A. 535; *In re Dempster*, 172 Fed. 353, 97 C. C. A. 51; *Gilbertson v. United States*, 168 Fed. 672, 94 C. C. A. 158; *In re New York Tunnel Co.*, 166 Fed. 284, 92 C. C. A. 202; *In re Hecox*, 164 Fed. 823, 90 C. C. A. 627; *Huttig Mfg. Co. v. Edwards*, 160 Fed. 619, 87 C. C. A. 521; *In re Worsham*, 142 Fed. 121, 73 C. C. A. 665; *Ayres v. Cone*, 138 Fed. 778, 71 C. C. A. 144; *Sarrazin v. W. R. Irby Cigar & T. Co.*, 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541; *Cook v. Robinson*, 194 Fed. 785, 114 C. C. A. 505; *Edelstein v. United States*, 79 C. C. A. 328, 149 Fed. 636 (writ of error denied, 205 U. S. 543, 27 Sup. Ct. 791, 51 L. ed. 922); *In re Gibbons*, 225 Fed. 420; *In re Sage*, 224 Fed. 525; *In re Culgin-Pace Contracting Co.*, 224 Fed. 245; *In re Davis*, 217 Fed. 113; *In re V. & M. Lumber Co.*, 182 Fed. 231; *In re Billing*, 145 Fed. 395; *In re Elmira Steel Co.*, 109 Fed. 456; *In re Henry Ulfelder Clothing Co.*, 98 Fed. 409; *State Nat. Bank of Maysville v. Ellison*, 75 Fed. 354. **Ariz.**—*Bail v. Hartman*, 9 Ariz. 321, 83 Pac. 358. **Cal.**—*Barrett v. Carney*, 33 Cal. 530. **Ill.**—*Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782. **Ia.**—*Wright v. Watkins*, 2 G. Gr. 547. **Mich.**—*Benedict v. Smith*, 48 Mich. 593, 12 N. W. 866. **N. J.**—*Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726. **Va.**—*Harman v. Stearns*, 95 Va. 58, 27 S. E. 601.

[a] A decree authorizing a receiver to sue is not open to collateral attack for mere error. *Slaughter v. Louisville & N. R. Co.*, 125 Tenn. 292, 143 S. W. 603.

19. **U. S.**—*Allen & Co. v. Thompson*, 10 Fed. 116; *United States v. Griswold*, 8 Fed. 556. **Ala.**—*Milhoux v. Aicardi*, 51 Ala. 594; *Oates v. Parish*, 47 Ala. 157. **Ark.**—*Young v. Stevenson*, 73 Ark. 480, 84 S. W. 623. **Cal.**—*Santa Rosa Bank v. White*, 139 Cal. 703, 73 Pac. 577. **Ga.**—*Brady v. Brady*, 71 Ga. 71. **Ill.**—*Ross-Lewin v. Gould*, 211 Ill. 384, 71 N. E. 1028. **Ind.**—*Wiley v. Pavey*, 61 Ind. 457, 28 Am. Rep. 677. **Ky.**—*Thurmond v. Andrews*, 10 Bush 400. **La.**—*Andrus v. Cornwell*, 134 La. 403, 64 So. 221. **Me.**—*Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19; *Stetson v. Bangor*, 56 Me. 274. **Md.**—*Talbott v. Suit*, 68 Md. 443, 13 Atl. 356. **Mass.**—*Fuller v. Pease*, 144 Mass. 390, 11 N. E. 694; *Way v. Howe*, 108 Mass. 502, 11 Am. Rep. 386. **Miss.**—*Stevens v. Brown*, 49 Miss. 597. **Mo.**—*Brown v. Covenant Mut. Life Ins. Co.*, 86 Mo. 51; *Thornton v. Hogan*, 63 Mo. 143; *Shelton v. Pease*, 10 Mo. 473. **Neb.**—*Seymour v. Street*, 5 Neb. 85. **N. H.**—*Parker v. Atwood*, 52 N. H. 181. **N. Y.**—*Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Sutherland v. Lasher*, 41 Misc. 249, 84 N. Y. Supp. 56; *Lutz v. Kalmus*, 115 N. Y. Supp. 230. **N. C.**—*Williams v. Scott*, 122 N. C. 545, 29 S. E. 877. **Ohio.**—*Howland v. Carson*, 28 Ohio St. 625; *Collins v. Davidson*, 16 Ohio Cir. Ct. (N. S.) 12. **Okla.**—*First Nat. Bank v. Masterson*, 29 Okla. 76, 116 Pac. 162. **Pa.**—*Sheets v. Hawk*, 14 Serg. & R. 173, 16 Am. Dec. 486. **Tenn.**—*Hennessee v. Mills*, 1 Baxt. 38; *Morris v. Creed*, 11 Heisk. 155. **Tex.**—*Brown v. Causey*, 56 Tex. 340; *Alston v. Robinett*, 37 Tex. 56; *Cooper Grocery Co. v. Gaddy* (Tex. Civ. App.), 141 S. W. 825; *Hoskins v. Velasco Nat. Bank*, 48 Tex. Civ. App. 246, 107 S. W. 598; *Fields v. Rust*, 36 Tex. Civ. App. 350, 82 S. W. 331. **Wash.**—*Delta County Bank v. McGranahan*, 37 Wash. 307, 79 Pac. 796. **Wis.**—*Thomas v. Jones*, 39 Wis. 124.

20. **U. S.**—*Lively v. Picton*, 218 Fed. 401, 134 C. C. A. 189; *Taylor v. Easton*, 180 Fed. 363, 103 C. C. A. 509; *Gunby v. Armstrong*, 133 Fed. 417, 66 C. C. A. 627; *Shinney v. North American Sav., Loan & Bldg. Co.*, 97 Fed. 9; *Olmstead v. Distilling & Cattle-Feeding Co.*, 73 Fed. 44. **Ala.**—*Ex parte Hurt*, 157 Ala. 368, 47 So. 264. **Cal.**—*Title Ins. &*

the orders made in receivership proceedings are equally invulnerable collaterally.<sup>21</sup>

(F.) ATTACHMENT AND GARNISHMENT. — Proceedings in attachment<sup>22</sup> and garnishment<sup>23</sup> have the same conclusive effect when attacked collaterally as other proceedings.

(G.) FORECLOSURE OF MORTGAGES. — A decree rendered in a proceeding to foreclose a mortgage, unless for some reason invalid, may only be questioned in a direct proceeding.<sup>24</sup>

Trust Co. *v.* Grider, 152 Cal. 746, 94 Pac. 601; Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90; Illinois Trust & Savings Bank *v.* Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60. **Colo.**—Powell *v.* National Bank, 19 Colo. App. 57, 74 Pac. 536. **Del.**—Harned *v.* Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 805. **Ga.**—Graves *v.* Denny, 15 Ga. App. 718, 84 S. E. 187. **Ill.**—Roby *v.* Title Guarantee & Trust Co., 166 Ill. 336, 46 N. E. 1110; Broch *v.* French, 116 Ill. App. 15. **Ind.**—Marshall *v.* Matson, 171 Ind. 238, 86 N. E. 339; Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231; Bodkin *v.* Merit, 102 Ind. 293, 1 N. E. 625; Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188. **Ia.**—Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26. **Kan.**—Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589; Missouri Pac. Ry. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072. **Md.**—Forest Lake Cemetery *v.* Baker, 113 Md. 529, 77 Atl. 853; James Clark Co. *v.* Colton, 91 Md. 195, 46 Atl. 386. **Mich.**—Nichol *v.* Murphy, 145 Mich. 424, 108 N. W. 704; McKay *v.* Van Kleeck, 133 Mich. 27, 94 N. W. 367. **Miss.**—Benjamin *v.* Staples, 93 Miss. 507, 47 So. 425. **Mo.**—State *ex rel.* Connors *v.* Shelton, 238 Mo. 281, 142 S. W. 417; Neun *v.* Blackstone Bldg. & Loan Assn., 149 Mo. 74, 50 S. W. 436; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Bloek *v.* Estes, 92 Mo. 318, 4 S. W. 731. **Neb.**—Gibson *v.* Sexson, 82 Neb. 475, 118 N. W. 77; Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Neb. 489, 95 N. W. 1022; Andrews *v.* Steele City Bank, 57 Neb. 173, 77 N. W. 342. **N. Y.**—Rabbe *v.* Astor Trust Co., 61 Misc. 650, 114 N. Y. Supp. 131. **N. C.**—Rousseau *v.* Call, 169 N. C. 173, 85 S. E. 414. **Okla.**—Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703. **Pa.**—Backenstoe *v.* Kline, 31 Pa. Super. 268. **S. D.**—Thurber *v.* Miller, 11 S. D. 124, 75 N. W. 900. **Tenn.**—Trougher *v.* Akin, 109 Tenn. 451, 73 S. W. 118;

Slaughter *v.* Louisville & N. R. Co., 125 Tenn. 292, 143 S. W. 603. **Tex.**—New Britain Machine Co. *v.* Watt (Tex. Civ. App.), 180 S. W. 624; American Const. Co. *v.* Seelig (Tex. Civ. App.), 131 S. W. 655; American Bonding Co. *v.* Williams (Tex. Civ. App.), 131 S. W. 652; Holland *v.* Preston (Tex. Civ. App.), 41 S. W. 374. **Wash.**—Carroll *v.* Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.

21. **Authorizing Suit by Receiver.** Graves *v.* Denny, 15 Ga. App. 718, 84 S. E. 187.

22. **U. S.**—Pensacolo State Bank *v.* Thornberry, 226 Fed. 611, 141 C. C. A. 367; Butterfield *v.* Miller, 195 Fed. 200, 115 C. C. A. 152; Eltonhead *v.* Allen, 119 Fed. 126, 55 C. C. A. 671; Needham *v.* Wilson, 47 Fed. 97. **Ala.**—McMahan *v.* Browne, 185 Ala. 272, 64 So. 553. **Cal.**—Title Ins. & Trust Co. *v.* California Development Co., 171 Cal. 173, 152 Pac. 542. **Colo.**—Van Wagenen *v.* Carpenter, 27 Colo. 444, 61 Pac. 698. **Fla.**—Lucy *v.* Deas, 59 Fla. 552, 52 So. 515. **Ind.**—Treharne *v.* Matson, 46 Ind. App. 705, 93 N. E. 553. **Mich.**—Gill *v.* Backus, 108 Mich. 417, 66 N. W. 347. **N. J.**—Diehl *v.* Page, 3 N. J. Eq. 143. **N. Y.**—Ledoux *v.* East River Silk Co., 19 Misc. 440, 44 N. Y. Supp. 489. **N. C.**—Harrison *v.* Pender, 44 N. C. 78. **Ore.**—Schlosser *v.* Beemer, 40 Ore. 412, 67 Pac. 299.

23. **U. S.**—Baltimore & Ohio R. Co. *v.* Hostetter, 240 U. S. 620, 36 Sup. Ct. 475; Harris *v.* Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023. **Cal.**—Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254. **Ind.**—Northern Indiana R. Co. *v.* Lincoln Nat. Bank, 47 Ind. App. 98, 92 N. E. 384. **Mo.**—Norman *v.* Eastburn, 230 Mo. 168, 130 S. W. 276. **Neb.**—Cooper *v.* Speiser, 34 Neb. 500, 52 N. W. 403.

24. **U. S.**—Bull *v.* Campbell, 225 Fed. 923, 141 C. C. A. 47; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Andrews *v.* Na-



(H.) TAX JUDGMENTS. — A judgment foreclosing a tax lien is of the same validity collaterally as any other judgment, and only jurisdictional objections can be collaterally urged against it.<sup>25</sup>

- tional Foundry & Pipe Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153. **Ark.**—Carpenter *v.* Zarbuck, 74 Ark. 474, 86 S. W. 229; Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704. **Cal.**—Hibernia Sav. & Loan Society *v.* Boyd, 155 Cal. 193, 100 Pac. 239; Johnson *v.* Friant, 140 Cal. 260, 73 Pac. 993; Hansen *v.* Wagner, 133 Cal. 69, 65 Pac. 142; Wood *v.* Jordan, 125 Cal. 261, 57 Pac. 997; Klumpke *v.* Henley, 24 Cal. App. 35, 140 Pac. 313. **Colo.**—Empire Ranch & Cattle Co. *v.* Gibson, 23 Colo. App. 476, 130 Pac. 615. **Ill.**—Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Vail *v.* Arkell, 146 Ill. 363, 34 N. E. 937; Chicago Dock & Canal Co. *v.* Kinzie, 93 Ill. 415. **Ind.**—White *v.* First Nat. Bank, 56 Ind. App. 708, 104 N. E. 60; White *v.* Bradfute, 56 Ind. App. 708, 104 N. E. 123; White *v.* Suggs, 56 Ind. App. 572, 104 N. E. 55; Hanley *v.* Mason, 42 Ind. App. 312, 85 N. E. 381, 732. **Ia.**—Ostby *v.* Secor, 94 N. W. 571. **Kan.**—Hartz *v.* Fitts, 89 Kan. 751, 132 Pac. 1187; Brenholts *v.* Miller, 80 Kan. 185, 101 Pac. 998. **Md.**—George Long C. Co. *v.* Albert, 116 Md. 111, 81 Atl. 265, Ann. Cas. 1913B, 1259. **Mich.** Kerr *v.* Weeks, 158 N. W. 131; Miller *v.* Peter, 158 Mich. 336, 122 N. W. 780. **Mo.**—Bryan *v.* McCaskill, 175 S. W. 961; Halter *v.* Leonard, 223 Mo. 286, 122 S. W. 706; Jones *v.* Edeman, 223 Mo. 312, 122 S. W. 1047. **Neb.**—Bresee *v.* Seberger, 88 Neb. 632, 130 N. W. 264. **N. Y.**—Hope *v.* Seaman, 119 N. Y. Supp. 713. **N. D.**—Borden *v.* McNamara, 20 N. D. 225, 127 N. W. 104. **Ore.**—Northwest Townsite Co. *v.* Conn., 74 Ore. 484, 145 Pac. 1058. **Wis.** Minneapolis Threshing Mach. Co. *v.* Ashauer, 142 Wis. 646, 126 N. W. 113. 25. **U. S.**—Wilfong *v.* Ontario Land Co., 171 Fed. 51, 96 C. C. A. 293; United States Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427. **Ala.**—Driggers *v.* Cassidy, 71 Ala. 529; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785. **Ark.**—Clay *v.* Barnes, 181 S. W. 303; Price *v.* Gunn, 114 Ark. 551, 170 S. W. 247; O'Barr *v.* Sanders, 113 Ark. 449, 169 S. W. 249; Hall *v.* Morris, 94 Ark. 519, 127 S. W. 718; Boynton *v.* Ashabanner, 75 Ark. 415, 91 S. W. 20; Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326; Clay *v.* Bilby, 72 Ark. 101, 78 S. W. 749; Burcham *v.* Terry, 55 Ark. 398, 18 S. W. 458; McCarter *v.* Neil, 50 Ark. 188, 6 S. W. 731; Scott *v.* Pleasants, 21 Ark. 364. **Cal.**—Crane *v.* Cummings, 137 Cal. 201, 69 Pac. 984; Wood *v.* Jordan, 125 Cal. 261, 57 Pac. 997; Hayward *v.* Pimental, 107 Cal. 386, 40 Pac. 545; Branson *v.* Caruthers, 49 Cal. 374; Crall *v.* Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797; Mayo *v.* Foley, 40 Cal. 281; Eitel *v.* Foote, 39 Cal. 439; People *v.* Doe, 36 Cal. 220; Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595. **Ill.**—People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053; Clark *v.* People *ex rel.* Kern, 146 Ill. 348, 35 N. E. 60; Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Chesnut *v.* Marsh, 12 Ill. 173. **Ind.**—Daly *v.* Gubbins, 170 Ind. 105, 82 N. E. 659; Duncan *v.* Lankford, 145 Ind. 145, 44 N. E. 12; Ellison *v.* Branstrator, 34 Ind. App. 410, 73 N. E. 146. **Mich.** Loud *v.* O'Brien, 167 Mich. 206, 132 N. W. 495; Owens *v.* Auditor General, 147 Mich. 683, 111 N. W. 354; Carpenter *v.* Auditor General, 144 Mich. 251, 107 N. W. 878; Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 79 N. W. 911. **Minn.**—State *ex rel.* Coburn *v.* Ries, 123 Minn. 397, 143 N. W. 981; Gribble *v.* Livermore, 64 Minn. 396, 67 N. W. 213; Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123. **Mo.**—Skillman *v.* Clardy, 256 Mo. 297, 165 S. W. 1050; South Missouri Pine Lumb. Co. *v.* Carroll, 255 Mo. 357, 164 S. W. 599; Miller *v.* Keaton, 236 Mo. 694, 139 S. W. 158; Sanzenbacher *v.* Santhuff, 220 Mo. 274, 119 S. W. 395; Charley *v.* Kelly, 120 Mo. 134, 25 S. W. 571; Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713; Wellshear *v.* Kelley, 69 Mo. 343. **N. D.** Hanson *v.* Franklin, 19 N. D. 259, 123 N. W. 386. **Ore.**—Clinton *v.* Portland, 26 Ore. 410, 38 Pac. 407. **Pa.**—Cadmus *v.* Jackson, 52 Pa. 295. **Tenn.**—Neely *v.* Buchanan (Tenn. Ch.), 54 S. W. 995; Reinhardt *v.* Nealis, 101 Tenn. 169, 46 S. W. 446. **Tex.**—Adams *v.* West Lumb. Co. (Tex. Civ. App.), 162 S. W. 974; Hollingsworth *v.* Wm. Cameron & Co. (Tex. Civ. App.), 160 S. W. 644;

(I.) EMINENT DOMAIN. — Judgments condemning property under the power of eminent domain unless void on their face are conclusive against collateral attack.<sup>26</sup>

(J.) HIGHWAY AND DRAINAGE PROCEEDINGS. — Immunity from collateral impeachment extends to orders and judgments rendered by courts and tribunals in highway and drainage proceedings.<sup>27</sup>

*Jameson v. O'Neill* (Tex. Civ. App.), 145 S. W. 680; *Mangum v. Kenley* (Tex. Civ. App.), 145 S. W. 316; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158; *Gibbs v. Scales*, 54 Tex. Civ. App. 96, 118 S. W. 188; *Harris v. Hill*, 54 Tex. Civ. App. 437, 117 S. W. 907. *Wash.*—*Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

[a] "The validity of a judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode, and by the same means, as a judgment in an action of any other class." *Eitel v. Foote*, 39 Cal. 439.

[b] Where a right of redemption from tax sale is foreclosed by a court without jurisdiction the same is subject to collateral attack. *McNamara v. Gunderson*, 89 Neb. 112, 131 N. W. 183.

26. U. S.—*Robinson v. Sea View R. Co.*, 169 Fed. 319. *Ala.*—*Leath v. Cobia*, 175 Ala. 435, 57 So. 972. *Ark.*—*McDonald v. Ft. Smith & W. R. Co.*, 105 Ark. 5, 150 S. W. 135. *D. C.*—*Briscoe v. MacFarland*, 32 App. Cas. 167. *Ill.*—*Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053. *Ind.*—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081; *Indiana, B. & W. Ry. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451. *Md.*—*Pettit v. County Commissioners*, 123 Md. 128, 90 Atl. 993; *Hamilton v. Annapolis & E. R. Co.*, 1 Md. Ch. 107. *Mo.*—*Lovitt v. Russell*, 138 Mo. 474, 40 S. W. 123; *Evans v. Haefner*, 29 Mo. 141. *N. Y.*—*Farrington v. New York*, 83 Hun 124, 31 N. Y. Supp. 371, 63 N. Y. St. 820; *In re Flatbush Ave. Extension*, 167 App. Div. 908, 151 N. Y. Supp. 766. *Ohio.*—*Tenney v. Cincinatti*, 24 Ohio Cir. Ct. 237. *Ore.*—*Chase v. Oregon City*, 72 Ore. 112, 143 Pac. 629. *S. D.*—*Weiland v. Ashton*, 18 S. D. 331, 100 N. W. 737. *Tex.*—*Hopkins v. Cravey*, 85 Tex. 189, 19 S. W. 1067; *Mundy v. Hart* (Tex. Civ. App.), 111 S. W. 236. *Va.*—*Justice v. Georgia Industrial Real-*

*ty Co.*, 109 Va. 366, 63 S. E. 1084. *Wash.*—*State ex rel. Murhard Est. Co. v. Superior Court*, 49 Wash. 392, 95 Pac. 488; *In re City of Seattle*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862. *Wyo.*—*Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677.

[a] An order confirming an award, in condemnation proceedings, cannot be questioned in an action against the city to recover the aggregate amount of the awards. *Hudson River Tel. Co. v. City of New York*, 210 N. Y. 394, 104 N. E. 935.

27. U. S.—*Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140, 31 C. C. A. 427; *Balfour v. City of Portland*, 28 Fed. 738. *Ala.*—*Kirby v. Court of Comrs.*, 186 Ala. 611, 65 So. 163. *Ark.*—*Improvement Road Dist. No. 2 Pulaski County v. Winkler*, 145 S. W. 209; *Brunley v. State*, 83 Ark. 236, 103 S. W. 615. *Cal.*—*Graham v. Baillard*, 157 Cal. 96, 106 Pac. 215; *Sacramento County v. Glann*, 14 Cal. App. 780, 113 Pac. 360. *Ill.*—*People v. Cleveland, C. C. & St. L. R. Co.*, 266 Ill. 98, 107 N. E. 251; *Spring Creek Drainage Dist. v. Comrs. of Highways*, 238 Ill. 521, 87 N. E. 394; *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306; *Perisho v. People ex rel. Gannaway*, 185 Ill. 334, 56 N. E. 1134; *Chicago v. Gage*, 232 Ill. 169, 83 N. E. 663; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503; *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Schertz v. People*, 105 Ill. 27; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *Gage v. Parker*, 103 Ill. 528; *Prout v. People*, 83 Ill. 154; *People v. Sargent*, 252 Ill. 104, 96 N. E. 847. *Ind.*—*Bailey v. Driver*, 57 Ind. App. 285, 107 N. E. 38; *Williams v. Osborne*, 181 Ind. 670,

**6. As Affected by Person Attacking.**—As to the scope of the doctrine of collateral attack with respect to the persons as to whom it may be applicable there is some confusion in the cases. It seems obvious that as to persons against whom the judgment is not operative as an adjudication of the matters determined by it, either conclusively or presumptively, the term collateral attack can logically have no application, since it is wholly unnecessary for them to attack a judgment which as to them adjudicates nothing. The general rule is that a judgment is admissible in evidence as an adjudication of facts, only against the parties thereto and those persons in privity with them,<sup>23</sup> and therefore generally the rules as to collateral attack have no ap-

104 N. E. 27; *Smith v. Pyle*, 44 Ind. App. 150, 88 N. E. 733; *Southern Indiana R. Co. v. Railroad Comrs.*, 172 Ind. 113, 87 N. E. 966; *American Steel Dredge Co. v. Board of Comrs.* (Ind.), 85 N. E. 1; *Harrod v. Littell*, 51 Ind. App. 418, 99 N. E. 817. **Ia.**—*Appeal of Head*, 141 Iowa 651, 118 N. W. 884. **Ky.**—*Com. v. Helm*, 169 Ky. 194, 183 S. W. 502. **Me.**—*Blaisdell v. Inhabitants of Town of York*, 110 Me. 500, 87 Atl. 361; *Bliss v. Junkins*, 106 Me. 128, 75 Atl. 386; *Cushing v. Webb*, 102 Me. 157, 66 Atl. 719. **Mich.**—*Troost v. Fellows*, 169 Mich. 66, 134 N. W. 1011; *Hoffman v. Shell*, 151 Mich. 669, 695, 115 N. W. 974; *Auditor General v. Bolt*, 147 Mich. 283, 111 N. W. 74. **Minn.**—*Martin County v. Kampert*, 129 Minn. 151, 151 N. W. 897; *In re Morrison County* (Minn.), 139 N. W. 286; *Merritt v. Duluth*, 103 Minn. 236, 114 N. W. 758. **Miss.**—*Wheeler & Silber v. Bogue Phalia Drainage Dist.*, 106 Miss. 619, 64 So. 375. **Mo.**—*State ex rel. Roberts v. Eicher* (Mo.), 178 S. W. 171; *Halter v. Leonard*, 223 Mo. 286, 122 S. W. 706; *State v. Schenkel*, 129 Mo. App. 224, 108 S. W. 635; *Mulligan v. Martin*, 125 Mo. App. 630, 102 S. W. 59. **Neb.**—*Wyman v. Searle*, 88 Neb. 26, 128 N. W. 801; *Omaha & N. P. R. Co. v. Sarpy County*, 82 Neb. 140, 117 N. W. 116. **N. D.**—*Ekworthzell v. Blue Grass Tp.*, 28 N. D. 20, 147 N. W. 726; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66. **Wash.**—*Reichling v. Covington Lumber Co.*, 57 Wash. 225, 106 Pac. 777; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241. **Wis.**—*Fraser v. Mulaney*, 129 Wis. 377, 109 N. W. 139.

See also 11 STANDARD PROC. 56, 113, 128.

**Proceedings of Quasi Judicial Bodies.** See *supra*, XVII, A, 5, a, (VIII).

[a] **Order Establishing Highway.** *Golden v. State*, 10 Ala. App. 235, 64 So. 517.

[b] **Order Vacating a Street.**—*Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097.

[c] **An order organizing a drainage district is final and its legality cannot be reviewed on an appeal from the confirmation of the assessments.** *Ziegler v. Gilliatt*, 263 Ill. 587, 105 N. E. 707.

[d] **A decision approving change of plans by a drainage district is not subject to attack in proceedings to ascertain the power of the district to make the change.** *People v. Spring Lake Drainage & Levee Dist.*, 253 Ill. 479, 97 N. E. 1042.

[e] **Confirmation of Assessment.** *Briscoe v. Rudolph*, 221 U. S. 547, 31 Sup. Ct. 679, 55 L. ed. 848; *People v. Belz*, 252 Ill. 296, 96 N. E. 910; *Daly v. Gubbins*, 170 Ind. 105, 82 N. E. 659.

[f] **When the report of viewers assessing the costs of constructing a sewer system is confirmed by a court having jurisdiction, the confirmation is conclusive collaterally.** *In re Winton Borough's Sewer*, 46 Pa. Super. 502.

[g] **Judgment Laying a Special Bridge Levy.**—*Pleasants County Court v. Brammer*, 68 W. Va. 25, 69 S. E. 450.

[h] **Locating Drainage Ditch.**—*Bonnewell v. Lowe*, 80 Kan. 769, 104 Pac. 853.

[i] **Order Establishing an Irrigation District.**—*People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399. See also *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687, 124 N. W. 118.

[j] **Order Establishing Levee District.**—*Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222.

28. See the title "Res Judicata."



plication to persons who are neither parties nor privies.<sup>29</sup> In some classes of cases, however, it seems to be held by some authorities that a judgment, though not in rem, is at least *prima facie*, and sometimes even conclusive evidence of the facts adjudicated, against third persons who are neither parties nor privies,<sup>30</sup> in which event, of course, it becomes necessary for such persons to attack the judgment if they wish to avoid its consequences. The limits within which attack is permitted in such cases seems to depend upon whether the adjudication is regarded as conclusive or as merely *prima facie* evidence of the facts adjudged.<sup>31</sup>

29. Ala.—*Shamblin v. Hall*, 123 Ala. 541, 26 So. 285. Ind.—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211. Me.—*Caswell v. Caswell*, 28 Me. 232; *Pierce v. Strickland*, 26 Me. 277. See *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589. Mass.—*Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393; *Pond v. Makepeace*, 2 Met. 114. Mich.—*Eureka Iron & Steel Wks. v. Bresnahan*, 66 Mich. 489, 33 N. W. 834. Mo.—*Russell v. Grant*, 122 Mo. 161, 26 S. W. 958. Pa.—See *The Building Association v. O'Connor*, 3 Phila. 453. S. C.—*Gregg v. Bigham*, 1 Hill 299, 26 Am. Dec. 181. Vt.—*Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361. Va.—*Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285. Eng. *Randal's Case*, 2 Mod. 308, 86 Eng. Reprint 1090; *Warter v. Perry*, Cro. Eliz. 199, 78 Eng. Reprint 454.

[a] Though no fraud or collusion was practiced in obtaining the judgment a third party may award it. In an early case in Massachusetts the court expressed itself upon this point thus: "Although the judgment in favor of the plaintiff, in the present case, was not recovered by collusion with his debtor, or with any fraudulent intention, yet we think the defendant has a right to avoid it in the same manner; because he is neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by a writ of error. . . . This rule of law does not appear, in any case, to have been controverted, and it seems reasonable and just, that where a judgment is recovered contrary to law, and prejudicial to a third party, he should have a right to avoid it." *Downs v. Fuller*, 2 Met. (Mass.) 135, 35 Am. Dec. 393.

[b] Recitals of evidential facts in a judgment may be contradicted by

third persons even in a collateral proceeding. *Shamblin v. Hall*, 123 Ala. 541, 26 So. 285.

[c] A trustee who is not a party to an action at common law against the cestui que trust is as a rule not bound by the judgment, and he, in an action that seeks to subject the trust estate to the satisfaction of that judgment may contest the correctness of the judgment and show that it is void, in order to protect the trust property. *Roberts v. Yancey*, 94 Ky. 243, 21 S. W. 1047.

[d] A mortgagee of land on which a building is subsequently erected may collaterally attack a judgment foreclosing a mechanic's lien against the building for materials, he not having been a party to the foreclosure proceedings. *Russell v. Grant*, 122 Mo. 161, 26 S. W. 958.

[e] In an action to recover for support furnished an alleged pauper, the plaintiff attempted to show by a certain probate decree the fact that the person was a pauper. The defendants were allowed to impeach the probate judgment because they were neither parties nor privies to it. *Cook v. Town of Morris*, 66 Conn. 137, 33 Atl. 594.

[f] Parties interested in property subject to a mechanic's lien, who are not made parties to the suit to enforce the lien may, in a suit upon the title under the lien, object to the regularity of the proceedings. *Hauser v. Hoffman*, 32 Mo. 334.

[g] A judgment declaring a ditch assessment to be a lien upon certain land may be collaterally attacked by one who is attempting to foreclose a mortgage which is a prior lien on the same land. *Deisner v. Simpson*, 72 Ind. 435.

30. See the title "Res Judicata."

31. See the following cases: U. S.

**Injury to Third Persons.**—Statements are sometimes made that a third person or stranger to the record will not be permitted to collaterally attack a judgment unless he has been injured by it.<sup>32</sup> The cases in which these statements appear are almost invariably cases in which the so-called third person or stranger is in reality in privity with a party to the previous proceedings or in which, contrary to the general

*Secrist v. Green*, 3 Wall. 744, 18 L. ed. 153; *Gregg v. Forsyth*, 24 How. 179, 16 L. ed. 731. **Ia.**—*Lathrop v. American Emigrant Co.*, 41 Iowa 547. **Mass.** *Wellington v. Gale*, 13 Mass. 483. **S. C.** *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

[a] In *Vose v. Morton*, 4 Cush. (Mass.) 27, 50 Am. Dec. 750, it was sought to recover land levied on and sold under an execution on a judgment. The defendant in possession of the land claimed under a deed from the judgment creditor, which deed was executed prior to but not recorded till after the attachment of the land in the previous action. In permitting the defendant to attack the judgment on the ground that there was no jurisdiction of the parties acquired the court used this language: "At the time the judgment was rendered, the tenant (defendant) had no reason, no occasion, and no right, to question its validity. Being neither a party nor privy to the judgment, he can not have a writ of error to reverse it, although it may be erroneous and void; but when such judgment is set up collaterally to defeat the tenant's title, which is otherwise good, and the tenant can show that the judgment is erroneous, either in matter of law or fact, he may do so by proof. It is a general and established rule of law, that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he can not bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void, in any suit, in which its validity is drawn in question." The court cites *Alexander v. Gould*, 1 Mass. 165; *Smith v. Saxton*, 6 Pick. (Mass.) 483; *Pond v. Makepeace*, 2 Met. (Mass.) 114; *Leonard v. Bryant*, 11 Met. (Mass.) 370.

[b] One having the naked possession of land cannot collaterally attack a decree divesting the title to that land out of the original patentee and vesting it in another, though the decree be

erroneous. *Mylar v. Hughes*, 60 Mo. 105.

[c] **Unauthorized Appearance.**—In a collateral proceeding a third party cannot interpose the objection that the attorney had no authority to appear and confess the judgment. *Martin v. Judd*, 60 Ill. 78.

**32. U. S.**—*Safe Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421. **Idaho.**—*Harpold v. Doyle*, 16 Idaho 671, 102 Pac. 158. **Ill.**—*Allison v. Drake*, 145 Ill. 500, 32 N. E. 537. **Ind.** *Owen County Council v. State*, 175 Ind. 610, 95 N. E. 253. **Ia.**—*Wolfe v. Joubert*, 45 La. Ann. 1100, 13 So. 806; *Collins v. Batterson*, 3 La. 242; *Quine v. Mayes*, 2 Rob. 510. **Mass.**—*Wellington v. Gale*, 13 Mass. 483. **Mich.** *Eureka Iron & Steel Wks. v. Bresnahan*, 66 Mich. 489, 33 N. W. 834. **Miss.** *Bergman v. Hutcheson*, 60 Miss. 872. **Mo.**—*Russell v. Grant*, 122 Mo. 161, 26 S. W. 958. **Neb.**—*Colby v. Brown*, 10 Neb. 413, 6 N. W. 474. **N. C.**—*Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569. **Pa.**—*Hanika's Estate*, 138 Pa. 330, 22 Atl. 90; *Glass v. Gilbert*, 58 Pa. 266. See *Lair v. Hunsicker*, 28 Pa. 115. **S. C.**—*Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736; *Darby & Co. v. Shannon*, 19 S. C. 526; *Gregg v. Bigham*, 1 Hill 299, 26 Am. Dec. 181. **Va.**—*Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285.

[a] The regularity of a judgment on a scire facias obtained on a mortgage cannot be questioned collaterally by one not connected with the mortgagor's title as grantee, mortgagee, judgment creditor, etc. *Glass v. Gilbert*, 58 Pa. 266.

[b] In *Freydendall v. Baldwin*, 103 Ill. 325, judgment creditors attempted to impeach prior judgments against their debtor on the ground that they were fraudulent. In denying them the relief prayed for the court said: "Certainly they can not demand that the judgments at law in favor of defendants against the common debtors shall be set aside, unless they are in some

rule, the judgment is given *prima facie* or conclusive effect as an adjudication, against persons who are neither parties nor privies; the typical instances being where an attack is made by a creditor upon an execution sale as a fraudulent conveyance, or a judgment is relied upon as a link in a chain of title.<sup>33</sup>

The parties and their privies being equally bound by the judgment the rules as to collateral impeachment are the same whether the attack be by a party or privy.<sup>34</sup> There is an apparent exception, however,

way injuriously affected by them, and then only to the extent such judgments interfere with their prior or superior equities. Whether such judgments are absolutely void for want of jurisdiction in the court to render them, is a matter in which complainants have no concern. That question can only be made by a party to the record. A judgment or decree absolutely void for want of jurisdiction in the court, if it affects his prior or superior equities, may be assailed by a stranger to the record. Otherwise he may not intermeddle with it."

33. See the cases cited in preceding note, the title "*Res Judicata*," and *infra*.

[a] **Prior Grantee.**—In ejectment where the plaintiff's title depended upon the levy of an execution in favor of the plaintiff against the defendant's grantor, made subsequent to the conveyance, the defendant was not permitted to impeach the judgment upon which the execution issued, since he could not show that there was a want of jurisdiction in the court rendering the judgment, or that it was obtained through fraud or collusion. *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527.

[b] **In trover by a prior mortgagee** against a sheriff and a purchaser at an execution sale for the value of the mortgaged property, which had been seized on several executions issued in favor of judgment creditors of the mortgagor and on one of which it had been sold, the defendants justified under the judgment and execution sale. The plaintiff offered evidence to show that the judgment was obtained by fraud and collusion. The appellate court after noticing the jurisdiction over the parties and subject-matter appeared of record, said: "The record, therefore, imported absolute verity, and could not be contradicted. But this rule applies only to parties and their

privies. It does not apply to such third persons, or strangers to the record, as would be prejudiced in regard to some pre-existing right if the judgment were given full credit and effect." *Eureka Iron, etc. Works v. Bresnahan*, 66 Mich. 489, 33 N. W. 834.

34. **Cal.**—*Agoure v. Peck*, 17 Cal. App. 759, 121 Pac. 706. **Ill.**—*Wright v. Wilson*, 183 Ill. App. 255. **La.**—*Wolfe v. Joubert*, 45 La. Ann. 1100, 13 So. 806. **N. C.**—*Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569. **Pa.**—*Lewis v. Rogers*, 16 Pa. 18. **Tex.**—*Young v. Bank of Miami* (Tex. Civ. App.), 175 S. W. 1102.

[a] That the debt on which the judgment was rendered was usurious may not be urged by a subsequent grantee of the judgment debtor by way of attack upon the judgment. *Black v. Pattison*, 61 Miss. 599.

[b] **Assignees** are bound by the judgment. **Ill.**—*Buckmaster v. Ryder*, 12 Ill. 207. **Mass.**—*Johnson v. Thaxter*, 7 Gray 242. **Ore.**—*Finley v. Houser*, 22 Ore. 562, 30 Pac. 494. **Tenn.** *People's Bank v. Williams* (Tenn. Ch.), 36 S. W. 983.

[c] **One who interpleads** in a garnishment cannot collaterally attack the judgment. *Steinbaker v. Congregation Brith-Scholom* (Mo. App.), 181 S. W. 1039.

[d] **Purchasers.**—When land or an interest therein is in litigation, a purchaser from or under one of the parties is as conclusively bound by the results of the litigation as if he had become an actual party, and cannot collaterally attack the proceedings. **D. C.**—*Merillat v. Hensley*, 34 App. Cas. 398, 401. **Ind.**—*Hogg v. Link*, 90 Ind. 346. **Ia.** *Johns v. Pattee*, 55 Iowa 665, 8 N. W. 663. **La.**—*Gallanger's Heirs v. Hebrew Congregation*, 35 La. Ann. 829.

[e] **One for whose benefit** certain petitioners in a suit in equity prosecuted their claims, is bound by the decree and may not collaterally attack



in the case of a creditor or other person who would be injured by a judgment obtained through the fraud and collusion of the parties to the proceeding.<sup>35</sup>

**7. Grounds of Attack.** — a. *Invalidity or Voidability in General.* A judgment or decree, void on its face, binds no one; it may be disregarded by anyone against whom it is sought to be enforced whether parties or strangers to the record.<sup>36</sup> But to be open to successful at-

the same. *Sanders v. Peck*, 87 Fed. 61, 30 C. C. A. 530.

[f] The indorser of a writ is privy to a judgment against the plaintiff on such writ and cannot upon scire facias dispute the validity of such judgment. *Pullman's Palace-Car. Co. v. Washburn*, 66 Fed. 790.

[g] Holders of stock in a corporation, as collateral security, standing in their own names on the company's books, and who participate actively in the management of such corporation are privies to a judgment against it and are concluded thereby. *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. 1006; *Larkin v. Hagan*, 14 Ariz. 63, 126 Pac. 268.

[h] An auditor appointed to distribute money cannot inquire into a judgment where there has been no fraudulent collusion against creditors. *In re Thompson's Appeal*, 57 Pa. 175; *Dyott's Estate*, 2 Watts & S. (Pa.) 557.

[i] Adverse claimants who do not appear in the interest of the insane ward, may not collaterally attack the order appointing a guardian for him. *White's Guardian v. Martin*, 2 Alaska 495.

[j] The wife and children for whose benefit a homestead was set apart, cannot attack its validity collaterally because of mere formal defects in the application or in the judgment setting apart the homestead. *Brooks v. Tinsley*, 13 Ga. App. 268, 79 S. E. 160.

[k] Ordinary judgment creditors of a succession cannot collaterally attack a judgment homologating an administrator's account. *Succession of P. G. Quin*, 30 La. Ann. 947.

[l] "A third possessor holding title to property judicially mortgaged for his vendor's debt may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it (*Bernard v. Vignaud*, 10 Mart. O. S. [La.] 482), and show that same is null for any cause in-

herent to the judgment itself (*Peets v. Wilson*, 19 La. 478); yet his rights, in this respect, are just the same as those of his vendor as judgment debtor—no greater, and nothing less." *Wolfe v. Joubert*, 45 La. Ann. 1100, 13 So. 806.

[m] Subsequent execution creditors cannot collaterally attack the judgment upon which a prior execution issued because of mere irregularities therein. *Lowber's Appeal*, 8 Watts & S. (Pa.) 387, 42 Am. Dec. 302.

[n] The heirs at law cannot as against bona fide purchasers collaterally attack a judgment foreclosing a mortgage against an insane person, though no guardian ad litem was appointed. *Dunn v. Dunn*, 114 Cal. 210, 46 Pac. 5.

[o] Persons claiming through the heirs may not attack a judgment foreclosing a mortgage against the decedent's lands, when the same is introduced in evidence to prove plaintiff's title in ejectment, when the judgment is merely voidable and not void. *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418.

[p] A subsequent judgment creditor (1) may not attack a judgment by confession against his debtor though the same was entered without authority, there being no collusion in the case. *Drexel's Appeal*, 6 Pa. 272. (2) Nor can he attack such a judgment for irregularities and defects in the form thereof. *Breading v. Boggs*, 20 Pa. 33.

[q] A partner of the judgment debtor may not collaterally attack the judgment under which the firm property was levied upon, on the ground that the court fixed the damages on an undated demand without the intervention of a jury. *Carter v. Roland*, 53 Tex. 540.

35. See *infra*, XVII, A, 7, d, (II). See also 10 STANDARD PROC. 182.

36. U. S.—*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Johnson v. North Star Lumb. Co.*, 206 Fed. 624, 125 C. C. A. 118; *John II Estate v.*

tack in a collateral proceeding the invalidity of the judgment must appear on its face.<sup>37</sup> The affirmance on appeal of such void judgment

- Brown, 201 Fed. 224, 119 C. C. A. 458; *Lincoln v. Tower*, 2 McLean 473, 15 Fed. Cas. No. 8,355. **Ark.**—*Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Evans v. Percifull*, 5 Ark. 424. **Cal.**—*Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295; *Smith v. Los Angeles & P. R. Co.*, 99 Cal. xix, 34 Pac. 242; *Forbes v. Hyde*, 31 Cal. 342. **Colo.**—*Riley v. Lemieux*, 24 Colo. App. 184, 132 Pac. 699; *Empire Ranch & Cattle Co. v. Farmer*, 24 Colo. App. 45, 131 Pac. 799; *Bloomer v. Jones*, 22 Colo. App. 404, 125 Pac. 541; *Mentzer v. Ellison*, 7 Colo. App. 315, 43 Pac. 464; *Buchanan v. Scandia Plow Co.*, 6 Colo. App. 34, 39 Pac. 899. **Conn.**—*Clark v. Platt*, 30 Conn. 282. **Del.**—*Frankel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. **Fla.**—*McGehee v. Wilkins*, 31 Fla. 83, 12 So. 228. **Ga.**—*Jordan v. J. A. Callaway & Co.*, 138 Ga. 209, 75 S. E. 101; *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79; *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134; *Parish v. Parish*, 32 Ga. 653; *Carter v. Atkinson*, 12 Ga. App. 390, 77 S. E. 370; *Bedingsfield v. First Nat. Bank*, 4 Ga. App. 197, 61 S. E. 30; *Weaver v. Webb, Galt & Kellogg*, 3 Ga. App. 726, 60 S. E. 367. **Idaho.**—*Leland v. Isenbeck*, 1 Idaho 469. **Ill.**—*People v. Clark*, 268 Ill. 156, 108 N. E. 994; *People v. Evans*, 262 Ill. 235, 104 N. E. 646; *Freydendall v. Baldwin*, 103 Ill. 325; *Bannon v. People*, 1 Ill. App. 496. **Ind.**—*Cavanaugh v. Smith*, 84 Ind. 380; *Deisner v. Simpson*, 72 Ind. 435; *White v. Suggs*, 56 Ind. App. 572, 104 N. E. 55. **Ia.**—*Beeman v. Kitzman*, 124 Iowa 86, 99 N. W. 171. **Kan.**—*North v. Moore*, 8 Kan. 143. **Ky.**—*Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575; *Dorsey v. Kendall*, 8 Bush 294. **La.**—*Quine v. Mayes*, 2 Rob. 510. **Me.**—*Winslow v. Troy*, 97 Me. 130, 53 Atl. 1008; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Caswell v. Caswell*, 28 Me. 232. **Mass.**—*Mercier v. Chace*, 9 Allen 242; *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750. **Minn.**—*Jewett v. Iowa Land Co.*, 64 Minn. 531, 67 N. W. 639. **Miss.**—*Campbell v. Brown*, 6 How. 106. **Mo.**—*Jewett v. Boardman*, 181 Mo. 647, 81 S. W. 186. **Neb.**—*Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97; *Colby v. Brown*, 10 Neb. 413, 6 N. W. 474. **Nev.**—*Long v. Tighe*, 36 Nev. 129, 133 Pac. 60; *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738. **N. H.**—*Gay v. Smith*, 38 N. H. 171. **N. J.**—*Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164. **N. Y.**—*Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278; *Gage v. Hill*, 43 Barb. 44; *Callahan v. Gerbereux*, 137 N. Y. Supp. 996. **N. C.**—*Hinton v. Penn Mut. L. Ins. Co.*, 126 N. C. 18, 35 S. E. 182; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716. **Ohio.**—*Fahs v. Taylor*, 10 Ohio 104; *Bryans v. Taylor*, Wright 245. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842. **Pa.**—*Fisher v. Longnecker*, 8 Pa. 410. **R. I.**—*Providence County Sav. Bank v. Hughes*, 26 R. I. 73, 58 Atl. 254. **S. C.**—*Woods v. Bryan*, 41 S. C. 74, 19 S. E. 218; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736. **Tenn.**—*Summar v. Jarrett*, 3 Baxt. 23. **Tex.**—*Hill & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67. **Va.**—*Staunton Perpetual Bldg., etc. Co. v. Haden*, 92 Va. 201, 23 S. E. 285. **Wis.**—*O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436. **Wyo.**—*Holt v. City of Cheyenne*, 22 Wyo. 212, 137 Pac. 876. **Eng.**—*Briscoe v. Stephens*, 2 Bing. 213, 130 Eng. Reprint 288.
- [a] **Creditors of a debtor against whom the clerk entered a judgment without acquiring jurisdiction are not restricted to the remedy by motion to vacate such judgment but may attack it collaterally.** *Oppenheimer v. Giershofer*, 54 Ill. App. 38.
- 37. U. S.**—*Pensacola State Bank v. Thornberry*, 226 Fed. 611, 141 C. C. A. 367; *Hatch v. Ferguson*, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759. **Cal.**—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81; *Forbes v. Hyde*, 31 Cal. 342. **Del.**—*Green v. Clawson*, 5 Houst. 159, 162. **Ga.**—*Owens v. Cocroft*, 14 Ga. App. 322, 80 S. E. 906. **Idaho.**—*Leland v. Isenbeck*, 1 Idaho 469. **Ill.**—*People v. Clark*, 268 Ill. 156, 108 N. E. 994; *Aldridge v. Matthews*, 257 Ill. 202, 100 N. E. 536; *Miller v. Rowan*, 251 Ill. 344, 96 N. E. 285; *O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124; *Desnoyers Shoe Co. v. First Nat. Bank*, 188 Ill. 312, 58 N. E. 994; *Rieh v. City of Chicago*, 187 Ill. 396, 58 N. E. 306;

does not render it any the less vulnerable collaterally,<sup>38</sup> particularly if such affirmance is put upon grounds not touching its validity.<sup>39</sup> Nor will an order of revivor impart any validity to it.<sup>40</sup>

**Voidable Judgment.**—Where the judgment is not void but merely voidable, it is not subject to collateral attack by the parties or their privies, but may only be questioned in some direct proceeding.<sup>41</sup>

*Gardner v. Bunn*, 132 Ill. 403, 23 N. E. 1072; *Drake v. Ogden*, 128 Ill. 603, 21 N. E. 511; *Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566; *Harris v. Lester*, 80 Ill. 307; *Martin v. Judd*, 60 Ill. 78; *Chase v. Tuckwood*, 86 Ill. App. 70; *Bannon v. People*, 1 Ill. App. 496. **Ind.** *Beavers v. Bess*, 58 Ind. App. 287, 108 N. E. 266. **Ia.**—*Oziak v. Howard*, 149 Iowa 199, 128 N. W. 364. **Ky.**—*International Harvester Co. v. Com.*, 185 S. W. 102; *Gullett v. Blanton*, 157 Ky. 457, 163 S. W. 465; *Puckett v. Jameson*, 157 Ky. 172, 162 S. W. 801; *Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575; *Robinson v. Carlton*, 123 Ky. 419, 96 S. W. 549; *Bean v. Everett*, 21 Ky. L. Rep. 1790, 56 S. W. 403. **La.**—*Jacobs v. Kansas City, S. & G. R. Co.*, 134 La. 389, 64 So. 150. **Miss.**—*Lake v. Perry*, 95 Miss. 550, 49 So. 569. **Mont.**—*Evans v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715. **N. C.**—*Pinnell v. Burroughs*, 168 N. C. 315, 84 S. E. 364; *McKellar v. McKay*, 156 N. C. 283, 72 S. E. 375. **Okla.**—*Jefferson v. Gallagher*, 150 Pac. 1071. **Tex.**—*San Bernardo Townsite Co. v. Hocker* (Tex. Civ. App.), 176 S. W. 644. **Wis.**—*Minneapolis Threshing Mach. Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113.

[a] **Conviction Under Anti-Pooling Act.**—A conviction and fine for violation of an anti-pooling act which the supreme court of the United States has declared unconstitutional may be successfully attacked collaterally. *International Harvester Co. v. Com.* (Ky.), 185 S. W. 102.

38. **Cal.**—*Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295. **Miss.** *Wilson v. Montgomery*, 14 Smed. & M. 205. **Tex.**—*Chambers v. Hodges*, 23 Tex. 104.

39. *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295.

40. *Minnesota Thresher Mfg. Co. v. L'Heureux*, 82 Neb. 692, 118 N. W. 565.

41. **U. S.**—*Christianson v. King County*, 239 U. S. 356, 36 Sup. Ct. 114; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054; *Cooper v.*

*Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47; *Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177; *Lively v. Picton*, 218 Fed. 401, 134 C. C. A. 189; *Jarrell v. Cole*, 215 Fed. 315, 131 C. C. A. 589; *Missouri, K. & T. Ry. Co. v. Goodrich*, 213 Fed. 339, 129 C. C. A. 599; *Harrison v. Gillespie*, 204 Fed. 384, 122 C. C. A. 554; *Butterfield v. Miller*, 195 Fed. 200, 115 C. C. A. 152; *Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *In re Heffron Co.*, 216 Fed. 642; *Ex parte Richards*, 117 Fed. 658; *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. 1006; *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. 790; *Nettleton v. Mosier*, 3 Fed. 387. **Ala.**—*McLaughlin v. Hardwick* (Ala. App.), 70 So. 305; *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414. **Alaska.**—*White's Guardian v. Martin*, 2 Alaska 495; *Ebner v. Heid*, 2 Alaska 600; *In re Decker's Estate*, 3 Alaska 106; *Sylvester's Admx. v. Willson's Admx.*, 2 Alaska 325. **Ariz.** *Tube City Min. & Mill. Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203. **Ark.** *Jones v. Ainell*, 186 S. W. 65; *Citizens' Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102; *Lewis v. St. Louis, I. M. & S. R. Co.*, 107 Ark. 41, 154 S. W. 198; *McDonald v. Ft. Smith & W. R. Co.*, 105 Ark. 5, 150 S. W. 135. **Cal.**—*Hall v. Brittain*, 171 Cal. 424, 153 Pac. 906; *Title Ins. & Tr. Co. v. California Develop. Co.*, 171 Cal. 173, 152 Pac. 542; *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238; *Bennett v. Wilson*, 133 Cal. 379, 65 Pac. 880; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642, 17 Pac. 928; *Drake v. Duvenick*, 45 Cal. 455; *Carpentier v. Oakland*, 30 Cal. 439; *Klumpke v. Henley*, 24 Cal. App. 35, 140 Pac. 289, 313; *Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462; *Agoure v. Peck*, 17 Cal. App. 759, 121 Pac. 706. **Colo.**—*Arnold v. Roup*, 157



b. *Legality of Tribunal.*—A valid judgment presupposes a legal tribunal having jurisdiction in the cause. If, therefore, the court or

- Pac. 200; *Is. re Hayes' Estate*, 55 Colo. 340, 135 Pac. 449; *Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Clarke v. Asher*, 53 Colo. 313, 125 Pac. 538; *Ross v. Newsom*, 25 Colo. App. 393, 138 Pac. 1015; *Brown v. Whetstone*, 25 Colo. App. 371, 138 Pac. 61; *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57. **D. C.**—*Degge v. Baxter*, 41 App. Cas. 169. **Fla.**—*Lucy v. Deas*, 59 Fla. 552, 52 So. 515. **Ga.**—*Wade v. Hurst*, 143 Ga. 26, 84 S. E. 65; *Flanders v. Sutton*, 143 Ga. 764, 85 S. E. 914; *Ketterer v. Stringfield*, 142 Ga. 441, 83 S. E. 116; *Williams v. Martin*, 7 Ga. 377; *Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187; *Owens v. Cocroft*, 14 Ga. App. 322, 80 S. E. 906; *Brooks v. Tinsley*, 13 Ga. App. 268, 79 S. E. 160; *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S. E. 128. **Idaho.**—*Harpold v. Doyle*, 16 Idaho 671, 102 Pac. 153; *McCornick v. Friedman*, 7 Idaho 686, 65 Pac. 440. **Ill.**—*Waller v. Village of River Forest*, 259 Ill. 223, 102 N. E. 290; *O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124; *Spring Creek Dist. v. Joliet*, 238 Ill. 521, 87 N. E. 394; *Highway Comrs. v. Drainage Dist.*, 207 Ill. 17, 69 N. E. 576; *Rich v. City of Chicago*, 187 Ill. 306, 58 N. E. 306; *Clark v. People ex rel. Kern*, 146 Ill. 348, 35 N. E. 60; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Clafin v. Dunne*, 129 Ill. 241, 21 N. E. 834; *Wright v. Wilson*, 183 Ill. App. 255; *Larimer v. Snell*, 181 Ill. App. 50; *Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206. **Ind.**—*Long v. Schowe*, 181 Ind. 13, 103 N. E. 785; *Young v. Wiley*, 102 N. E. 54; *Shultz v. Shultz*, 136 Ind. 323, 36 N. E. 126; *Mannix v. State*, 115 Ind. 245, 17 N. E. 565; *Weiss v. Guérineau*, 109 Ind. 438, 9 N. E. 399; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Fidler v. Gilchrist* (Ind. App.), 109 N. E. 796; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *White v. Suggs*, 56 Ind. App. 572, 104 N. E. 55. **Ia.**—*Edmundson v. Independent School Dist.*, 98 Iowa 369, 67 N. W. 671; *Smith v. Smith*, 22 Iowa 516; *Mason v. Messenger*, 17 Iowa 261. **Kan.**—*Hartz v. Fitts*, 89 Kan. 751, 132 Pac. 1187. **Ky.** *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Baker v. Baker*, *Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Anderson's Committee v. Anderson's Admx.*, 161 Ky. 18, 170 S. W. 213; *Board of Prison Comrs. v. De Moss*, 157 Ky. 289, 163 S. W. 183; *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231; *Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113; *Clark County v. Ecton*, 150 Ky. 774, 150 S. W. 1016; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378; *Buchanan v. Henry*, 143 Ky. 628, 137 S. W. 222; *Staples v. Shiver*, 122 S. W. 826. **Me.**—*Wilson ex rel. Welch v. Lacroix*, 111 Me. 324, 89 Atl. 69; *Davis v. Davis*, 61 Me. 395, 399; *Smith v. Abbott*, 40 Me. 442; *Granger v. Clark*, 22 Me. 128. **Md.**—*Mister v. Thomas*, 122 Md. 445, 89 Atl. 844. **Mass.**—*Johnson v. Thaxter*, 7 Gray 242; *Greene v. Greene*, 2 Gray 361, 61 Am. Dec. 454; *McRae v. Mattoon*, 13 Pick. 53, 57; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218. **Mich.**—*Kerr v. Weeks*, 158 N. W. 131; *Rohrabacher v. Walsh*, 170 Mich. 59, 135 N. W. 907; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Eureka Iron & Steel Wks. v. Bresnahan*, 66 Mich. 489, 33 N. W. 834. **Minn.** *Martin County v. Kampert*, 129 Minn. 151, 151 N. W. 897; *State ex rel. Coburn v. Ries*, 123 Minn. 397, 143 N. W. 981. **Mo.**—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Skillman v. Clardy*, 256 Mo. 297, 165 S. W. 1050; *Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561; *Davidson v. Laclede Land & Imp. Co.*, 253 Mo. 223, 161 S. W. 686; *Carter v. Carter*, 237 Mo. 624, 141 S. W. 873; *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124; *Callahan v. Griswold*, 9 Mo. 784; *Steinbaker v. Congregation Brith-Sholom* (Mo. App.), 181 S. W. 1039; *Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152. **Mont.**—*Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966. **Neb.**—*George v. Dill*, 83 Neb. 825, 120 N. W. 447; *Jones v. Danforth*, 71 Neb. 722, 99 N. W. 495. **Nev.**—*Daly v. Lahontan Mines Co.*, 151 Pac. 514. **N. H.**—*Holland v. Laconia Bldg. & Loan Assn.*, 68 N. H. 480, 41 Atl. 178; *Blanchard v. Webster*, 62 N. H. 467. **N. J.**—*Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201; *McDevitt v. Connell*, 71 N. J. Eq. 119, 63 Atl. 504. **N. Y.**—*Curtis v. Dunkirk Sav. & Loan Assn.*, 163 App. Div. 469, 148 N. Y. Supp. 860; *Schwabe v. Herzog*, 161 App. Div. 712, 146 N. Y. Supp. 644; *Kurzweil v. Story & Clark Piano Co.*, 159 N. Y. Supp. 231. **N. C.**

tribunal rendering the judgment lacked even a de facto organization,<sup>42</sup> or the judge sitting in the case wanted even a colorable right to act,<sup>43</sup> the judgment would be a nullity and open to collateral impeachment. It is otherwise, however, where the judgment was rendered by a de facto court<sup>44</sup> or judge.<sup>45</sup>

*Pinnell v. Burroughs*, 168 N. C. 315, 84 S. E. 364; *Rawls v. Mayo*, 163 N. C. 177, 79 S. E. 298. **N. D.**—*St. Anthony & Dakota Elev. Co. v. Martineau*, 30 N. D. 425, 153 N. W. 416; *Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737; *Nichols & Shepard Co. v. Paulson*, 10 N. D. 440, 87 N. W. 977. **Okla.**—*Blackwell v. McCall*, 153 Pac. 815; *Coblentz v. Cochran*, 44 Okla. 158, 143 Pac. 658; *Bowen v. Carter*, 42 Okla. 565, 144 Pac. 170; *Edwards v. Smith*, 42 Okla. 544, 142 Pac. 302; *Rice v. Woolery*, 38 Okla. 199, 132 Pac. 817. **Ore.** *Northwest Townsite Co. v. Conn.*, 74 Ore. 484, 145 Pac. 1058; *Finley v. Houser*, 22 Ore. 562, 30 Pac. 494; *Morrill v. Morrill*, 20 Ore. 96, 25 Pac. 362. **Pa.**—*In re Gottesfeld*, 245 Pa. 314, 91 Atl. 494; *In re Metzger's Estate*, 242 Pa. 69, 88 Atl. 915; *Brundred v. Egbert*, 164 Pa. 615, 30 Atl. 503; *Ogle v. Baker*, 137 Pa. 378, 20 Atl. 998; *Otterson v. Middleton*, 102 Pa. 78, 86; *Meekley's Appeal*, 102 Pa. 536; *Lewis v. Rogers*, 16 Pa. 18. **R. I.**—*Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625. **S. C.**—*Norton v. Wallace*, 2 Rich. L. 460. **Tenn.**—*Puckett v. Wynns*, 132 Tenn. 513, 178 S. W. 1184; *Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781; *Kelley v. Mize*, 3 Sneed 59. **Tex.** *Young v. Bank of Miami*, 175 S. W. 1102; *Frisby v. Withers*, 61 Tex. 134; *Brown v. Foster Lumb Co.* (Tex. Civ. App.), 178 S. W. 787; *Baker v. Stephenson* (Tex. Civ. App.), 174 S. W. 970; *White v. Bedell* (Tex. Civ. App.), 173 S. W. 624; *Clarke v. A. B. Frank Co.* (Tex. Civ. App.), 168 S. W. 492; *Williams v. Abilene Independent Tel. Co.* (Tex. Civ. App.), 168 S. W. 402; *Lester v. Gatewood* (Tex. Civ. App.), 166 S. W. 389; *Hills & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67. **Utah.** *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560. **Vt.**—*Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976. **Va.** *Avant v. Cook*, 86 S. E. 903; *Saunders v. Link*, 114 Va. 285, 76 S. E. 327; *Alvis v. Saunders*, 113 Va. 208, 74 S. E. 153. **W. Va.**—*Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933. **Wis.**—*Cody v. Cody*, 98 Wis. 445,

74 N. W. 217. **Wyo.**—*Holt v. City of Cheyenne*, 22 Wyo. 212, 137 Pac. 876.

42. **Cal.**—*People v. Toal*, 85 Cal. 333, 24 Pac. 603. **Ga.**—*Beddingfield v. First Nat. Bank*, 4 Ga. App. 197, 61 S. E. 30. **N. J.**—*Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marsh. 206, 19 Am. Dec. 61. **N. Y.**—*People v. Albertson*, 8 How. Pr. 363. **Tex.**—*Hill & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67.

43. **Ill.**—*Hoagland v. Creed*, 81 Ill. 506. **Kan.**—*In re Hinkle*, 31 Kan. 712, 3 Pac. 531. **Ky.**—*Dixon v. Melton*, 137 Ky. 689, 126 S. W. 358. **La.**—*State v. Fritz*, 27 La. Ann. 689; *State v. Phillips*, 27 La. Ann. 663. **Mich.**—*Bliss v. Tyler*, 113 N. W. 317. **Tex.**—*Andrews v. Beck*, 23 Tex. 455.

[a] **Proceedings at an adjourned term** of a board of supervisors are coram non judice when the board has no power to adjourn its sessions to such a time. *Grimmett v. Askew*, 48 Ark. 151, 2 S. W. 707.

44. **U. S.**—*Comstock v. Tracey*, 46 Fed. 162. **Mich.**—*Connine v. Smith*, 157 N. W. 450. **Minn.**—*Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289. **Mo.**—*Bouldin v. Ewart*, 63 Mo. 330; *State v. Peyton*, 32 Mo. App. 522. **Tex.**—*Watts v. State*, 22 Tex. App. 572, 3 S. W. 769.

[a] **Unconstitutional Statute.**—To the effect that a court based on an unconstitutional statute is a de facto tribunal, see *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289. To the contrary, see *Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

45. **U. S.**—*In re Ah Lee*, 6 Sawy. 410, 5 Fed. 899. **Conn.**—*Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89. **Haw.**—*Hind v. Wilders' S. S. Co.*, 14 Hawaii 215. **Ind.**—*Smurr v. State*, 105 Ind. 125, 4 N. E. 445; *Case v. State*, 5 Ind. 1. **Ia.**—*Guthrie v. Guthrie*, 71 Iowa 744, 30 N. W. 779; *Babcock v. Wolf*, 70 Iowa 676, 28 N. W. 490. **Kan.** *Higby v. Ayres*, 14 Kan. 331; *Hunter's Admr. v. Ferguson's Admr.*, 13 Kan. 462. **Mass.**—*Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374. **Minn.**—*Carli v.*

c. *Want of Jurisdiction*.—(I.) **Generally**.—The existence of a legally organized tribunal appearing, it is equally essential that such tribunal possess jurisdiction<sup>46</sup> of the parties and the subject-matter. For if a want of such jurisdiction is disclosed by an inspection of the record the judgment is a nullity and open to successful attack in any collateral proceeding.<sup>47</sup>

Rhener, 27 Minn. 292, 7 N. W. 139. Mo.—*State v. Douglass*, 50 Mo. 593. Nev.—*Mallett v. Uncle Sam G. & S. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484. N. Y.—*Morris v. People*, 3 Denio 381; *People v. White*, 24 Wend. 520. Ohio. *Ex parte Strang*, 21 Ohio St. 610. Ore. *Hamlin v. Kassafer*, 15 Ore. 456, 15 Pac. 778. Pa.—*Campbell v. Com.*, 96 Pa. 344. S. C.—*Taylor v. Skrine*, 3 Brev. 516.

[a] A judge selected by the clerk to try the cause is a special judge de facto, whose proceedings are not subject to collateral attack. *Hunter's Admr. v. Ferguson's Admr.*, 13 Kan. 462.

46. Jurisdiction is the power to hear and determine and give the judgment rendered. U. S.—*Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547. Conn.—*Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 483. Haw.—*The King v. Lee Fook*, 7 Hawaii 249. Ind.—*Quarl v. Abbott*, 102 Ind. 233, 1 N. E. 476. Mo.—*Babb v. Bruere*, 23 Mo. App. 604. N. J.—*Perrine v. Farr*, 22 N. J. L. 356. N. Y.—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536. Wis.—*Pollard v. Wegener*, 13 Wis. 569; *Sitzman v. Pacquette*, 13 Wis. 291.

47. U. S.—*Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751; *Wetmore v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Gagnon v. United States*, 193 U. S. 451, 24 Sup. Ct. 510, 48 L. ed. 745; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170; *Lessee of Hickey v. Stewart*, 3 How. 750, 11 L. ed. 814; *Shriver's Lessee v. Lynn*, 2 How. 43, 11 L. ed. 172; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Elliott v. Peirsol's Lessee*, 1 Pet. 328, 7 L. ed. 164; *Rose v. Himely*, 4 Cranch 241, 2 L. ed. 608;

*The Petsy*, 3 Dall. 6, 1 L. ed. 485; *Johnson v. North Star Lumb. Co.*, 206 Fed. 624, 125 C. C. A. 118; *Audas v. Highland Land & Bldg. Co.*, 205 Fed. 862, 125 C. C. A. 62; *Ritchie v. Sayers*, 100 Fed. 520; *Nettleton v. Mosier*, 3 Fed. 387; *Basso v. United States*, 40 Ct. Cl. 202. Ala.—*Hicky v. Stallworth*, 143 Ala. 535, 39 So. 267. Ark.—*McDonald v. Ft. Smith & W. R. Co.*, 105 Ark. 5, 150 S. W. 135; *Crittenden Lumb. Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836; *Whitford v. Whitford*, 100 Ark. 63, 139 S. W. 653; *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773; *M'Connell v. Day*, 61 Ark. 464, 33 S. W. 731; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Culley v. Edwards*, 44 Ark. 423, 426, 51 Am. Rep. 614; *Adams v. Thomas*, 44 Ark. 267, 270. Cal. *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. Colo.—*Consolidated Home Supply, etc. Co. v. Town of Evans*, 59 Colo. 482, 149 Pac. 834; *Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Symes v. People*, 17 Colo. App. 466, 69 Pac. 312; *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, 63 Pac. 1061. D. C.—*Morse v. United States*, 29 App. Cas. 433. Ga.—*Jones v. Smith*, 120 Ga. 642, 48 S. E. 134; *Owens v. Crockett*, 14 Ga. App. 322, 80 S. E. 906. Idaho.—*McCornick v. Friedman*, 7 Idaho 686, 65 Pac. 440. Ill.—*People v. Evans*, 262 Ill. 235, 104 N. E. 646; *Thompson v. People*, 207 Ill. 334, 69 N. E. 842; *Osgood v. Blackmore*, 59 Ill. 261. Ind.—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278; *Lowery v. State L. Ins. Co.*, 153 Ind. 100, 54 N. E. 442; *Cavanaugh v. Smith*, 84 Ind. 380; *Beavers v. Bess*, 58 Ind. App. 287, 108 N. E. 266. Ia.—*Beeman v. Kitzman*, 124 Iowa 86, 99 N. W. 171; *Thornily v. Prentice*, 121 Iowa 89, 96 N. W. 728. Kan.—*Watkins Land Mtg. Co. v. Mullen*, 8 Kan. App. 705, 54 Pac. 921. Ky.—*Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797. Me.—*Inhab. of Winslow*



(II.) Jurisdiction Exceeded.—(A). GENERALLY.—It is equally essential that the relief actually granted be not in excess of the power of the court. A judgment in excess of the power which the court may lawfully exercise in any case is void, at least as to the excess,<sup>43</sup> and

*v. Inhab. of Troy*, 97 Me. 130, 53 Atl. 1008. **Mass.**—Cook *v. Darling*, 18 Pick. 393; Mercier *v. Chace*, 9 Allen 242; Jochumsen *v. Suffolk Sav. Bank*, 3 Allen 87; Peters *v. Peters*, 8 Cush. 529. **Mich.**—Tromble *v. Hoffman*, 130 Mich. 676, 90 N. W. 694; Peninsular Sav. Bank *v. Ward*, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; Nugent *v. Nugent*, 70 Mich. 52, 37 N. W. 706; Green-vault *v. Farmers' & Mechanics' Bank*, 2 Doug. 498. **Minn.**—Hadley *v. Bour-deaux*, 90 Minn. 177, 95 N. W. 1109; Schmitt *v. Dahl*, 88 Minn. 506, 93 N. W. 665; Duxbury *v. Dahle*, 78 Minn. 427, 81 N. W. 198; Gulickson *v. Bodkin*, 78 Minn. 33, 80 N. W. 783. **Mo.**—State *v. Wood*, 155 Mo. 425, 56 S. W. 474; Cox *v. Boyce*, 152 Mo. 576, 54 S. W. 467; Hope *v. Blair*, 105 Mo. 85, 16 S. W. 595; McClanahan *v. West*, 100 Mo. 309, 13 S. W. 674; Adams *v. Cowles*, 95 Mo. 501, 8 S. W. 711; Cloud *v. Inhab. of Pierce City*, 86 Mo. 357, 366; Hux-ley *v. Harrold*, 62 Mo. 516; State *v. Stephenson*, 12 Mo. 178; Hedrix *v. Chicago*, R. I. & P. Ry., 103 Mo. App. 40, 77 S. W. 495; Caffery *v. Choctaw Coal & Min. Co.*, 95 Mo. App. 174. **Mont.**—Evans *v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715; Burke *v. Inter-State Sav. & L. Assn.*, 25 Mont. 315, 64 Pac. 879. **Neb.**—Minnesota Thresher Mfg. Co. *v. L'Heureux*, 82 Neb. 692, 118 N. W. 565; Gibson *v. Sexson*, 82 Neb. 475, 118 N. W. 77; Banking House *v. Dukes*, 70 Neb. 648, 97 N. W. 805; Rice *v. Allen*, 69 Neb. 349, 95 N. W. 704; Fogg *v. Ellis*, 61 Neb. 829, 86 N. W. 494; Bradley *v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 71 N. W. 282. **N. J.**—Crawford *v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201. **N. Y.** Stuyvesant *v. Weil*, 41 App. Div. 551, 58 N. Y. Supp. 697. **N. C.**—Balk *v. Harris*, 122 N. C. 64, 30 S. E. 318. **N. D.**—Shane *v. Peoples*, 25 N. D. 188, 141 N. W. 737. **Okla.**—First State Bank *v. Lattimer*, 149 Pac. 1099. **S. C.**—Beau-drot *v. Murphy*, 53 S. C. 118, 30 S. E. 825. **S. D.**—Stearns *v. Wright*, 13 S. D. 544, 83 N. W. 587. **Tex.**—Hopkins *v. Cain*, 105 Tex. 591, 143 S. W. 1145; Missouri, K. & T. Ry. Co. *v. Chenault*, 24 Tex. Civ. App. 481, 60 S. W. 55.

**Vt.**—Alexander & Hutchinson *v. City of Montpelier*, 81 Vt. 549, 71 Atl. 720. **Va.**—Lawson *v. Moorman*, 85 Va. 880, 9 S. E. 150. **Wis.**—Cowie *v. Stroh-meyer*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778.

[a] A judgment of naturalization nunc pro tunc may be collaterally im-peached as being rendered without juris-diction, where it is entered many years after the original judgment and no memorandum whatever of the origi-nal judgment exists. Gagnon *v. United States*, 193 U. S. 451, 24 Sup. Ct. 510, 48 L. ed. 745.

48. **U. S.**—*Ex parte Cuddy*, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. ed. 154; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. ed. 118; Lamaster *v. Keeler*, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. ed. 238; United States *v. Walker*, 109 U. S. 258, 3 Sup. Ct. 277, 27 L. ed. 927; Windsor *v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; Day *v. Micou*, 18 Wall. 156, 21 L. ed. 860; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; Bigelow *v. Forrest*, 9 Wall. 339, 19 L. ed. 696; Williamson *v. Berry*, 8 How. 495, 12 L. ed. 1170; Elliott *v. Peirsol's Lessee*, 1 Pet. 328, 7 L. ed. 164; Rose *v. Himely*, 4 Cranch 241, 2 L. ed. 608; Ritchie *v. Sayers*, 100 Fed. 520; United States *v. Labette County*, 7 Fed. 318. **Colo.**—Newman *v. Bullock*, 23 Colo. 217, 47 Pac. 379. **D. C.**—Morse *v. United States*, 29 App. Cas. 433. **Ill.**—People *v. Seelye*, 146 Ill. 189, 32 N. E. 458. **Ind.**—McFadden *v. Ross*, 108 Ind. 512, 8 N. E. 161. **Kan.**—Watkins Land Mtg. Co. *v. Mullen*, 8 Kan. App. 705, 54 Pac. 921. **Me.**—Lane *v. Crosby*, 42 Me. 327. **Mass.**—Folger *v. Columbian Ins. Co.*, 99 Mass. 267. **Minn.**—Sache *v. Gillette*, 101 Minn. 169, 112 N. W. 386; State *ex rel. Holland v. Miesen*, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513. **Neb.**—Banking House of A. Castetter *v. Dukes*, 70 Neb. 648, 97 N. W. 805; Cizek *v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28. **N. H.** State *v. Fowler*, 28 N. H. 184. **N. J.** Munday *v. Vail*, 34 N. J. L. 418. **Ohio.** Spoors *v. Coen*, 44 Ohio St. 497, 9 N. E. 132. **Tex.**—Sandoval *v. Rosser*, 86 Tex. 682, 26 S. W. 933, 935. **Va.**—Seamster

consent of the parties to the exercise of such jurisdiction cannot add anything to the validity of the judgment.<sup>49</sup>

(D.) **JUDGMENT BEYOND THE ISSUES.**—The mere fact that a judgment is outside the issues should not invalidate it on collateral attack, providing the court has kept within the power it might exercise in a proper case. While many of the decisions sustain this view,<sup>50</sup> there

*v. Blackstock*, 83 Va. 232, 2 S. E. 36. **W. Va.**—*Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603.

[a] It is not the result reached which determines whether or not the judgment is void but the power or authority which lies behind the mere conclusion that determines the question. To decide wrong where authority exists to pronounce judgment is error which can only be corrected in a direct proceeding. To decide wrong where no jurisdiction exists to pronounce judgment of the character involved renders the adjudication void and it can be attacked anywhere and collaterally. *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38.

[b] A justice judgment in excess of the highest limit which the statute allows, is void and collaterally attackable. *Jones v. Jones*, 14 N. C. 360; *Houser v. McKennon*, 1 Baxt. (Tenn.) 287.

[c] **Excessive Fine.**—A fine which is greater than the court could in any case impose is a nullity. *People v. Carter*, 48 Hun 165, 14 Civ. Proc. 241, 15 N. Y. St. 640; *People ex rel. Stokes v. Riseley*, 38 Hun 280. But see *Clark v. Holdridge*, 58 Barb. (N. Y.) 61, 40 How. Pr. 320.

[d] Judgment of imprisonment where no power is given by statute to imprison is void. **Ala.**—*Ex parte McKivett*, 55 Ala. 236. **Cal.**—*Ex parte Baldwin*, 60 Cal. 432. **Ill.**—*Newton v. Locklin*, 77 Ill. 103. **N. J.**—*Rhinehart v. Lance*, 45 N. J. L. 311, 39 Am. Rep. 592.

[e] An award of real estate as alimony, being not merely erroneous but in excess of the court's jurisdiction under the statute, will render the decree subject to collateral impeachment. *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28.

[f] A probate court's judgment ordering a sale and seizure of land is void as to such seizure when the court had no power to order it. *Wisdom v. Buckner*, 31 La. Ann. 52.

[g] A judgment of condemnation

and sale of the fee to land is void for the excess above a life estate when the statute expressly prohibits the court from condemning any rights outlasting the life estate. *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, 19 L. ed. 696.

[h] In all special statutory proceedings, (1) the measure of the court's power is the statute itself, and the exercise in such proceedings of power not authorized by the statute renders the judgment null and void and subject to collateral attack. *Murray v. American Surety Co.*, 70 Fed. 341, 17 C. C. A. 138. (2) The fact that the court might have power to appoint a receiver for a bank under other proceedings which the code authorizes, does not give it power to appoint a receiver in proceedings instituted by the attorney general on behalf of the people to enjoin an insolvent bank from the further transaction of any business. *Murray v. American Surety Co.*, 70 Fed. 341, 17 C. C. A. 138; *People's Home Sav. Bank v. Superior Court*, 103 Cal. 27, 36 Pac. 1015.

49. *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28.

50. **Cal.**—*Bond v. Pacheco*, 30 Cal. 530; *Shirra v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. **Ill.**—*Tolman v. Jones*, 114 Ill. 147, 28 N. E. 464. **Ia.**—*Davenport Mut. Sav. Fund & Loan Assn. v. Schmidt*, 15 Iowa 213. **Mo.**—*Lewis v. Morrow*, 89 Mo. 174, 1 S. W. 93; *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290; *O'Reilly v. Nicholson*, 45 Mo. 160; *First Nat. Bank v. Hughes*, 10 Mo. App. 7. **Neb.**—*Bannard v. Duncan*, 65 Neb. 179, 90 N. W. 947. **Tex.**—*Kendall v. Mather*, 48 Tex. 585. **Vt.**—*Chaffee v. Hooper*, 54 Vt. 513. **Wis.**—*Board of Supervisors v. Mineral Point R. R. Co.*, 24 Wis. 93; *Allie v. Schmitz*, 17 Wis. 169.

[a] In excess of the prayer of the complaint or petition. **Cal.**—*Chase v. Christianson*, 41 Cal. 253. **Ga.**—*Buice v. Lowman Gold & Silver Mining Co.*, 64 Ga. 769. **Ia.**—*Ketchum v. White*, 72 Iowa 193, 33 N. W. 627. **Me.**—*Smith*

are numerous decisions to the effect that a judgment not warranted by the pleadings is void collaterally.<sup>51</sup>

*v. Keen*, 26 Me. 411. **Minn.**—*Gillett v. Truax*, 27 Minn. 528, 8 N. W. 767. **N. J.**—*Van Dyke v. Bastedo*, 15 N. J. L. 224. **N. C.**—*Savage v. Hussey*, 48 N. C. 149. **Wis.**—*In re Graham*, 74 Wis. 450, 43 N. W. 148; *Baizer v. Lasch*, 28 Wis. 268.

[b] A default judgment in excess of the relief demanded is merely erroneous. **Cal.**—*Chase v. Christianson*, 41 Cal. 253; *Bond v. Pacheco*, 30 Cal. 530. **Ia.**—*Ketchum v. White*, 72 Iowa 193, 33 N. W. 627. **N. Y.**—*Harrison v. Union Trust Co.*, 144 N. Y. 326, 39 N. E. 353. **S. D.**—*Mach v. Blanchard*, 15 S. D. 432, 90 N. W. 1042. **Wis.**—*Jones v. Jones*, 78 Wis. 446, 47 N. W. 728.

[c] Consent Judgment.—In regard to a consent judgment attacked collaterally on the ground that it was not authorized by the pleading, the court said: "We can conceive of no reason why a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agree to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, much less void, as to him." *Fletcher v. Holmes*, 25 Ind. 458.

51. **U. S.**—*Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464. **Cal.**—*Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259; *Remington v. Superior Court*, 69 Cal. 633, 11 Pac. 252; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212. **Ill.**—*Frankfurter v. Bryan*, 12 Ill. App. 549. See *Silsbe v. Lucas*, 36 Ill. 462. **Ind.**—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51; *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161. **Ia.**—*Gaylord v. Scarff*, 6 Iowa 179. **Minn.**—*Sache v. Gillette*, 101 Minn. 169, 112 N. W. 386. **Miss.**—*Williams v. Childress*, 25 Miss. 78. **Mo.**—*State ex rel. McManus v. Muench*, 117 S. W. 25.

**Neb.**—*Banking House of A. Castetter v. Dukes*, 70 Neb. 648, 97 N. W. 805; *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28. **N. J.**—*Munday v. Vail*, 34 N. J. L. 418. **N. Y.**—*Butler v. Mayor*, 7 Hill 329. **Ohio.**—*Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132. **Tex.**—*Sandoval v. Rosser*, 86 Tex. 682, 26 S. W. 933, 935; *Holman v. Mayor*, 34 Tex. 668. **Va.**—*Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36; *Lavell v. McCurdy's Exrs.*, 77 Va. 763. **Wis.**—*Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709. **Eng.**—*Groome v. Forrester*, 5 Maule & S. 314, 105 Eng. Reprint 1066.

[a] A judgment for the recovery of possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464.

[b] An order establishing highway termini different from the termini described in the petition has been held invalid at least as to the excess. **Ia.** *State v. Molly*, 18 Iowa 525. **N. H.** *Fames v. Northumberland*, 44 N. H. 67; *Clement v. Burns*, 43 N. H. 609. But see *Davenport Mut. Sav. Fund & Loan Assn. v. Schmidt*, 15 Iowa 213.

[c] An order allowing an administrator's sale is void if it contains land not described in the petition. *Townsend v. Gordon*, 19 Cal. 188; *Verry v. McClellan*, 6 Gray (Mass.) 535, 66 Am. Dec. 423.

[d] An assignment of dower is void which includes land not contained in the petition for the assignment. *Falls v. Wright*, 55 Ark. 562, 18 S. W. 1044; *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9.

[e] Trustee's sale void which contains land not described in the petition. *Shriver's Lessee v. Lynn*, 2 How. (U. S.) 43, 11 L. ed. 172.

[f] Retention of Jurisdiction.—A petition asking for the appointment of a new trustee and that he be vested with the trust property empowers the court to decide only the issues thereby framed. When that is done, the court's power is exhausted and it may not by a clause in the decree retain jurisdiction of the estate for further purposes



(III.) **Judgment Premature.**—A judgment rendered in advance of the time at which the court lawfully acquires jurisdiction is void.<sup>52</sup> But the premature entry of a judgment after the court has acquired jurisdiction in the case is at most an irregularity which must be availed of in a direct proceeding.<sup>53</sup>

(IV.) **How the Question of Jurisdiction Determined.**—(A.) **INSPECTION OF THE RECORD.**—Whether or not the court rendering the judgment had

of administration. *State ex rel. McManus v. Muench* (Mo.), 117 S. W. 25.

[g] "The courts cannot, *ex mero motu*, set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non iudice* and void." *State ex rel. McManus v. Muench*, 217 Mo. 124, 117 S. W. 25.

52. **Prior to Date Set for Appearance.**—A decree *pro confesso* taken against non-resident defendants before the date fixed by the order of publication for the appearance of such defendants is void. *Morse v. United States*, 29 App. Cas. (D. C.) 433.

[a] **The appointment of a receiver** before the date specified in the notice of hearing is void where there was no appearance or stipulation. *Gibson v. Sexson*, 82 Neb. 475, 118 N. W. 77.

53. **U. S.**—*Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177. **Cal.**—*In re Newman's Estate*, 75 Cal. 213, 16 Pac. 887. **Ill.**—*Town of Lyons v. Cooledge*, 89 Ill. 529. **Kan.**—*Mitchell v. Aten*, 37 Kan. 33, 14 Pac. 497. **Mich.**—*Granger v. Judge of Superior Court*, 44 Mich. 384, 6 N. W. 848. **Mo.** *Sims v. Gray*, 66 Mo. 613; *Murray v. Purdy*, 66 Mo. 606; *Bailey v. McGinniss*, 57 Mo. 362. **Neb.**—*Bokhoof v. Stewart*, 89 N. W. 759. **N. J.**—*Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201. **S. D.**—*Weiland v. City of Ashton*, 18 S. D. 331, 100 N. W. 737.

[a] **A decree appointing an administrator** before the time authorized by the notice is such an irregularity. *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235.

[b] **Entry of Default.**—It is not a valid objection collaterally that the decree was taken before the default was actually entered. *Drake v. Duvenick*, 45 Cal. 455.

[c] **Prior to Verdict.**—It is not fatal

collaterally that the judgment was entered and recorded before the verdict was filed. *Weiland v. City of Ashton*, 18 S. D. 331, 100 N. W. 737.

[d] **A justice's judgment by default** rendered before the expiration of three hours does not render the judgment void. *Wise v. Loring*, 54 Mo. App. 258; *Klein v. Wielandy*, 15 Mo. App. 581.

[e] **That before an appeal is dismissed** garnishment on the original judgment issued is an irregularity which does not render the garnishment proceedings nor the judgment on the replevy bond void. *Cariker v. Dill* (Tex. Civ. App.), 140 S. W. 843.

[f] **Judgment on Claim Not Due.** Where the statute permits an attachment suit on claims not due but forbids judgment until they become due, a judgment rendered before that time is void. *King v. Frazer*, 2 Wills. Civ. Cas. (Tex.) §788.

[g] **Before Petition Filed.**—A decree cannot be collaterally attacked upon the ground that it was rendered before the formal filing of the petition. *Pollard v. American Freehold Land Mtg. Co.*, 103 Ala. 289, 295, 16 So. 801.

[h] **That a note sued upon was not** filed with the clerk when default was entered is a mere irregularity. *West Duluth Land Co. v. Bradley*, 75 Minn. 275, 77 N. W. 961.

[i] **Time For Answer Not Expired.** Where the court has acquired jurisdiction it is not a fatal defect that the judgment is entered prior to the expiration of the time allowed for answer. *Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201.

[j] **A judgment in attachment** entered before the expiration of the delay required by statute is not open to collateral attack. *Stephenson v. Newcomb*, 5 Harr. (Del.) 150; *Porter v. Partee*, 7 Humph. (Tenn.) 168. But see *People v. Jarrett*, 7 Ill. App. 566.

[k] **Approval of Sale.**—Though by statute an administrator's or guardian's sale must be approved at the term fol-

jurisdiction of the parties and the subject-matter must be ascertained from an inspection of the record,<sup>54</sup> even though the record be irregular and defective.<sup>55</sup> The record imports verity and cannot be contra-

lowing that in which it took place, the approval of such sale at the term when made does not invalidate it on collateral attack. *Henry v. McKerlie*, 78 Mo. 416; *Wilkerson v. Allen*, 67 Mo. 502.

[1] An order to sell land is valid collaterally though made before the administrator has rendered a final account of personal assets. *Snyder v. Markel*, 8 Watts (Pa.) 416.

54. **U. S.**—*Galpin v. Page*, 85 Wall. 350, 21 L. ed. 959. **Ark.**—*Crittenden Lbr. Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102; *Adams v. Thomas*, 44 Ark. 267. **Colo.**—*Kavanaugh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152; *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57; *Empire Ranch & Cattle Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522; *La Fitte v. Salisbury*, 22 Colo. App. 641, 126 Pac. 1104. **Ga.** *Ketterer v. Stringfield*, 142 Ga. 441, 83 S. E. 116; *Curtis v. Town of Mansfield*, 132 Ga. 441, 64 S. E. 327. **Haw.**—*Carey v. Hawaiian Lbr. Mills, Ltd.*, 21 Hawaïi 311. **Idaho.**—*O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20, 257. **Ill.** *Spring Creek Drainage Dist. v. Comrs. of Highways*, 238 Ill. 521, 87 N. E. 394; *Horn v. Metzger*, 234 Ill. 240, 84 N. E. 893; *Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820; *Harris v. Lester*, 80 Ill. 307; *Swearengen v. Gulick*, 67 Ill. 208; *Botsford v. O'Conner*, 57 Ill. 72; *Jackson v. Mulzer*, 174 Ill. App. 272. **Ind.**—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278; *Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151; *Sims v. Gay*, 109 Ind. 501, 9 N. E. 120; *Reid v. Mitchell*, 93 Ind. 469; *Goar v. Maranda*, 57 Ind. 339; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Baker v. Osborne*, 55 Ind. App. 518, 104 N. E. 97. **Ky.**—*Anderson's Committee v. Anderson's Admr.*, 161 Ky. 18, 170 S. W. 213; *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384. **Me.**—*Wilson ex rel. Welch v. Lacroix*, 111 Me. 324, 89 Atl. 69. **Mass.**—*Tufts v. Hancock*, 171 Mass. 148, 50 N. E. 459. **Minn.**—*Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *State*

*v. Macdonald*, 24 Minn. 48. **Mo.**—*Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *Potter v. Whitten*, 161 Mo. App. 118, 142 S. W. 453. **N. C.** *Pinnell v. Burroughs*, 168 N. C. 315, 84 S. E. 364. **N. D.**—*Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737. **Okla.**—*Edwards v. Smith*, 42 Okla. 544, 142 Pac. 302; *Hocker v. Johnson*, 131 Pac. 1094. **Ore.**—*Moore Realty Co. v. Carr*, 61 Ore. 34, 120 Pac. 742; *Underwood v. French*, 6 Ore. 66, 25 Am. Rep. 500. **S. D.**—*Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. **Tenn.**—*Pope v. Harrison*, 16 Lea 82. **Tex.**—*Crawford v. McDonald*, 88 Tex. 626, 630, 33 S. W. 325; *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072; *Bradley v. Love*, 60 Tex. 472; *Tennell v. Breedlove*, 54 Tex. 540; *Murchison v. White*, 54 Tex. 78, 83; *Fitch v. Boyer*, 51 Tex. 336; *Mitchell v. Menley*, 32 Tex. 460; *Waterman Lumber & Supply Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360; *Oliver v. Bordner* (Tex. Civ. App.), 145 S. W. 656. **Vt.**—*Spaulding v. Chamberlin*, 12 Vt. 538, 36 Am. Dec. 358; *Sparhawk v. Admx. of Buell*, 9 Vt. 41. **Va.**—*Hill v. Woodward*, 78 Vt. 765. **W. Va.**—*Central Dist. & P. Tel. Co. v. Parkersburg & O. V. E. Ry. Co.*, 85 S. E. 65.

#### [a] Conclusiveness of Record.

"The record of a court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be most disastrous in its results. A judicial record contains evidence of its own validity, and should testimony deors the record itself be admitted to contradict or vary its recitals it would render such records of no avail, and definite sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Hence all records must be tried and construed by themselves." *Harris v. Lester*, 80 Ill. 307.

[b] Parol Evidence.—See *Butterfield v. Miller*, 195 Fed. 200, 115 C. C. A. 152; *Ryan v. Staples*, 76 Fed. 721, 23 C. C. A. 541. See 10 ENCY. OF EV. 936.

55. **Cal.**—*Mesnager v. De Leonis*, 140 Cal. 402, 73 Pac. 1052. **Ky.**—*Bamber-*

dicted by extraneous evidence,<sup>56</sup> although in some jurisdictions it is permissible to show in contradiction of the record that jurisdiction over the parties was wanting.<sup>57</sup>

(B.) PRESUMPTIONS WHERE RECORD SILENT. — (1.) *Generally.* — It may be, however, that the jurisdictional facts do not appear on the record. In such case it becomes important to ascertain the nature of the jurisdiction exercised by the court. Certain presumptions operate in aid of the judgments of courts of general jurisdiction which are withheld from those of inferior tribunals.<sup>58</sup>

(2.) *Courts of General Jurisdiction.* — (a.) *Rule Stated.* — The rule of universal application is that every intendment consistent with the record will be indulged to sustain the proceedings of domestic courts of general and superior jurisdiction.<sup>59</sup> Consequently the mere silence of the

ger v. Green, 146 Ky. 258, 142 S. W. 384. N. D.—Shane v. Peoples, 25 N. D. 188, 141 N. W. 737. Ore.—Moore Realty Co. v. Carr, 61 Ore. 34, 120 Pac. 742.

56. U. S.—Old Wayne Life Assn. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959. Ariz.—Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; Bryan v. Kales, 3 Ariz. 423, 31 Pac. 517. Cal. Drake v. Duveniek, 45 Cal. 455; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. Ill.—Botsford v. O'Conner, 57 Ill. 72. Tex.—Hopkins v. Cain, 105 Tex. 591, 143 S. W. 1145; Hill & Jahns v. Lofton (Tex. Civ. App.), 165 S. W. 67.

[a] *False Return.*—The return of an officer showing due service of summons can as a rule be contradicted only in a direct proceeding against the officer for a false return and not by way of collateral attack. Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; Duffey v. Frankenberg, 144 Ill. App. 103; Campbell Prtg. Press & Mfg. Co. v. Mardel-Luse & Co., 50 Neb. 283, 69 N. W. 774; Wilson v. Shipman, 34 Neb. 573, 52 N. W. 576; Holliday v. Brown, 33 Neb. 657, 50 N. W. 1042.

57. Ark.—Griffin v. State, 37 Ark. 437. D. C.—Tenney v. Taylor, 1 App. Cas. 223. Ga.—Dozier v. Richardson, 25 Ga. 90. Ia.—State Ins. Co. v. Waterhouse, 78 Iowa 674, 43 N. W. 611. Kan. Thorn v. Salmonson, 37 Kan. 411, 15 Pac. 588; Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149. Me.—Bailey v. Merchants' Ins. Co., 110 Me. 348, 86 Atl. 328. Minn.—Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108. N. J.—Jones v. Manganese Iron Ore Co. (N. J. Eq.), 3 Atl. 517. N. Y.—Ferguson v. Crawford, 86 N. Y. 609; Bonnet v. Lachman,

65 Hun 554, 20 N. Y. Supp. 514; Dutton v. Smith, 10 App. Div. 566, 42 N. Y. Supp. 80. Ohio.—Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541. Wis.—Pollard v. Wegener, 13 Wis. 569.

[a] A distinction (1) has been made between a proceeding in rem and one that involves merely a determination of the personal liability of the defendant. Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541. (2) "In an action on a personal judgment, whether rendered by a court of this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment." Paulin v. Sparrow, 91 Ohio St. 279, 110 N. E. 528.

58. *Superior Jurisdiction Defined.* "To constitute a court, a superior court, as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential, to enable the court to take cognizance of them, is the acquisition of jurisdiction of the persons of the parties." Simons v. De Bare, 8 Abb. Pr. (N. Y.) 269, 4 Bosw. (N. Y.) 547.

[a] A court of general jurisdiction is one "which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary." Lessee of Grignon v. Astor, 2 How. (U. S.) 319, 11 L. ed. 283.

59. U. S.—Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625. Ala.—Johnson v.



record as to the facts and circumstances conferring jurisdiction is not fatal to the judgments of such courts; for it will be conclusively pre-

Johnson, 182 Ala. 376, 62 So. 706; Alabama Coal & Coke Co. v. Gulf Coal & Coke Co., 171 Ala. 544, 51 So. 685; Duncan v. Williams, 89 Ala. 341, 7 So. 416; Matthews v. McDade, 72 Ala. 377; *Ex parte* Rodgers, 12 Ala. App. 218, 67 So. 710; Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; Bryan v. Kales, 3 Ariz. 423, 31 Pac. 517. **Ark.**—Crittenden Lbr. Co. v. McDougal, 101 Ark. 390, 142 S. W. 836; Bank of Pine Bluff v. Levi, 90 Ark. 166, 118 S. W. 250; Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Clay v. Bilby, 72 Ark. 101, 78 S. W. 749; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; McLain v. Duncan, 57 Ark. 49, 20 S. W. 597. **Cal.**—Morrissey v. Gray, 162 Cal. 638, 124 Pac. 246; Johnson v. Canty, 162 Cal. 391, 123 Pac. 263; *In re* Eichhoff's Estate, 101 Cal. 600, 36 Pac. 11; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Frey v. Superior Court, 22 Cal. App. 421, 134 Pac. 733; Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454, 462; Bagley v. City & County of San Francisco, 19 Cal. App. 255, 125 Pac. 931. **Colo.**—Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512; Hughes v. Webster, 52 Colo. 475, 122 Pac. 789; Ross v. Newsom, 25 Colo. App. 393, 138 Pac. 1015; Empire Ranch & Cattle Co. v. Coleman, 23 Colo. App. 351, 129 Pac. 522. **Haw.**—*Ex parte* Smith, 14 Hawaii 245. **Idaho.**—O'Neill v. Potvin, 13 Idaho 721, 93 Pac. 20, 257. **Ill.**—Dickinson v. Belden, 268 Ill. 105, 108 N. E. 1011; Peters v. Dieus, 254 Ill. 379, 98 N. E. 560; Horn v. Metzger, 234 Ill. 240, 84 N. E. 893; Benefield v. Albert, 132 Ill. 665, 24 N. E. 634; Wenner v. Thornton, 98 Ill. 156; Swearengen v. Gulick, 67 Ill. 208; Jackson v. Mulzer, 174 Ill. App. 272; Cigler v. Keinath, 167 Ill. App. 65. **Ind.**—White v. Suggs, 56 Ind. App. 572, 104 N. E. 55; Baker v. Osborne, 55 Ind. App. 518, 104 N. E. 97; Young v. Wiley (Ind. App.), 102 N. E. 54. **Ia.**—Hawk v. Day, 148 Iowa 47, 126 N. W. 955; Boker v. Chapline, 12 Iowa 204; Wright v. Marsh, 2 G. Gr. 94. **Kan.**—Hillyard v. Banchor, 85 Kan. 516, 118 Pac. 67. **Ky.**—Kreiger v. Sonne, 151 Ky. 739, 152 S. W. 936; Steel v. Stearns Coal & Lbr. Co., 148 Ky. 429, 146 S. W. 721; Duff v. Hagins, 146 Ky. 792, 143 S. W. 378; Feltner v. Huff, 118 S. W. 936; Northington v. Reid, 75 S. W. 206; Ross v. McGrath's Admr., 27 Ky. L. Rep. 723, 86 S. W. 555; Berry v. Foster, 22 Ky. L. Rep. 745, 58 S. W. 709. **La.**—Gentile v. Foley, 3 La. Ann. 146. **Me.**—Austin v. Austin, 50 Me. 74, 79 Am. Dec. 597; Battles v. Holley, 6 Greenl. 145. **Mass.**—Gray v. Gardner, 3 Mass. 399. **Minn.**—Hadley v. Bourdeaux, 90 Minn. 177, 95 N. W. 1109; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783. **Miss.**—Martin v. Miller, 103 Miss. 754, 60 So. 772; Stevenson's Heirs v. McReary, 12 Smed. & M. 9, 51 Am. Dec. 102. **Mo.**—Conway v. Robinson, 178 S. W. 154; Bryan v. McCaskill, 175 S. W. 961; Wilson v. Wilson, 255 Mo. 528, 164 S. W. 561; Vasquez v. Richardson, 19 Mo. 96; Davison v. Bankers Life Assn., 166 Mo. App. 625, 150 S. W. 713. **Neb.**—Herter v. Herter, 97 Neb. 260, 149 N. W. 795. **N. D.**—Shane v. Peoples, 25 N. D. 188, 141 N. W. 737. **Ohio.**—Paulin v. Sparrow, 91 Ohio St. 279, 110 N. E. 528; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541. **Okla.**—First State Bank v. Lattimer, 149 Pac. 1099; Hoeker v. Johnson, 131 Pac. 1094. **Ore.**—Claypool v. O'Neill, 65 Ore. 511, 133 Pac. 349. **S. D.**—Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94. **Tenn.**—Puckett v. Wynns, 132 Tenn. 513, 178 S. W. 1184. **Tex.**—Martin v. Burns, 80 Tex. 676, 679, 16 S. W. 1072; Brockenborough v. Melton, 55 Tex. 493; Hill & Jahns v. Lofton (Tex. Civ. App.), 165 S. W. 67; Gibson v. Oppenheimer (Tex. Civ. App.), 154 S. W. 694; Wilkin v. Simmons (Tex. Civ. App.), 151 S. W. 1145; Cain v. Hopkins (Tex. Civ. App.), 141 S. W. 834; Earnest v. Glaser, 32 Tex. Civ. App. 378, 74 S. W. 605. **Utah.**—*In re* Evans, 42 Utah 282, 130 Pac. 217. **Vt.**—Giddings v. Smith, 15 Vt. 344; Hazard v. Martin, 2 Vt. 77, 84. **Wash.**—Kline Bros. & Co. v. North Coast Fire Ins. Co., 80 Wash. 609, 142 Pac. 7; Jorgenson v. Winter, 69 Wash. 573, 125 Pac. 957. **Wis.**—Minneapolis Threshing Mach. Co. v. Ashauer, 142 Wis. 646, 126 N. W. 113.

#### [a] Judgment Entered by Clerk.

The same presumption does not attend a judgment entered by the clerk as is indulged in favor of one entered pursuant to judicial action by the court. Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454, 462.

#### [b] From the identity of names of

sumed, where the record is silent that jurisdiction was duly acquired and properly exercised in a manner consistent with its retention.<sup>60</sup>

(b.) *Presumption's as to Process or Appearance.*—This presumption extends to all matters going to the authority of the court to render the

plaintiff and defendant it will not be presumed on a collateral attack that the parties were the same, where such presumption would invalidate a judgment regular on its face and entered in a cause of which the court had jurisdiction. *Allen v. Evans*, 7 Ariz. 354, 64 Pac. 414.

[c] The entry of judgment by *cegnovit* under a warrant of attorney to confess judgment is a proceeding which the courts entertain in the ordinary exercise of their authority as courts of general jurisdiction. The fact that the statute has regulated the mode of procedure, does not convert the proceeding into one of such a special character that the same presumptions do not obtain as in the case of ordinary judgments of superior courts of general jurisdiction. *Bush v. Hanson*, 70 Ill. 480.

[d] *Judgments of the court of first instance*, a tribunal established during the early history of California prior to its admission into the union, were aided by the same presumption as affected the judgments of other courts of general jurisdiction. *Ryder v. Cohn*, 37 Cal. 69.

60. **U. S.**—*McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625. **Ala.**—*Poliard v. American Freehold Land Mtg. Co.*, 103 Ala. 289, 295, 16 So. 801. **Ark.** *Clay v. Barnes*, 181 S. W. 303; *Price v. Gunn*, 114 Ark. 551, 170 S. W. 247; *Crittenden Lbr. Co. v. McDougal*, 101 Ark. 390, 395, 142 S. W. 837; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Culley & Son v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Adams v. Thomas*, 44 Ark. 267, 270; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *McKnight v. Smith*, 5 Ark. 409. **Cal.**—*Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Mesnager v. De Leonis*, 144 Cal. 402, 73 Pac. 1052; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Drake v. Duvenick*, 45 Cal. 455; *Quivey v. Porter*, 37 Cal. 458; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. **Colo.**—*Consolidated Home Supply etc. Co. v. Town of Evans*, 59

**Colo.** 482, 149 Pac. 834; *Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Empire Ranch & Cattle Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522. **Ga.**—*Hood v. Hood*, 143 Ga. 616, 85 S. E. 849. **Ill.**—*Dickinson v. Belden*, 268 Ill. 105, 108 N. E. 1011; *Kuzak v. Anderson*, 267 Ill. 609, 103 N. E. 662; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304; *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195; *Niekraus v. Wilk*, 161 Ill. 76, 43 N. E. 741; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; *Huntington v. Metzger*, 158 Ill. 272, 41 N. E. 881; *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634; *Matthews v. Hoff*, 113 Ill. 90; *Swearengen v. Gulick*, 67 Ill. 208; *Goudy v. Hall*, 30 Ill. 109; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Cigler v. Keinath*, 167 Ill. App. 65; *Kanorowski v. People*, 113 Ill. App. 468; *Calhoun v. Ross*, 60 Ill. App. 309; *Austin v. Austin*, 43 Ill. App. 488. **Ind.** *Young v. Wiley*, 183 Ind. 449, 107 N. E. 278; *Castetter v. State*, 112 Ind. 445, 14 N. E. 388; *Hays v. Ford*, 55 Ind. 52. **Ia.**—*Hawk v. Day*, 148 Iowa 47, 126 N. W. 955; *Boker v. Chapline*, 12 Iowa 204; *Wright v. Marsh*, 2 G. Gr. 94. **Ky.** *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Baker v. Baker*, *Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384; *Crown Real Estate Co. v. Rogers's Committee*, 132 Ky. 790, 117 S. W. 275; *Dennis v. Alves*, 117 S. W. 287. **Minn.**—*Hadley v. Bourdeaux*, 90 Minn. 177, 95 N. W. 1109; *Gulickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783. **Mo.** *Conway v. Robinson*, 178 S. W. 154; *Bryan v. McCaskill*, 175 S. W. 961. **Mont.**—*Burke v. Inter-State Sav. & L. Assn.*, 25 Mont. 315, 64 Pac. 879. **Neb.** *Banking House of A. Castetter v. Dukes*, 70 Neb. 648, 97 N. W. 805; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97. **Nev.**—*Daly v. Lahontan Mines Co.*, 151 Pac. 514. **N. J.** *McDevitt v. Connell*, 71 N. J. Eq. 119, 63 Atl. 504; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726; *Dean v. Thatcher*, 32 N. J. L. 470. **N. D.** *Shane v. Peoples*, 25 N. D. 188, 111 N. W. 737. **Okla.**—*Hoecker v. Johnson*, 131

judgment attacked, including the acquirement of jurisdiction over the parties and subject-matter by process, appearance or otherwise.<sup>61</sup>

**Personal Service.**—Where actual service is relied upon to sustain the judgment it will be presumed that regular process issued and was duly served or that jurisdiction was acquired by appearance.<sup>62</sup>

Pac. 1094. **Ore.**—First Nat. Bank *v.* Manassa, 150 Pac. 258; Moore Realty Co. *v.* Carr, 61 Ore. 34, 120 Pac. 742; Allen *v.* Norton, 6 Ore. 344. **S. D.** Carter *v.* Frahm, 31 S. D. 379, 141 N. W. 370; Stearns *v.* Wright, 13 S. D. 544, 83 N. W. 587; Phillips *v.* Phillips, 13 S. D. 231, 83 N. W. 94; Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891. **Tenn.**—Pope *v.* Harrison, 16 Lea 82. **Tex.**—Wilkin *v.* Simmons (Tex. Civ. App.), 151 S. W. 1145; Blunt *v.* Houston Oil Co. (Tex. Civ. App.), 146 S. W. 248; Mangum *v.* Kenley (Tex. Civ. App.), 145 S. W. 316. **Wis.**—Minneapolis Threshing Mach. Co. *v.* Ashauer, 142 Wis. 646, 126 N. W. 113.

61. **U. S.**—Mayor, etc. of City of Helena *v.* United States, 104 Fed. 112, 43 C. C. A. 429; Texas & P. Ry. Co. *v.* Smith, 91 Fed. 483, 33 C. C. A. 648; Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; *In re* Gibbons, 225 Fed. 420; Kelley *v.* Morrell, 29 Fed. 736. **Ala.** Alabama Coal & Coke Co. *v.* Gulf Coal & Coke Co., 171 Ala. 544, 54 So. 685; Matthews *v.* McDade, 72 Ala. 377. **Ark.** Clay *v.* Barnes, 181 S. W. 303; Price *v.* Gunn, 114 Ark. 551, 170 S. W. 247; Crittenden Lbr. Co. *v.* McDougal, 101 Ark. 390, 395, 142 S. W. 837; Pattison *v.* Smith, 94 Ark. 588, 127 S. W. 983; Livingston *v.* New England Mortgage Co., 77 Ark. 379, 91 S. W. 752; Kelly *v.* Laconia Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638. **Cal.**—Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742. **Colo.**—Kavanagh *v.* Hamilton, 53 Colo. 157, 125 Pac. 512; Hughes *v.* Webster, 52 Colo. 475, 122 Pac. 789; Farmers' Union D. Co. *v.* Rio Grande Canal Co., 37 Colo. 512, 86 Pac. 1042; Fletcher *v.* Stowell, 17 Colo. 94, 28 Pac. 326; Behymer *v.* Nordloh, 12 Colo. 352, 21 Pac. 37; Pennington *v.* McNally, 11 Colo. 557, 19 Pac. 503; Hughes *v.* Cummings, 7 Colo. 138, 2 Pac. 289. **Ind.**—Young *v.* Wiley, 183 Ind. 449, 107 N. E. 278; Markel *v.* Evans, 47 Ind. 326; Brownfield *v.* Weicht, 9 Ind. 394; Spangle *v.* Spangle, 41 Ind. App. 297, 83 N. E. 720. **Ia.**—*In re* Head's Appeal, 141 Iowa 651, 118 N. W. 884. **Ky.**—Torian *v.* Caldwell, 167 Ky. 670, 181 S. W. 373;

Kreiger *v.* Sonne, 151 Ky. 739, 152 S. W. 936; Steel *v.* Stearns Coal & Lumber Co., 148 Ky. 429, 146 S. W. 721; Duff *v.* Hagins, 146 Ky. 792, 143 S. W. 378; Bamberger *v.* Green, 146 Ky. 258, 142 S. W. 384; Crown etc. Co. *v.* Rogers, 132 Ky. 790, 117 S. W. 275. **La.** Gentile *v.* Foley, 3 La. Ann. 146. **Mass.** Gray *v.* Gardner, 3 Mass. 399. **Miss.** Stevenson's Heirs *v.* McReary, 12 Smed. & M. 9, 51 Am. Dec. 102. **Mo.**—Vasquez *v.* Richardson, 19 Mo. 96. **N. D.** Shane *v.* Peoples, 25 N. D. 188, 141 N. W. 737. **Tex.**—Brockenborough *v.* Milton, 55 Tex. 493. **Vt.**—Doolittle *v.* Holton, 28 Vt. 819, 67 Am. Dec. 745; Giddings *v.* Smith, 15 Vt. 344; Hazard *v.* Martin, 2 Vt. 77, 84; Judge of Probate *v.* Fillmore, 1 D. Chip. 420. **Wis.** Chandler *v.* Munkwitz Realty & Inv. Co., 148 Wis. 5, 134 N. W. 148; Minneapolis Threshing Mach. Co. *v.* Ashauer, 142 Wis. 646, 126 N. W. 113.

62. **Ala.**—Weaver *v.* Brown, 87 Ala. 533, 6 So. 354. **Ark.**—Waldron *v.* Taenzer, 79 Ark. 16, 94 S. W. 925; Johnson *v.* Lesser, 76 Ark. 465, 91 S. W. 763; Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704. **Cal.**—Bagley *v.* Devlin, 19 Cal. App. 274, 125 Pac. 939; Bagley *v.* Lilienthal, 19 Cal. App. 273, 125 Pac. 938; Bagley *v.* City & County of San Francisco, 19 Cal. App. 255, 125 Pac. 931. **Ga.**—Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562. **Ill.**—Horn *v.* Metzger, 234 Ill. 240, 84 N. E. 893; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Searle *v.* Galbraith, 73 Ill. 269; Reddick *v.* President of State Bank, 27 Ill. 145. **Ind.** Young *v.* Wiley, 183 Ind. 449, 107 N. E. 278; Indianapolis & C. G. R. Co. *v.* State, 105 Ind. 37, 4 N. E. 316; Bloomfield R. R. Co. *v.* Burress, 82 Ind. 83; Crane *v.* Kimmer, 77 Ind. 215; Hes *v.* Watson, 76 Ind. 359; Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162; Dwiggin *v.* Cook, 71 Ind. 579; Ayers *v.* Harshman, 66 Ind. 291; Abdil *v.* Abdil, 33 Ind. 460; Harkrider *v.* Harvey, 3 Ind. 104. **Ia.**—See Hawk *v.* Day, 148 Iowa 47, 126 N. W. 955 (apparently holding that the presumption is not conclusive); *In re* Head's Appeal, 141 Iowa 651, 118 N. W. 884; Ockendon *v.*



**Constructive Service.** — A judgment entered on constructive service by publication is generally given the same conclusive effect as judgments on personal service and so where the record fails to disclose the steps taken to acquire jurisdiction in such cases it will be presumed that jurisdiction was properly acquired.<sup>63</sup> If, however, the statute

Barnes, 43 Iowa 615. **Ky.**—*Kreiger v. Sonne*, 151 Ky. 739, 152 S. W. 936; *Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575; *Farnsworth v. Barret*, 146 Ky. 556, 142 S. W. 1049; *Feltner v. Huff*, 118 S. W. 936; *Jones v. Edwards*, 78 Ky. 6. **Minn.**—*Turrell v. Warren*, 25 Minn. 9. **Mo.**—*Conway v. Robinson*, 178 S. W. 154. **N. H.**—*Wingate v. Haywood*, 40 N. H. 437. **N. J.**—*Stokes v. Middleton*, 28 N. J. L. 32. **N. Y.**—*Ray v. Rowley*, 1 Hun 614, 4 Thomp. & C. 43. **Ohio.**—*Lessee of Morgan v. Burnett*, 18 Ohio 535. **Pa.**—*Willis v. Willis' Admr.*, 12 Pa. 159. **S. D.**—*Stearns v. Wright*, 13 S. D. 544, 83 N. W. 587; *Stoddard Mfg. Co. v. Mattice*, 10 S. D. 253, 72 N. W. 891. **Tenn.**—*Hopper v. Fisher*, 2 Head. 253. **Tex.**—*Guilford v. Love*, 49 Tex. 715; *Cariker v. Dill* (Tex. Civ. App.), 140 S. W. 843. **Va.**—*Ferguson's Admr. v. Teel*, 82 Va. 690. **Wis.**—*Tallman v. Ely*, 6 Wis. 244.

[a] That summons was issued and served in time to give the court jurisdiction to hear and determine the cause will be presumed. *Horn v. Metzger*, 234 Ill. 240, 84 N. E. 893.

[b] **Service on infant** will be presumed where the record shows the appointment of a guardian ad litem. *Ark.* *Clay v. Bilby*, 72 Ark. 101, 78 S. W. 749; *Beddinger v. Smith*, 13 S. W. 734; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. **Ill.**—*Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634. **Ind.**—*Brackenridge v. Dawson*, 7 Ind. 383; *Horne v. State Bank*, 1 Ind. 130. **S. D.**—*Phillips v. Phillips*, 13 S. D. 231, 83 N. W. 94. **Tex.**—*McAnear v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625. But see *Norris v. Stephens*, 9 Baxt. 433.

63. **Ala.**—*Seelye v. Smith*, 85 Ala. 25, 4 So. 664. **Ark.**—*Priee v. Gunn*, 114 Ark. 551, 170 S. W. 247; *Crittenden Lumb. Co. v. McDougal*, 101 Ark. 390, 395, 142 S. W. 836; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983. **Cal.** *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. **Idaho.**—*O'Neill v. Potvin*, 13 Idaho 721, 93 Pac. 20, 257. **Ia.**—*Hawk v. Day*, 118 Iowa 47, 140 N. W. 935; *Loving v. Pairo*, 10 Iowa 282; *Wright v. Marsh*, 2 G. Gr. 94. **Ky.**—*Kreiger v.*

*Sonne*, 151 Ky. 739, 152 S. W. 936; *Carr's Admr. v. Carr*, 92 Ky. 552, 18 S. W. 453; *Ross v. McGrath's Admr.*, 27 Ky. L. Rep. 723, 86 S. W. 555. **Minn.** *Gemmell v. Rice*, 13 Minn. 371. **Ore.** *Bank of Colfax v. Richardson*, 34 Ore. 518, 54 Pac. 359. **Tex.**—*Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072; *Lawler's Heirs v. White*, 27 Tex. 250; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158. **Utah.**—*Hoagland v. Hoagland*, 19 Utah 103, 57 Pac. 20. **Wis.**—*Nash v. Church*, 10 Wis. 303, 78 Am. Dec. 678.

[a] **Proper affidavit for publication** will be presumed. *Wenner v. Thornton*, 98 Ill. 156; *Carey v. Reeves*, 32 Kan. 718, 5 Pac. 22.

[b] **Due publication presumed.** *Applegate v. Lexington & C. Co. Min. Co.*, 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. ed. 892; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304.

[c] **The supreme court of the United States in Applegate v. Lexington & C. Co. Min. Co.**, 117 U. S. 269, 6 Sup. Ct. 742, 29 L. ed. 892, endorses the rule. The language of that case is: "The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in, or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court so far as it affects such property, will be valid. The case of *Galpin v. Page*, 18 Wall. 250 [85 U. S. 350, 21 L. ed. 959], cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to ap-

either expressly or by necessary implication requires the steps taken to secure jurisdiction by publication to be spread upon the record, the silence of the record in this respect would be fatal.<sup>64</sup>

(c.) *Attachment Proceedings.*—Jurisdiction over attachment proceedings is part of the general jurisdiction conferred upon the courts in which they are cognizable, and that jurisdiction is supported by the same presumptions as in other cases.<sup>65</sup>

(3.) *Courts of General Jurisdiction Over Particular Matters.*—The court may possess a general jurisdiction over a limited number of matters. In such case if the record discloses a subject-matter falling within that class, the usual presumptions of jurisdiction and regularity apply.<sup>66</sup>

pear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual.”

64. **U. S.**—Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Harvey *v.* Tyler, 2 Wall. 328, 332, 17 L. ed. 871; Cohen *v.* Portland Lodge No. 142, B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Preston *v.* Walsh, 10 Fed. 315. **Ark.** Clay *v.* Bilby, 72 Ark. 101, 78 S. W. 749. **Fla.**—Myakka Co. *v.* Edwards, 68 Fla. 372, 67 So. 217. **Ill.**—Bradley *v.* Drone, 187 Ill. 175, 58 N. E. 304; Wenner *v.* Thornton, 98 Ill. 156; Haywood *v.* Collins, 60 Ill. 328; Donlin *v.* Hettlinger, 57 Ill. 348; Boyland *v.* Boyland, 18 Ill. 551. **Ia.**—Hawk *v.* Day, 148 Iowa 47, 126 N. W. 955. **Ky.**—Brownfield *v.* Dyer, 7 Bush 505. **Mo.**—Conway *v.* Robinson, 178 S. W. 154. **N. H.**—Morse *v.* Presby, 25 N. H. 299, 302. **N. Y.** Hallett *v.* Righters, 13 How. Pr. 43. **Ohio.**—Lessee of Adams *v.* Jeffries, 12 Ohio 253.

[a] **A mere recital of proper service** does not change the rule. Gregory *v.* Bartlett, 55 Ark. 30, 17 S. W. 344. Compare, *infra*, XVII, B, 7, c, (IV), (C), (5).

[b] **Strict Compliance Necessary.** “The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court; . . . it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode

in which the publication must be established. These provisions, . . . must be strictly pursued, for the statute is in derogation of the common law.” Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

[c] **The order which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its direction, unless its absence is supplied by proper averment.** Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

65. **U. S.**—Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490. **Mo.**—Huxley *v.* Harrold, 62 Mo. 516. **N. J.**—Thompson *v.* Eastburn, 16 N. J. L. 100. **Tex.**—Willis & Bro. *v.* Mooring & Blanchard, 63 Tex. 340.

[a] **That the affidavit was filed will be presumed.** **U. S.**—Biggs *v.* Blue, 5 McLean 148, 3 Fed. Cas. No. 1,403. **Ind.**—Doe *v.* Rue, 4 Blackf. 263. **Mo.** Sloan *v.* Mitchell, 84 Mo. 546.

[b] **That the bond was given will be presumed.** Seelye *v.* Smith, 85 Ala. 25, 4 So. 664; Doe *v.* Rue, 4 Blackf. (Ind.) 263.

66. **U. S.**—Edelstein *v.* United States, 149 Fed. 636, 79 C. C. A. 328. **Ala.**—Coltart *v.* Allen, 40 Ala. 155, 88 Am. Dec. 757; Gray’s Admr. *v.* Cruise, 36 Ala. 559; Ikelheimer *v.* Chapman’s Admr., 32 Ala. 676; Lyon *v.* Odom, 31 Ala. 234. **Cal.**—Johnson *v.* Canty, 162 Cal. 391, 123 Pac. 263. **Ill.**—People *v.* Medart, 166 Ill. 348, 46 N. E. 1095; Henline *v.* People, 81 Ill. 269; Bostwick *v.* Skinner, 80 Ill. 147; Barnett *v.* Wolf, 70 Ill. 76; Moffitt *v.* Moffitt, 69 Ill. 641; Propst *v.* Meadows, 13 Ill. 157; Nealy

(4.) *Courts Exercising Special Statutory Powers.*—When the court is exercising a special statutory power, the record must as a rule disclose the circumstances of its acquisition since the presumption of jurisdiction does not obtain.<sup>67</sup> It is otherwise where the method of acquiring

*v. Brown*, 6 Ill. 10. **Ky.**—*Williams v. Morgan*, 1 Litt. 167; *McGuire v. Justices of Owsley*, 7 B. Mon. 340; *Jacobs v. Louisville R. R. Co.*, 10 Bush 263. **N. J.**—See *Den ex dem. Obert v. Hammel*, 18 N. J. L. 73.

See *infra*, XVII, A, 7, c, (IV), (B), (7).

[a] "There is a marked distinction between a court having general and exclusive jurisdiction over a limited number of subjects and a court having no jurisdiction over certain subjects except in cases in which certain essential and indispensable facts shall exist. In the latter case the rule that the facts conferring the jurisdiction must appear in the record of the proceedings applies to all courts, circuit as well as county. The rule does not grow out of nor depend upon the fact that the court . . . has not full and complete jurisdiction of the subject-matter about which it assumes to act. If the jurisdiction over the subject-matter is complete and unlimited, the action of the court will always be taken to be within its authority and jurisdiction, unless the contrary appears." *Jacobs' Admr. v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

67. **U. S.**—*Harvey v. Tyler*, 2 Wall. 328, 17 L. ed. 871; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221. **Ala.**—*Goodwin v. Sims*, 86 Ala. 102, 5 So. 587; *Graham v. Reynolds*, 45 Ala. 578; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785. **Ark.**—*Gibney v. Crawford*, 51 Ark. 34, 9 S. W. 309. **Ill.**—*Spring Creek Drainage Dist. v. Comrs. of Highways*, 238 Ill. 521, 87 N. E. 394; *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Haywood v. Collins*, 60 Ill. 328; *Donlin v. Hettinger*, 57 Ill. 348; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463. **Ind.**—*Cone v. Cotton*, 2 Blackf. 82. **Ia.**—*Hunger v. Barlow*, 39 Iowa 539. **Me.**—*Prentiss v. Parks*, 65 Me. 559. **Md.**—*Shivers v. Wilson*, 5 Har. & J. 130, 9 Am. Dec. 497. **Mass.**—*Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837. **Mich.**—*Wight v. Warner*, 1 Doug. 384. **Mo.**—*Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097; *Allen v. McCabe*, 93 Mo. 135, 6 S. W.

62; *Brown v. Walker*, 11 Mo. App. 226. **N. Y.**—*Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Denning v. Corwin*, 11 Wend. 647; *Striker v. Kelly*, 7 Hill 9. **Ore.**—*Ferguson v. Jones*, 17 Ore. 204, 20 Pac. 842; *Northcut v. Lemery*, 8 Ore. 316. **Tenn.**—*Barry v. Patterson*, 3 Humph. 313; *Earthman's Admr. v. Jones*, 2 Yerg. 484. **Tex.**—*Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Bruhn & Williams v. National Bank*, 54 Tex. 152; *Mitchell v. Runkle*, 25 Tex. Supp. 132. **Va.**—*Chesterfield Co. v. Hall's Exr.*, 80 Va. 321; *Pulaski County v. Stuart*, 28 Gratt. (69 Va.) 872.

[a] "A court of general jurisdiction, . . . may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959.

[b] An order authorizing publication in a tax proceeding must appear on the record, otherwise the publication confers no jurisdiction to sell the lands. *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. 344.

[c] Jurisdiction of county court to confirm a special assessment will not be presumed but must appear on the face of the record. *Spring Creek Drainage Dist. v. Comrs. of Highways*, 238 Ill. 521, 87 N. E. 394.

[d] Foreign Attachment.—The circuit court in a foreign attachment proceeding is exercising a special statutory power and its jurisdiction must be shown on the record. *Haywood v. Collins*, 60 Ill. 328; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463.

[e] Jurisdiction over the subject of divorce is a special authority not rec-



jurisdiction in such cases is not required by the statute to be spread upon the record.<sup>68</sup> And where these special statutory powers are exercised pursuant to the usual common law and chancery practice of personal service or seizure of the property, the usual presumption of jurisdiction applies.<sup>69</sup>

(5.) *Inferior Courts.*—(a.) *In General.*—A distinction is recognized between courts of general and those of special and inferior jurisdiction.<sup>70</sup> Unless given by statute,<sup>71</sup> no presumption exists in favor of the jurisdiction of these latter courts, and if the record does not affirmatively show that the court had jurisdiction the judgment is subject to collateral attack on this ground.<sup>72</sup>

ognized by the common law, and when a foreign divorce judgment of a common law court, though of general jurisdiction, is offered, its proceedings in relation to divorce stand on the same footing with those of courts of limited and inferior jurisdiction, so that its powers in the case must be shown and appear to have been strictly pursued. *Com. v. Blood*, 97 Mass. 538. See also *Lawrence's Case*, 18 Abb. Pr. (N. Y.) 347; *Northcut v. Lemery*, 8 Ore. 316.

68. **U. S.**—*Applegate v. Lexington & C. Min. Co.*, 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. ed. 892; *Eltonhead v. Allen*, 119 Fed. 126, 55 C. C. A. 671. **Cal.**—*Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. **Ky.**—*Newcomb's Exrs. v. Newcomb*, 13 Bush 544, 26 Am. Rep. 222. **Wis.**—*In re Marchant's Estate*, 121 Wis. 526, 99 N. W. 320; *Falkner v. Guild*, 10 Wis. 563.

[a] **The commissioner's court** in the exercise of its statutory power to establish stock districts is now a court of general jurisdiction to which the presumption applies. *McLaughlin v. Hardwick* (Ala. App.), 70 So. 305.

69. **U. S.**—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. ed. 490. **Ill.**—*Nichols v. Mitchell*, 70 Ill. 258; *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217. **Ia.**—*Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **N. Y.**—*Denning v. Corwin*, 11 Wend. 647. **Va.**—*Pulaski County v. Stuart*, 28 Gratt. (69 Va.) 872.

[a] **A proceeding to sell land free from dower rights** of an insane wife is a proceeding in equity for the protection of the wife's inchoate dower rights and does not come within the rule as to statutory powers wholly derived from statute. *Conway v. Robinson* (Mo.), 178 S. W. 154.

70. A court of special jurisdiction is

one which "is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise." *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319, 11 L. ed. 283.

[a] **Limited and Special Jurisdiction Distinguished.**—"I apprehend the term, 'limited jurisdiction,' to be somewhat ambiguous, and that the books sometimes use it without due precision. Our supreme court is limited by acts of the legislature; so likewise is the court of common pleas; and the newly constituted circuit courts; yet each of them exercises a general jurisdiction. The word *limited*, seems to be used sometimes carelessly instead of the term *special*, for I take the true distinction between courts to be such as possess a general, and such as have only a *special* jurisdiction for a particular purpose, or clothed with special powers for the performance of specific duties, beyond which they have no manner of authority: and these special powers to be exercised in a summary way; either by a tribunal already existing for general purposes, or else by persons appointed or to be appointed in some definite form. . . . Unless their proceedings, on the face of them, show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction, or exceeded it." *Den ex dem. Obert v. Hamel*, 18 N. J. L. 73.

71. *In re Head's Appeal*, 141 Iowa 651, 118 N. W. 884.

72. **U. S.**—*Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283. **Ala.**—*Martin v. Martin*, 173 Ala. 106,

(b.) *Justice Courts*.—The court of a justice of the peace is generally considered an inferior court whose judgments are not aided by any presumptions as to jurisdiction.<sup>73</sup> In a few states justices of the peace are deemed to exercise general jurisdiction over certain matters and when acting within those defined limits their judgments are attended by the same presumptions of jurisdiction as are those of superior courts.<sup>74</sup>

(c.) *Quasi-Judicial Tribunals*.—No presumption of jurisdiction exists

- 55 So. 632; Goodwater Warehouse Co. v. Street, 137 Ala. 621, 34 So. 903. Ark. Latham v. Jones, 6 Ark. 371; Pendleton v. Fowler, 6 Ark. 41. Cal.—*Ex parte* Kearny, 55 Cal. 212; Hahn v. Kelly, 31 Cal. 391, 94 Am. Dec. 742. Ga.—Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488. Ill.—Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333; Osgood v. Blackmore, 59 Ill. 261; Shufeldt v. Buckley, 45 Ill. 223. Ind.—Cauldwell v. Curry, 93 Ind. 363; Newman v. Manning, 89 Ind. 422; Argo v. Barthand, 80 Ind. 63; Stoddard v. Johnson, 75 Ind. 20; Nicholson v. Stephens, 47 Ind. 185; Board of Comrs. v. Markle, 46 Ind. 96. Ia.—Pursley v. Hayes, 22 Iowa 11, 92 Am. Dec. 350; Cooper v. Sunderland, 3 Iowa 114, 66 Am. Dec. 52. Kan.—Case v. Hannahs, 2 Kan. 490. Ky.—Crown Real Estate Co. v. Rogers' Committee, 132 Ky. 790, 117 S. W. 275. Me.—Dodge v. Kellock, 13 Me. 136. Md.—Fahey v. Mottu, 67 Md. 250, 10 Atl. 68. Mass. Com. v. Downey, 9 Mass. 520; Bridge v. Ford, 4 Mass. 641; Rossiter v. Peck, 3 Gray 538. Mich.—Saunders v. Tioga Mfg. Co., 27 Mich. 520; Allen v. Carpenter, 15 Mich. 25; Clark v. Holmes, 1 Doug. 390; Wight v. Warner, 1 Doug. 384. Minn.—Clague v. Hodgson, 16 Minn. 329. Miss.—Adams v. First Nat. Bank, 103 Miss. 744, 60 So. 770; Hinton v. Bd. of Suprs., 84 Miss. 536, 36 So. 565; Moore v. Hoskins, 66 Miss. 496, 6 So. 500; Steen v. Steen, 25 Miss. 513; Saffrans v. Terry, 12 Smed. & M. 690. Mo.—Karnes v. Alexander, 92 Mo. 660, 4 S. W. 518; McCloon v. Beatlie, 16 Mo. 391; Borsch v. Schneider, 27 Mo. 101; State v. Edwards, 192 Mo. App. 413, 182 S. W. 816. N. H.—Goulding v. Clark, 34 N. H. 148. N. J.—Den *ex dem.* Obert v. Hammel, 18 N. J. L. 73. N. Y.—Morse v. Cloyes, 11 Barb. 100; Brown v. Cady, 19 Wend. 477. Ore. Bewley v. Graves, 17 Ore. 274, 20 Pac. 322. Pa.—Fowler v. Jenkins, 28 Pa. 176. Tex.—Hill & Jahns v. Lofton (Tex. Civ. App.), 165 S. W. 67; Young v. Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.
- [a] **Tax Proceedings**.—The proceedings of a district court to collect delinquent taxes depends solely upon the statute and its jurisdiction in this particular is limited and special. Hill & Jahns v. Lofton (Tex. Civ. App.), 165 S. W. 67.
- [b] **The recital of jurisdiction in the decree is not sufficient in such cases.** Martin v. Martin, 173 Ala. 106, 55 So. 632; Neville v. Kennedy, 125 Ala. 149, 28 So. 452; Pollard v. Hanrick, 74 Ala. 334.
- [c] **What Jurisdictional Facts**.—The rule that jurisdiction must be apparent on the face of the proceedings is limited to those jurisdictional facts which the law directs the court to set forth on its record. Levy v. Ferguson Lbr. Co., 51 Ark. 317, 11 S. W. 284; Visart v. Bush, 46 Ark. 153.
73. **U. S.**—Den *ex dem.* Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155. Cal. Jolley v. Foltz, 34 Cal. 321. Conn. Starr v. Scott, 8 Conn. 480. Ind.—Treharne v. Matson, 46 Ind. App. 705, 93 N. E. 553. Mass.—Bridge v. Ford, 4 Mass. 641. Mich.—Van Kleek v. Eggleston, 7 Mich. 511; Spear v. Carter, 1 Mich. 19, 48 Am. Dec. 688. Mo.—Carpenter v. Roth, 192 Mo. 658, 91 S. W. 540; Fulkerson v. Davenport, 70 Mo. 541; Baker v. Baker, 70 Mo. 134; State *ex rel.* Polster v. Miles, 149 Mo. App. 638, 129 S. W. 731; Heman v. Larkin, 99 Mo. App. 294, 73 S. W. 218; Wise v. Loring, 54 Mo. App. 258. N. H. State v. Wear, 38 N. H. 314. N. D. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292. Wis.—Storm v. Adams, 56 Wis. 137, 14 N. W. 69; Baizer v. Lasch, 28 Wis. 268.
- See cases in preceding note.
74. **N. J.**—Russell v. Works, 35 N. J. L. 316. **N. C.**—Hiatt v. Simpson, 35 N. C. 72. **Pa.**—Billings v. Russell, 23 Pa. 189, 62 Am. Dec. 330. **Tenn.**—Turner v. Ireland, 11 Humph. 447. **Tex.**

in favor of the various boards and officers acting in a quasi-judicial capacity. Unless the record affirmatively shows their power to act in the particular case their orders are a nullity.<sup>75</sup>

(7.) *Probate Courts.*—The jurisdiction of probate courts is usually general as to certain matters and its orders and decrees with reference to any such matter are entitled to the same presumptions of integrity as those of superior courts of unlimited jurisdiction.<sup>76</sup> The record

Clayton *v.* Hurt, 88 Tex. 595, 32 S. W. 876; Heck *v.* Martin, 75 Tex. 469, 471, 13 S. W. 51; Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Wakefield *v.* King, 2 Wills. Civ. Cas., §695. **Vt.** Wright *v.* Hazen, 24 Vt. 143.

[a] The language of the constitution that justices of the peace shall have jurisdiction, etc., confers upon them the general judicial powers of the government over the subjects therein specified, subject to the limitations therein prescribed, and such jurisdiction is as general and exclusive as is that of the various other courts mentioned in the constitution over the subjects committed to them, etc. Brooks *v.* Powell (Tex. Civ. App.), 29 S. W. 809.

[b] **Rule in Massachusetts.**—"A justice of the peace exercises his jurisdiction mainly according to the course of the common law; his court is, for many purposes, a court of record, to which a writ of error will lie. . . . In our view, the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a judgment of a justice of the peace." Hendrick *v.* Whittemore, 105 Mass. 23.

75. **Ala.**—Golden *v.* State, 10 Ala. App. 235, 64 So. 517. **Me.**—Blaisdell *v.* Inhab. of Town of York, 110 Me. 500, 87 Atl. 361. **N. M.**—Van Patten *v.* Boyd, 20 N. M. 250, 150 Pac. 917.

[a] **County Commissioners.**—Hennin *v.* People, 81 Ill. 269; Dumoss *v.* Francis, 15 Ill. 543; Ferris *v.* Ward, 9 Ill. 499; Nealy *v.* Brown, 6 Ill. 10; Rhode *v.* Davis, 2 Ind. 53; Larimer *v.* Krau, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936.

[b] **In laying out highways** the court of county commissioners is an inferior tribunal within the rule. Small *v.* Pennell, 31 Me. 267.

[c] **A board of supervisors** having only limited jurisdiction and only jur-

isdiction touching back taxes when such assessments are made in the manner provided by statute, by either the tax collector or the county assessor, its order, containing the record of what was done by the board in the matter of a back tax assessment must set out sufficient facts to show that it had jurisdiction of the person and the subject matter. Adams *v.* First Nat. Bank, 103 Miss. 744, 60 So. 770; Wright *v.* Edwards Hotel & City R. Co., 101 Miss. 470, 58 So. 332.

[d] **Court Martial.**—Crawford *v.* Howard, 30 Me. 422.

76. **U. S.**—Christianson *v.* King County, 239 U. S. 356, 36 Sup. Ct. 114; Cornett *v.* Williams, 20 Wall. 226, 22 L. ed. 254; Grignon's Lessee *v.* Astor, 2 How. 319, 11 L. ed. 283; Kelley *v.* Morrell, 29 Fed. 736. **Ala.**—Barelift *v.* Treece, 77 Ala. 528; Acklen *v.* Goodman, 77 Ala. 521; Burke *v.* Mutch, 66 Ala. 568; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677. **Ark.**—Flowers *v.* Reece, 92 Ark. 611, 123 S. W. 773; Hare *v.* Shaw, 84 Ark. 32, 104 S. W. 931; Currie *v.* Franklin, 51 Ark. 338, 11 S. W. 477; Montgomery *v.* Johnson, 31 Ark. 74; George *v.* Norris, 23 Ark. 121. **Cal.**—Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Lucas *v.* Todd, 28 Cal. 182. **Conn.**—Dickinson *v.* Hayes, 31 Conn. 417. **Fla.**—Epping, Bellas & Co. *v.* Robinson, 21 Fla. 36. **Ga.**—Davie *v.* McDaniel, 47 Ga. 195; Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Wood *v.* Crawford, 18 Ga. 526. **Idaho.**—Clark *v.* Rossier, 10 Idaho 348, 78 Pac. 358. **Ill.**—Balsewicz *v.* Chicago, B. & Q. R. Co., 240 Ill. 238, 88 N. E. 734; Goodbody *v.* Goodbody, 95 Ill. 456; Logan *v.* Williams, 76 Ill. 175. **Ind.**—Doe *ex dem.* Harkrider *v.* Harvey, 3 Ind. 104. **Ia.**—Read *v.* Howe, 39 Iowa 553; Cowins *v.* Tool, 36 Iowa 82. **Kan.** Higgins *v.* Reed, 48 Kan. 272, 29 Pac. 389. **Ky.**—Master's Exr. *v.* Bienker, 87 Ky. 1, 7 S. W. 158. **La.**—Wisdom *v.* Parker, 31 La. Ann. 52; Sizemore *v.*



need only show an adjudication upon some matter within the probate court's power such as the appointing or removing of an executor<sup>77</sup> or

Wedge, 20 La. Ann. 124. **Me.**—Record v. Howard, 58 Me. 225. **Mass.**—Sever v. Russell, 4 Cush. 513, 50 Am. Dec. 811. **Mich.**—Osman v. Traphagen, 23 Mich. 80; Coon v. Fry, 6 Mich. 506. **Minn.**—Curran v. Kuby, 37 Minn. 330, 33 N. W. 907; Davis v. Hudson, 29 Minn. 27, 11 N. W. 136; Moreland v. Lawrence, 23 Minn. 84. **Miss.**—Ames v. Williams, 72 Miss. 760, 17 So. 762; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Jones v. Coon, 5 Smed. & M. 751. **Mo.**—Bingham v. Kollman, 256 Mo. 573, 165 S. W. 1097; Wilson v. Wilson, 255 Mo. 528, 164 S. W. 561; Spicer v. Spicer, 249 Mo. 582, 155 S. W. 832; Carter v. Carter, 237 Mo. 624, 141 S. W. 873; Smith v. Black, 231 Mo. 681, 132 S. W. 1129; Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283; Robbins v. Boulware, 190 Mo. 33, 88 S. W. 674; Macey v. Stark, 116 Mo. 481, 21 S. W. 1088; Sherwood v. Baker, 105 Mo. 472, 16 S. W. 938; Price v. Springfield Real-Estate Assn., 101 Mo. 107, 14 S. W. 57; Henry v. McKerlie, 78 Mo. 416, 427; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276; State *ex rel.* Gardiner v. Dickman, 175 Mo. App. 543, 157 S. W. 1012; Nelson v. Troll, 173 Mo. App. 51, 156 S. W. 16; Deweese v. Yost, 161 Mo. App. 10, 143 S. W. 72. **Neb.** Herter v. Herter, 97 Neb. 260, 149 N. W. 795. **N. H.**—Gordon v. Gordon, 55 N. H. 399. **N. J.**—Clark v. Costello, 59 N. J. L. 234, 36 Atl. 271. **N. C.** Overton v. Cranford, 52 N. C. 415, 78 Am. Dec. 244. **Ohio.**—Children's Home of Marion County v. Fetter, 90 Ohio St. 110, 106 N. E. 761; Sheldon's Lessee v. Newton, 3 Ohio St. 494. **Okla.** Homer v. McCurtain, 40 Okla. 406, 138 Pac. 807. **S. D.**—Matson v. Swenson, 5 S. D. 191, 58 N. W. 570. **Tenn.**—State v. Anderson, 16 Lea 321; Brien v. Hart, 6 Humph. 131. **Tex.**—Martin v. Robinson, 67 Tex. 368, 3 S. W. 550; Guilford v. Love, 49 Tex. 715; Meniffee v. Hamilton, 32 Tex. 495; Waterman Lumb. & Supply Co. v. Robins (Tex. Civ. App.), 159 S. W. 360; Caruthers v. Hadley (Tex. Civ. App.), 134 S. W. 757. **Vt.**—Townsend v. Downer's Estate, 32 Vt. 183; Doolittle v. Holton, 28 Vt. 819, 67 Am. Dec. 745; Sparhawk v. Buell's Admr., 9 Vt. 41; Judge of Probate v. Fillmore, 1 D. Chip. 420.

**Va.**—Ridgely v. Bennett, 13 Lea 210. **Wash.**—State *ex rel.* Neal v. Kauffman, 86 Wash. 172, 149 Pac. 656. **Wis.** Portz v. Schantz, 70 Wis. 497, 36 N. W. 249. **Wyo.**—Lethbridge v. Lauder, 13 Wyo. 9, 76 Pac. 682.

[a] Surrogate court of New York City. *Bearns v. Gould*, 77 N. Y. 455.

[b] Court of Ordinary.—*Bowen v. Gaskins*, 144 Ga. 1, 85 S. E. 1007.

[c] Orphans' Court.—*Newby v. Blakely*, 85 N. J. L. 728, 90 Atl. 318.

[d] By statute the decrees of probate courts are sometimes given the same presumptions that attach to superior courts. *Providence County Sav. Bank v. Hughes*, 26 R. I. 73, 58 Atl. 254.

77. **U. S.**—Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. ed. 314; *Hurlburt v. Van Wormer*, 14 Fed. 709. **Ala.**—*Johnson v. Kyser*, 127 Ala. 309, 27 So. 784; *Bean v. Chapman*, 73 Ala. 140; *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757; *Gray's Admr. v. Cruise*, 36 Ala. 559; *Ikelheimer v. Chapman's Admr.*, 32 Ala. 676; *Lyon v. Odom*, 31 Ala. 234. **Cal.**—*Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378. **Ga.** *Thompson v. Chapeau*, 132 Ga. 847, 65 S. E. 127. **Ky.**—*Master's Exr. v. Bieker*, 87 Ky. 1, 7 S. W. 158; *Stevenson v. Huddleson*, 13 B. Mon. 299. **La.** *Duson v. Dupre*, 32 La. Ann. 896. **Md.** *Wilson v. Ireland*, 4 Md. 444. **Mich.** *Benjamin v. Early*, 123 Mich. 93, 81 N. W. 973. **Minn.**—*In re Hanson*, 105 Minn. 30, 117 N. W. 235. **Ohio.**—*Children's Home of Marion County v. Fetter*, 90 Ohio St. 110, 106 N. E. 761. **Tex.**—*Mills v. Herndon*, 60 Tex. 353; *Willis & Bro. v. Ferguson*, 59 Tex. 172; *Dancy v. Strickling*, 15 Tex. 557, 65 Am. Dec. 179. **Vt.**—*Steen v. Bennett*, 24 Vt. 303.

[a] The reason for appointing a new administrator need not be shown by the record. *Saltonstall v. Riley*, 28 Ala. 164.

[b] That there was a general administrator will be presumed from the appointment of an administrator *de bonis non*. *Sims v. Waters*, 65 Ala. 442.

[c] Acceptance of Administrator's Resignation.—Where a second administrator is appointed, it will be presumed that the court had duly accepted the

administrator, or guardian;<sup>75</sup> the sale of a decedent's,<sup>79</sup> or ward's property,<sup>80</sup> final distribution,<sup>81</sup> or some other matter of probate cognizance. In certain jurisdictions, however, the probate court is one of inferior jurisdiction whose orders and decrees are entitled only to the presumptions that attach to the proceedings of such inferior courts.<sup>82</sup> A judgment of a probate court on matters not within its general authority is accompanied by no presumption of jurisdiction.<sup>83</sup>

(8.) *Circuit Courts.*—Judgments and decrees of circuit courts pronounced in the exercise of their general jurisdiction in law and equity are supported by all intendments as to jurisdiction and regularity.<sup>84</sup>

(9.) *County Courts.*—The orders and judgments of county courts, made in the exercise of their general powers are entitled to the same favorable presumptions which are accorded to courts of general jurisdiction.<sup>85</sup> Where such courts are of general unlimited jurisdiction

resignation of the first administrator and settled his account. *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127.

78. *Md.*—*Fridge v. State*, 3 Gill & J. 103, 20 Am. Dec. 463. *Mich.*—*Palmer v. Oakley*, 2 Doug. 433, 47 Am. Dec. 41. *Mo.*—*Strouse v. Drennan*, 41 Mo. 289. *Ohio.*—*Shroyer v. Richmond*, 16 Ohio St. 455.

79. *U. S.*—*Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254. *Ark.*—*George v. Norris*, 23 Ark. 121. *Ga.*—*Barclay v. Kimsey*, 72 Ga. 725. *Idaho.*—*Clark v. Rossier*, 10 Idaho 348, 78 Pac. 358. *Mo.*—*Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129. *N. Y.*—*Sheldon v. Wright*, 7 Barb. 39. *Tex.*—*Tom v. Sayers*, 64 Tex. 339; *Moody v. Butler*, 63 Tex. 210; *Hurley v. Barnard*, 48 Tex. 83; *Meniffee v. Hamilton*, 32 Tex. 495; *Lynch v. Baxter*, 4 Tex. 331, 51 Am. Dec. 735. *Vt.*—*Doolittle v. Holton*, 28 Vt. 819, 67 Am. Dec. 745. *Va.*—*Woodhouse v. Fillbates*, 77 Va. 317. *Wis.*—*Jackson ex dem. Grignon v. Astor*, 1 Pin. 137.

[a] *Special Power.*—The probate's power to sell lands to pay debts is sometimes regarded as special and limited. *Ala.*—*Sermon v. Black*, 79 Ala. 507; *Wyatt's Admr. v. Rambo*, 29 Ala. 510, 69 Am. Dec. 89. *Idaho.*—*Ethell v. Nichols*, 1 Idaho 741. *Miss.*—*Laughman v. Thompson*, 4 Smed. & M. 259.

80. *Redmond v. Anderson*, 18 Ark. 449.

81. *U. S.*—*Hiller v. Ladd*, 85 Fed. 703, 29 C. C. A. 394. *Cal.*—*Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132. *Minn.*—*Eddy v. Kelly*, 72

*Minn.* 32, 74 N. W. 1020. *Mo.*—*Tapley v. McPike*, 50 Mo. 589. *Ore.*—*Yeaton v. Barnhart*, 150 Pac. 742.

82. *Alaska.*—*In re Decker's Estate*, 3 Alaska 106; *White's Guardian v. Martin*, 2 Alaska 495; *Sylvester's Admr. v. Willson's Admr.*, 2 Alaska 325. *Mass.*—*Thayer v. Winchester*, 133 Mass. 447; *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Dec. 372. *R. I.*—*People's Sav. Bank v. Wilcox*, 15 R. I. 258, 3 Atl. 211.

83. *Vogelsang v. Dougherty*, 46 Tex. 466; *Bowser v. Williams*, 6 Tex. Civ. App. 197, 25 S. W. 453.

84. *U. S.*—*Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625. *Ala.*—*Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710. *Ill.*—*Peters v. Dieus*, 254 Ill. 379, 98 N. E. 560. *Mo.*—*Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711; *Potter v. Whitten*, 161 Mo. App. 118, 142 S. W. 453.

See *supra*, XVII, A, 7, c, (IV), (B), (2).

[a] *Circuit Court of Cook County.* *Maginn v. Standard Equipment Co.*, 150 Fed. 139, 80 C. C. A. 15.

[b] *Circuit Court of St. Louis.* *Bryan v. McCaskill (Mo.)*, 175 S. W. 961.

85. *Ia.*—*State v. Berry*, 12 Iowa 58. *Ky.*—*Elliott v. Treadway*, 10 B. Mon. 22. *Mo.*—*Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097; *Zimmerman v. Snowden*, 88 Mo. 218. *N. D.*—*Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737. *Tex.*—*Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Poor v. Boyce*, 12 Tex. 440; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *White v. Bedell (Tex. Civ. App.)*, 173 S. W. 624; *Wil-*

every presumption accorded any court upholds their judgments.<sup>80</sup>

(10.) *Federal Courts.*—When a judgment of a federal court is attacked collaterally, the presumption of jurisdiction as well as every other presumption which upholds the judgments of courts of general jurisdiction accompanies it.<sup>81</sup>

*Lin v. Simmons* (Tex. Civ. App.), 151 S. W. 1115.

[a] The county court in Illinois though of limited jurisdiction, is not strictly speaking one of inferior jurisdiction and when acting within the sphere of its jurisdiction as liberal inferences will be indulged in favor of its judgments and decrees as those of circuit courts. *Barnett v. Wolf*, 70 Ill. 76; *Propst v. Meadows*, 13 Ill. 157.

86. U. S.—*Harvey v. Tyler*, 12 Wall. 328, 17 L. ed. 871. Cal.—*Barrett v. Carney*, 33 Cal. 530. Ill.—*Matthews v. Hoff*, 113 Ill. 90. Va.—*De Vaughn v. Devaughn*, 19 Gratt. (60 Va.) 556.

87. U. S.—*Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. ed. 520; *Levell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. ed. 463; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Skirving v. National Life Ins. Co.*, 59 Fed. 742, 8 C. C. A. 241. Ala.—*Hundley v. Chadwick*, 109 Ala. 575, 19 So. 845. Ark.—*Byers v. Fowler*, 12 Ark. 218. Ind.—*Hays v. Ford*, 55 Ind. 52. Mich.—*Arnold v. Nye*, 23 Mich. 286. Minn.—*Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938; *Turrell v. Warren*, 25 Minn. 9. Miss.—*Goodsell v. Delta & Pine Land Co.*, 72 Miss. 580, 18 So. 452. Mo.—*Reed v. Vaughn*, 15 Mo. 137, 55 Am. Dec. 133. Nev.—*Ex parte Hill*, 5 Nev. 154. N. Y.—*Ruckman v. Cowell*, 1 N. Y. 505; *Griswold v. Sedgwick*, 1 Wend. 126. Okla.—*Bowen v. Carter*, 42 Okla. 565, 144 Pac. 170.

As to effect of judgments of federal courts in state courts and vice versa, see *infra*, XVIII.

[1] "The courts of the United States (1) are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." *Marshall in Kennedy Lessee v. Kennedy*, 5 Cranch 173, 3 L. ed. 70; *McCormick v. Sul-*

*livan*, 10 Wheat. 192, 199, 6 L. ed. 300.

(2) Their jurisdiction, though limited to certain subject-matter, is general as to all such matters, and their judgments upon such subject-matter are entitled to the same presumptions as other courts of general jurisdiction. See *Grignon's Lessee v. Astor* 2 How. (U. S.) 319, 11 L. ed. 283.

[b] "Although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, . . . yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity." *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. ed. 463.

[c] As to Both Subject-Matter and Parties.—*Ex parte Caddy*, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. ed. 154.

[d] The United States courts in the Indian Territory were courts of superior jurisdiction whose judgments were entitled to every presumption as to jurisdiction and regularity. *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934.

[e] The district court as a court of bankruptcy is a court of limited jurisdiction, but its judgments upon questions specially made subject to its jurisdiction by section 2 of the bankruptcy act, possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. *Edelstein v. United States*, 149 Fed. 636, 79 C. C. A. 328.

[f] Admiralty court proceedings have been denied this presumption of jurisdiction. *Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194.

[g] Confiscation Proceedings.—A district court of the United States has been held a court of limited jurisdiction in confiscation proceedings and its judgment held void where the record showed neither an order for seizure nor an actual seizure of the land. *Mason v. Tuttle*, 75 Va. 105.



(11.) *Foreign Judgments.*—The application of the rules hereinbefore discussed, to foreign judgments is treated elsewhere in this article.<sup>88</sup>

(C.) WHERE JURISDICTIONAL MATTERS SHOWN ON RECORD.—(1.) *Generally.* The presumptions of jurisdiction heretofore discussed are predicated upon a silent record. They cannot arise in opposition to the record itself for it is presumed to speak the truth.<sup>89</sup> Where, therefore, the record shows what was done by way of obtaining jurisdiction there can be no presumption that anything different was done,<sup>90</sup> and if the facts

88. See *infra*, XVIII.

89. See *supra*, XVII, A, 7, c, (IV), (B).

90. **U. S.**—Old Wayne Mut. Life Assn. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. ed. 201; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. ed. 298; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Pensacola State Bank v. Thornberry, 226 Fed. 611, 141 C. C. A. 367; Butterfield v. Miller, 195 Fed. 200, 115 C. C. A. 152; Indiana & Arkansas Lumb. & Mfg. Co. v. Brinkley, 164 Fed. 963, 91 C. C. A. 91; Johnson v. Hunter, 147 Fed. 133, 77 C. C. A. 359. **Ala.**—Medley v. Shipes, 58 So. 304. **Ark.**—Crittenden Lumb. Co. v. McDougal, 101 Ark. 390, 142 S. W. 836; Winn v. Campbell, 94 Ark. 338, 126 S. W. 1059; Grimmett v. Askew, 48 Ark. 151, 2 S. W. 707; Evans v. Percifull, 5 Ark. 424. **Cal.**—Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. **Colo.**—Empire Ranch & Cattle Co. v. Farmer, 24 Colo. App. 45, 131 Pac. 799. **Del.**—Frankel v. Satterfield, 9 Houst. 201, 19 Atl. 898. **Ga.**—Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 S. E. 517. **Ill.**—Aldridge v. Matthews, 257 Ill. 202, 100 N. E. 536; Miller v. Rowan, 251 Ill. 344, 96 N. E. 285; People *ex rel.* Raymond v. Talmadge, 194 Ill. 67, 61 N. E. 1049; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; Dickey v. Chicago, 152 Ill. 468, 38 N. E. 932; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Swiggart v. Harber, 5 Ill. 364, 39 Am. Dec. 418; Buckmaster v. Carlin, 4 Ill. 104. **Ind.**—Beavers v. Bess, 58 Ind. App. 287, 108 N. E. 266. **Ia.**—Oziah v. Howard, 149 Iowa 199, 128 N. W. 364; Mahoney v. State Ins. Co., 133 Iowa 570, 110 N. W. 1041; Thornily v. Prentice, 121 Iowa 89, 96 N. W. 728. **Kan.**—Mickel v. Hicks, 19 Kan. 578, 27 Am. Rep. 161.

**Ky.**—Baker v. Baker, Eccles & Co., 162 Ky. 683, 173 S. W. 109. **Mich.**—*In re* Phillips, 158 Mich. 155, 122 N. W. 554; Tromble v. Hoffman, 130 Mich. 676, 90 N. W. 694; Peters v. Youngs, 122 Mich. 484, 81 N. W. 263. **Minn.**—Barber v. Morris, 37 Minn. 194, 33 N. W. 559. **Mo.**—Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002; Smith v. Young, 136 Mo. App. 65, 117 S. W. 628. **Neb.**—*In re* Nelson's Est., 81 Neb. 363, 115 N. W. 1087; Banking House v. Dukes, 70 Neb. 648, 97 N. W. 805; Cizek v. Cizek, 69 Neb. 797, 99 N. W. 28; Fogg v. Ellis, 61 Neb. 829, 86 N. W. 494; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97. **S. D.**—Carter v. Frahm, 31 S. D. 379, 141 N. W. 370. **Tex.**—Houston Oil Co. v. Davis (Tex. Civ. App.), 132 S. W. 808. **Vt.**—Hopkins v. Heywood, 86 Vt. 486, 86 Atl. 305. **Wis.**—O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 486.

[a] The United States supreme court has stated the rule thus: "... Such presumptions, ... only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred." Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

[b] Reason for the Rule.—"Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would

thus affirmatively disclosed upon the record are insufficient to confer jurisdiction the judgment is a nullity and subject to collateral attack.<sup>91</sup>

(2.) *Jurisdiction of Subject-Matter*.—Want of jurisdiction of the subject-matter appearing affirmatively upon the record renders the judgment a nullity and the parties may disregard it.<sup>92</sup>

(3.) *Jurisdiction of Parties*.—(a.) *In General*.—A failure of the court to acquire jurisdiction of the parties, when disclosed by an examination of the record itself, renders a personal judgment subject to collateral attack.<sup>93</sup>

always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed." *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959.

91. **U. S.**—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Pensacola State Bank v. Thornberry*, 226 Fed. 611; *Cohen v. Portland Lodge No. 142*, B. P. O. E., 152 Fed. 357, 81 C. C. A. 483. **Ark.**—*Price v. Gunn*, 170 S. W. 247; *McDonald v. Ft. Smith & W. R. Co.*, 105 Ark. 5, 150 S. W. 135; *Crittenden Lumb. Co. v. McDougal*, 101 Ark. 390, 142 S. W. 836; *Winn v. Campbell*, 94 Ark. 338, 126 S. W. 1059; *Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199; *Greenstreet v. Thornton*, 60 Ark. 369, 30 S. W. 347; *Ex parte Woods*, 3 Ark. 532. **Cal.**—*Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007. **Colo.**—*Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Empire Ranch & Cattle Co. v. Farmer*, 24 Colo. App. 45, 131 Pac. 799; *Empire Ranch & Cattle Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522; *Empire Ranch & Cattle Co. v. Irwin*, 23 Colo. App. 206, 128 Pac. 867; *Gibson v. Austin*, 23 Colo. App. 220, 128 Pac. 859; *Bloomer v. Jones*, 22 Colo. App. 404, 125 Pac. 541. **Del.**—*Frankel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. **D. C.**—*Tenney v. Taylor*, 1 App. Cas. 223. **Ga.**—*Beddingfield v. First Nat. Bank*, 4 Ga. App. 197, 61 S. E. 30. **Ill.**—*Aldridge v. Matthews*, 257 Ill. 202, 100 N. E. 536; *Swearngen v. Gulick*, 67 Ill. 208; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. **Ia.**—*Hawk v. Day*, 148 Iowa 47, 126 N. W. 955. **Kan.**—*Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161. **Ky.**—*Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Carpenter v. Moorelock*, 151 Ky. 506, 152 S. W. 575. **Mich.**—*In re Phillips*, 158 Mich. 155, 122 N. W. 554. **Minn.**—*Jewett v. Iowa Land Co.*, 64

*Minn.* 531, 67 N. W. 639; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559. **Mo.**—*Kunzi v. Hickman*, 243 Mo. 103, 147 S. W. 1002. **Neb.**—*Minnesota Thresher Mfg. Co. v. L'Heureux*, 82 Neb. 692, 118 N. W. 565; *Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; *Banking House of A. Castetter v. Dukes*, 70 Neb. 648, 97 N. W. 805. **Tex.**—*Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340; *Hill & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67; *Waterman Lumber & Supply Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360; *Houston Oil Co. v. Davis* (Tex. Civ. App.), 132 S. W. 808. **Wis.**—*Minneapolis Threshing Machine Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113; *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436.

[a] A decree of insolvency will not be presumed valid, where it shows on its face that it was rendered several years after the court had lost jurisdiction of the estate. *Medley v. Shipps*, 177 Ala. 94, 58 So. 304.

92. **U. S.**—*Johnson v. North Star Lumb. Co.*, 206 Fed. 624, 125 C. C. A. 118; *John II Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458. **Ga.**—*Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517. **Ill.**—*People v. Clark*, 268 Ill. 156, 108 N. E. 994. **Minn.**—*Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108. **Mont.**—*Evans v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715. **N. J.**—*Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201. **Okla.**—*In re Moore's Guardianship*, 152 Pac. 378; *First State Bank v. Lattimer*, 149 Pac. 1099. **Tex.**—*Waterman Lumb. & Supply Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360.

93. **U. S.**—*Priest v. Board of Trustees of Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751. **Ark.**—*Ex parte Woods*, 34 Ark. 291. **La.**—*Jacobs v. Kansas City, S. & G. R. Co.*, 131

(b.) *Process Wanting or Defective.* — Unless process is waived by appearance or otherwise, a personal judgment would not be binding on the parties, when the record affirmatively shows that no process was ever issued in the case or that one was issued which contained a fatal defect.<sup>94</sup> But the judgment is not open to collateral attack merely because the record shows a defect or irregularity in the summons which does not render the judgment void.<sup>95</sup>

La. 389, 64 So. 150. **Mo.**—Givens v. Harlow, 251 Mo. 231, 158 S. W. 355. **Okla.**—Jefferson v. Gallagher, 150 Pac. 1071.

[a] **Personal Judgment on Constructive Service.**—A general and personal judgment rendered against the defendant is void where the record affirmatively shows that it was rendered on constructive service and defendant defaulted. Givens v. Harlow, 251 Mo. 231, 158 S. W. 355.

94. **U. S.**—Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., 124 Fed. 259; Citizens Bank v. Brooks, 23 Blatchf. 137, 23 Fed. 21. **Cal.**—Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 Pac. 295. **Conn.**—Porter v. Orient Ins. Co., 72 Conn. 519, 45 Atl. 7. **Fla.**—McGehee v. Wilkins, 31 Fla. 83, 12 So. 228. **Ill.**—Dickey v. Chicago, 152 Ill. 468, 38 N. E. 932; Haywood v. Collins, 60 Ill. 328; Oppenheimer v. Giershofer, 54 Ill. App. 38. **Ind.**—Cavanaugh v. Smith, 84 Ind. 380. **Ia.**—Beeman v. Kitzman, 124 Iowa 86, 99 N. W. 171; Kitsmiller v. Kitchen, 24 Iowa 163. **Ky.**—Newcomb v. Newcomb, 13 Bush 544, 26 Am. Rep. 222. **La.**—Williams v. Clark, 11 La. Ann. 761. **Me.**—Inhab. of Winslow v. Inhab. of Troy, 97 Me. 130, 53 Atl. 1008. **Mass.**—Needham v. Thayer, 147 Mass. 536, 18 N. E. 429; Downs v. Fuller, 2 Mete. 135, 35 Am. Dec. 393. **Miss.**—Harrington v. Wofford, 46 Miss. 31; Enos v. Smith, 7 Smed. & M. 85. **Mo.**—Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002; Childs v. Shannon's Admr., 16 Mo. 331; Stuckert v. Thompson, 181 Mo. App. 518, 16 S. W. 692; First Nat. Bank v. Hughes, 10 Mo. App. 7. **Neb.**—Minnesota Thresher Mfg. Co. v. L'Heureux, 82 Neb. 692, 118 N. W. 565; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Jaster v. Currie, 69 Neb. 4, 94 N. W. 995; Fogg v. Ellis, 61 Neb. 829, 86 N. W. 494; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Kaufmann v. Drexel, 56 Neb. 229, 76 N. W. 559; Campbell

Printing Press & Mfg. Co. v. Marder, Luse & Co., 50 Neb. 283, 69 N. W. 774; Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765; Haynes v. Aultman, etc. Co., 36 Neb. 257, 54 N. W. 511. **N. Y.**—Bonnet v. Lachman, 65 Hun 554, 20 N. Y. Supp. 514, 48 N. Y. St 749; Callahan v. Gerbereux, 153 App. Div. 71, 137 N. Y. Supp. 996; McGill v. Weill, 10 N. Y. Supp. 246. **Okla.**—Jefferson v. Gallagher 150 Pac. 1071. **S. C.**—Stanley v. Stanley, 35 S. C. 94, 14 S. E. 675. **Tex.**—San Bernardo Townsite Co. v. Hocker, 176 S. W. 644; Parker v. Spencer, 61 Tex. 155; Earnest v. Glaser, 32 Tex. Civ. App. 378, 74 S. W. 605; Caplen v. Compton, 5 Tex. Civ. App. 410, 27 S. W. 24. **W. Va.**—Fowler v. Lewis' Admr., 36 W. Va. 112, 14 S. E. 447; Hall v. Hall, 30 W. Va. 779, 5 S. E. 260.

[a] **Notice of Inquisition.**—A decree of the probate court, upon application of municipal officers, adjudging a person to be of unsound mind and appointing a guardian for him, is void and collaterally attackable, when it appears that the fourteen days prior notice authorized by statute was not given to him and no inquisition was had. Inhab. of Winslow v. Inhab. of Troy, 97 Me. 130, 53 Atl. 1008.

[b] **A personal judgment against a non-resident** upon service of process beyond the state is subject to collateral attack. **U. S.**—Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. **Conn.**—Porter v. Orient Ins. Co., 72 Conn. 519, 45 Atl. 7. **Mass.**—Needham v. Thayer, 147 Mass. 536, 18 N. E. 429. **Tex.**—San Bernard Townsite Co. v. Hocker (Tex. Civ. App.), 176 S. W. 644.

[c] **A judgment restoring a lost record** without notice to the parties to be affected thereby and on an ex parte affidavit, is a nullity and binding on no one. Harris v. Lester, 80 Ill. 307.

95. **Ala.**—Foster v. Thompson, 10 Ala. App. 365, 65 So. 414. **Cal.**—In re James' Estate, 99 Cal. 374, 33 Pac. 1122. **Ky.**—Farnsworth v. Barret, 146



(c.) *Defects in Service.*—In the absence of a voluntary appearance, an entire failure to serve the summons, or a wholly inadequate service when shown by the record, would avoid the judgment collaterally.

Ky. 556, 142 S. W. 1049. W. Va. Ambler v. Leach, 15 W. Va. 677.

See generally the title "Process."

[a] **The process is sufficient collaterally** if it informs the defendant of the nature of the proceedings, of the interest he has in them and of the court where the hearing will take place. Ill.—Goudy v. Hall, 36 Ill. 313, 87 Am. Dec. 217. Ind.—Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184. Mo.—Thompson v. Chicago, etc. Ry. Co., 110 Mo. 147, 19 S. W. 77.

[b] **Matters of Form.**—That the process does not conform to the statute in matters of mere form is of no importance collaterally. Me.—Boynton v. Fly, 12 Me. 17. N. Y.—Denman v. McGuire, 101 N. Y. 161, 4 N. E. 278. Vt. Allen v. Huntington, 2 Aiken 249, 16 Am. Dec. 702.

[c] **An error in the date of the summons** is not fatal collaterally. Chicago Dock & Canal Co. v. Kinzie, 93 Ill. 415.

[d] **Omission of Clerk's Signature.** Ambler v. Leach, 15 W. Va. 677.

[e] **Amendable Defects.**—Where the defendant has notice of the suit and fails to object to defects in process, he is estopped by the judgment from thereafter questioning them. Baker v. Thompson, 75 Ga. 164.

[f] **An incorrect designation in the process** will not affect the proceedings when attacked collaterally. Thus a summons against "Miss Sue Dixon" is sufficient to support a judgment against "Sue R. Dixon." Dixon v. Melton, 137 Ky. 689, 126 S. W. 358. See also Farnsworth v. Barret, 146 Ky. 556, 142 S. W. 1049; Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575.

[g] **An erroneous return day in the summons** does not render the process void (Jones v. Danforth, 71 Neb. 722, 99 N. W. 495), a process requiring the defendant to answer in an interval less than that to which he is by law entitled. Whitwell v. Barbier, 7 Cal. 54, 63.

[h] **The praecipe serves as a guide to the clerk in issuing the summons** and likewise serves to mark the time when the action begins even though the clerk should be dilatory in issuing

the summons. Its filing is not jurisdictional and defects in it do not affect the validity of the proceedings. McMillon v. Harrison, 66 Fla. 200, 63 So. 427.

96. U. S.—Webster v. Reid, 11 How. 437, 13 L. ed. 761. Fla.—Haddock v. Wright, 25 Fla. 202, 5 So. 813. Ind. Anderson v. Miller, 4 Blatchf. 417. Kan.—Pray v. Jenkins, 47 Kan. 599, 28 Pac. 716. La.—Simpson v. Hope, 23 La. Ann. 557; Gaicennie v. Akins' Exr., 17 La. 42, 36 Am. Dec. 604; Pile v. Kenner, 16 La. 570; Thomas v. Breedlove, 6 La. 573. Me.—Penobscot R. Co. v. Weeks, 52 Me. 456. Mo.—Feurt v. Caster, 174 Mo. 289, 73 S. W. 576; McClanahan v. West, 100 Mo. 309, 13 S. W. 674; Smith v. Ross, 7 Mo. 463. Neb.—Gibson v. Sexson, 82 Neb. 475, 118 N. W. 77. N. Y.—*In re Stilwell's Estate*, 139 N. Y. 337, 34 N. E. 777; Baldwin v. Kimmel, 16 Abb. Pr. 353, 1 Robt. 109; Porter v. Bronson, 19 Abb. Pr. 236, 29 How. Pr. 292. N. C.—Isley v. Boon, 113 N. C. 249, 18 S. E. 174; Grubb v. Lookabill, 100 N. C. 267, 6 S. E. 390. S. D.—Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94. Tex.—Galloway v. Bank, 56 S. W. 236; Roller v. Ried, 87 Tex. 69, 26 S. W. 1060.

See generally the title "Service of Process and Papers."

[a] **On Former Agent.**—Service upon a person who had at one time been an agent of the defendant but who at the time of service was no longer such, confers no jurisdiction. Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393.

[b] **Attempted service upon a corporation** by serving persons who at the time were not officers of the corporation will not give the court jurisdiction, and its decree is subject to collateral attack. Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 50 Neb. 283, 69 N. W. 774.

[c] **Where the statute requires service by the sheriff** of one county and the record shows service by the sheriff of another county the judgment is collaterally attackable notwithstanding a general recital of due and legal service. Munson v. Pawnee Cattle Co., 53 Colo. 337, 126 Pac. 275.

An irregularity in the manner of service is not available on collateral attack where it appears that the defendant was in fact served.<sup>97</sup>

(d.) *Return Defective*.—The return appearing upon the record may show such want of jurisdiction as to invalidate the judgment.<sup>98</sup> An informal or imperfect return, however, which does not defeat the court's jurisdiction will not subject the judgment to impeachment in a collateral proceeding,<sup>99</sup> particularly where the judgment recites that

[d] **Service upon minor under fourteen years** made upon the minor personally will not confer jurisdiction, where the statute requires such service to be made upon the minor's father, mother or guardian. *Herdlicka v. Evans*, 165 Iowa 207, 145 N. W. 84. See generally the title "Infants."

[e] **Leaving a Copy at Defendant's Late Residence**.—*Minnesota Thresher Mfg. Co. v. L'Heureux*, 82 Neb. 692, 118 N. W. 565.

97. **Ala.**—*Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 So. 516; *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414. **Ark.**—*Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550. **Ind.**—*Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820. **Ia.**—*Thornily v. Prentice*, 121 Iowa 89, 96 N. W. 728; *Longueville v. May*, 115 Iowa 709, 87 N. W. 432; *Ballinger v. Tarbell*, 16 Iowa 491, 85 Am. Dec. 527. **Miss.**—*Harrington v. Wofford*, 46 Miss. 31. **Neb.**—*Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774; *Gandy v. Jolly*, 35 Neb. 711, 53 N. W. 658. **Tex.**—*Batjer v. Roberts* (Tex. Civ. App.), 148 S. W. 841. **Vt.**—*Allen v. Hall*, 8 Vt. 34.

[a] **Service two days before return day** when the statute requires service to be made three days before the return day, will not render the judgment subject to collateral attack. *Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414.

[b] **That process was served after the return day** does not invalidate the judgment, where defendant could have answered long before judgment. *Batjer v. Roberts* (Tex.), 148 S. W. 841.

[c] **Reading the summons instead of delivering it to defendant** is a mere irregularity. *Gandy v. Jolly*, 35 Neb. 711, 53 N. W. 658.

[d] **Service on the agent of a foreign corporation** designated to accept process was good on collateral attack although made in a county where no designation of agency was filed, and

though there was no agent in the county where the land in suit was situated. *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57.

[e] **Service in Wrong County**.—That the service of process was made upon defendant in a county other than that of his residence is not ground for collateral attack on a judgment of a court of general jurisdiction. *Wing v. Little*, 163 Ill. App. 468.

98. **Cal.**—*Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380. **Del.**—*Frankel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. **Mo.**—*Givens v. Harlow*, 251 Mo. 231, 158 S. W. 355; *Priest v. Captain*, 236 Mo. 446, 139 S. W. 204; *Stuckert v. Thompson*, 181 Mo. App. 518, 164 S. W. 692.

[a] **An unsworn return by a constable** will rebut the presumption of jurisdiction arising from recitals in the decree, where the statute requires such return to be verified. *Herdlicka v. Evans*, 165 Iowa 207, 145 N. W. 84.

[b] **Affidavit by Deputy in His Own Name**.—Where proof of extraterritorial service is made by a deputy in his own name, the judgment is thereby invalidated; the process being directed to the sheriff. *Stuckert v. Thompson*, 181 Mo. App. 518, 164 S. W. 692.

[c] **A return made before a deputy clerk is fatally defective**, and confers no jurisdiction, where the statute requires service of process in a sister state shall be proved by an affidavit of an officer of the sister state making the service, made before the clerk or judge of the court of which affiant is an officer. *Givens v. Harlow*, 251 Mo. 231, 158 S. W. 355; *Priest v. Captain*, 236 Mo. 446, 139 S. W. 204.

99. **Ark.**—*Scott v. Pleasants*, 21 Ark. 364. **Cal.**—*Newman's Estate*, 75 Cal. 213, 16 Pac. 887; *Drake v. Duvenick*, 45 Cal. 455; *Peck v. Strauss*, 33 Cal. 678; *Musser v. Fitting*, 26 Cal. App. 746, 148 Pac. 536; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. **Conn.**—*Morey v. Hoyt*, 62 Conn. 542,

the complaint and summons in the case had been duly served.<sup>1</sup>

(c.) *Where Appearance Shown.*—(AA.) *In General.*—A party who surrenders himself to the jurisdiction of the court is not in position to attack the judgment collaterally for lack of jurisdiction over himself.<sup>2</sup>

26 Atl. 127. Fla.—McMillon v. Harrison, 66 Fla. 200, 63 So. 427. Ill. Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813. Ind.—Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490. Ia.—Wilson v. Call, 49 Iowa 463. Kan.—Axman v. Decker, 45 Kan. 179, 25 Pac. 582. Minn.—Gribble v. Livermore, 64 Minn. 396, 67 N. W. 213; Brown v. Atwater, 25 Minn. 520. Miss.—Kelly v. Harrison, 69 Miss. 856, 12 So. 261; Rigby v. Lefevre, 58 Miss. 639; Crizer v. Gorren, 41 Miss. 563; Campbell v. Hays, 41 Miss. 561. N. C.—McElrath v. Butler, 29 N. C. 398. N. D.—Hanson v. Franklin, 19 N. D. 259, 123 N. W. 386. Ohio.—Paulin v. Sparrow, 91 Ohio St. 279, 110 N. E. 528. Ore. Bank of Colfax v. Richardson, 34 Ore. 518, 54 Pac. 359. Pa.—Brundred v. Egbert, 164 Pa. 615, 30 Atl. 503; Sloan v. McKinstry, 18 Pa. 120. Tex.—Batjer v. Roberts (Tex. Civ. App.), 148 S. W. 841. Va.—Ferguson v. Teel, 82 Va. 690.

[a] It is not a good objection that the return omits to state a delivery of the process upon the defendant named therein "in person." Brooks v. Powell (Tex. Civ. App.), 29 S. W. 809.

[b] *Made Too Late.*—A return upon the summons not made within the period required by statute will not render the judgment impeachable collaterally. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138; Rivard v. Gardner, 39 Ill. 125.

[c] *That the place of service is not state* is not fatal. Stoddard Mfg. Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

[d] *Variance.*—(1) An immaterial variance in the return is not ground for collateral attack. Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512. (2) Spelling defendant's name "George B. Hamilton" in the return whereas her name was Georgie B. Hamilton, will not overcome a recital of proper service in the judgment. Kavanagh v. Hamilton, 53 Colo. 157, 125 Pac. 512.

[e] *Verification.*—(1) It is not a good objection that the return is not verified (Ostby v. Secor [Iowa], 94 N. W. 571; Muchmore v. Guest [Neb.], 96

N. W. 194), (2) unless a sworn return is made indispensable by the statute, Herdlicka v. Evans, 165 Iowa 207, 145 N. W. 84.

[f] *Age of Server.*—Where the affidavit of service does not state that the affiant was twenty-one years of age at the time of the service, the defect is not fatal collaterally. Peck v. Strauss, 33 Cal. 678.

[g] *That a joint service* instead of a several one is shown by the return does not make it void. McMillon v. Harrison, 66 Fla. 200, 63 So. 427.

[h] *Copy of Complaint.*—Failure of the return to show that a copy of the complaint was served with the summons is not fatal to default judgment when questioned collaterally. Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454, 462.

1. Peck v. Strauss, 33 Cal. 678; Musser v. Fitting, 26 Cal. App. 746, 148 Pac. 536.

2. U. S.—McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545. Ark.—Ederheimer v. Carson Dry Goods Co., 105 Ark. 488, 152 S. W. 142. Cal.—Harvey v. Foster, 64 Cal. 296, 30 Pac. 849. Neb.—Radil v. Sawyer, 84 Neb. 143, 120 N. W. 957; David Bradley & Co. v. Matley, 83 Neb. 589, 119 N. W. 958.

[a] A party who appears to object to the jurisdiction of the appellate court on the ground that the appellate proceedings were not instituted within the statutory period, cannot collaterally attack the court's erroneous decision that it had jurisdiction. Radil v. Sawyer, 84 Neb. 143, 120 N. W. 957.

[b] *A mere intruder* who voluntarily intervenes in the action before being summoned and who is not mentioned in the complaint or process is bound by the judgment and cannot attack it collaterally. Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867.

[c] *Attacking Manner of Service.* One who specially appears before a justice of the peace to attack the manner of the service of process cannot collaterally impeach an adverse judgment there rendered. David Bradley &



(BB.) *Authority of Attorney.*—Since the court in proceeding with the cause necessarily determines the attorney's right to act for a party, a number of decisions regard this as conclusive collaterally and refuse to entertain any objection based on the attorney's authority to make appearance in the case.<sup>3</sup> There are cases, however, holding a judgment upon unauthorized appearance of an attorney without service, to be void and collaterally attackable,<sup>4</sup> particularly in the case of a foreign judgment.<sup>5</sup>

(f.) *Service by Publication.*—(AA.) *In General.*—To sustain, against collateral attack, a judgment based on substituted service through publication, the steps disclosed by the record as constituting the service

Co. v. Matley, 83 Neb. 589, 119 N. W. 958.

[d] **Though sued by fictitious name and no amendment changing the name is made.** Johnston v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753.

3. **U. S.**—Landes v. Brant, 10 How. 348, 13 L. ed. 449; White v. Crow, 17 Fed. 98; Field v. Gibbs, Pet. C. C. 155, 9 Fed. Cas. No. 4,766. **Ark.**—Marks v. Matthews, 50 Ark. 338, 7 S. W. 303; Denton v. Roddy, 34 Ark. 642. **Cal.**—Carpentier v. Oakland, 30 Cal. 439. **Conn.**—Butler v. Butler, 1 Root 275. **Fla.**—Haddock v. Wright, 25 Fla. 202, 5 So. 813. **Ill.**—Martin v. Judd, 60 Ill. 78; Cigler v. Keinath, 167 Ill. App. 65. **Ind.**—Wiley v. Pratt, 23 Ind. 628. **Ia.**—Willenburg v. Hersey, 104 Iowa 699, 74 N. W. 1; Macomber v. Peck, 39 Iowa 351; Aultman v. McLean, 27 Iowa 129; Prince v. Griffin, 16 Iowa 552. **La.**—Brigot's Heirs v. Brigot, 47 La. Ann. 1304, 17 So. 825. **Mass.**—Finneran v. Leonard, 7 Allen 54, 83 Am. Dec. 665. **Mich.**—Rohrabacher v. Walsh, 170 Mich. 59, 135 N. W. 907; Mayhew v. Snell, 33 Mich. 182; Reed v. Gage, 33 Mich. 179. **Mo.**—State ex rel. Ponath v. Muench, 230 Mo. 236, 130 S. W. 282; Scott v. Royston, 223 Mo. 568, 123 S. W. 454; Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Baker v. Stonebraker, 34 Mo. 172. **Neb.**—Wabaska Elec. Co. v. Blue Spring, 84 Neb. 577, 122 N. W. 21. **Nev.**—Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360. **N. H.**—Everett v. Warner Bank, 53 N. H. 340. **N. J.**—Dickinson v. Trenton, 33 N. J. Eq. 63. **N. Y.**—Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 25 N. E. 941; Brown v. Nichols, 42 N. Y. 26, 9 Abb. Pr. (N. S.) 1; Reed v. Pratt, 2 Hill 64. **N. C.**—Edwards v. Moore, 99 N. C. 1, 5 S. E. 13. **Ohio.**—Pillsbury's Lessee v. Dugan's Admr., 9 Ohio 117,

34 Am. Dec. 427. **Pa.**—Cyphert v. McClune, 22 Pa. 195. **Vt.**—Mussey v. White, 58 Vt. 45, 3 Atl. 319; Abbott & Co. v. Dutton, 44 Vt. 546, 8 Am. Rep. 394; Hubbard v. Dubois, 37 Vt. 94, 86 Am. Dec. 690. **W. Va.**—Wandling v. Straw, 25 W. Va. 692.

[a] **A third party may not raise such objection.** Martin v. Judd, 60 Ill. 78.

[b] **Consent Judgment.**—Where an attorney appears without authority and consents to a judgment the same is only voidable. **Ark.**—Denton v. Roddy, 34 Ark. 642. **D. C.**—The United States Elec. Lighting Co. v. Leiter, 8 Mackey 575. **Neb.**—Wabaska Electric Co. v. Blue Springs, 84 Neb. 577, 122 N. W. 21.

[c] **Authority Exceeded.**—If the attorney has authority to appear for a party and to consent to judgment, it cannot be urged collaterally that the attorney had no authority to consent to the judgment which was actually rendered. Lewis v. St. Louis, I. M. & S. R. Co., 107 Ark. 41, 154 S. W. 198; Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734. But see Chase v. Dana, 44 Ill. 262.

4. Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97.

[a] **No presumptions will be indulged as to the authority of an attorney to confess judgment in vacation.** Martin v. Judd, 60 Ill. 78.

[b] **A confession of judgment on a different note from that upon which the attorney was authorized to confess judgment is a nullity.** Chase v. Dana, 44 Ill. 262.

5. See *infra*, XVIII.

must show a substantial,<sup>6</sup> if not a strict<sup>7</sup> compliance with the statute.

**[BB.] Affidavit Hearing or Defective.**—Where the affidavit required by statute as a basis for such publication is jurisdictional the decree is void collaterally when the record shows that none was filed,<sup>8</sup> or one was filed which omitted some fact made essential by statute.<sup>9</sup> A judgment rendered on constructive service may be attacked collaterally unless facts showing the existence of a cause of action for which publication is authorized are stated in the affidavit.<sup>10</sup> And the same is true unless it appears also, at least inferentially,<sup>11</sup> that the circumstances warranted constructive service, as that due diligence was used

**6. U. S.**—Guaranty Trust, etc. Co. v. Green Cove S. & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Indiana & Arkansas Lumb. & Mfg. Co. v. Brinkley, 164 Fed. 963. **Cal.**—Hyde v. Redding, 74 Cal. 493, 16 Pac. 380; McMinn v. Whelan, 27 Cal. 300. **Ky.**—Kreiger v. Sonne, 151 Ky. 739, 152 S. W. 936. **Mo.**—Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002; State v. Leonard (Mo. App.), 116 S. W. 14. **Neb.**—Vandervort v. Finnell, 96 Neb. 515, 148 N. W. 332. **N. D.**—Atwood v. Roan, 26 N. D. 622, 145 N. W. 587; Fenton v. Minnesota Title Ins. & Trust Co., 15 N. D. 365, 109 N. W. 263. **Tex.**—Houston Oil Co. v. Davis (Tex. Civ. App.), 132 S. W. 808; Gibbs v. Scales (Tex. Civ. App.), 118 S. W. 188; Harris v. Hill, 54 Tex. Civ. App. 437, 117 S. W. 907.

**7.** Gibson v. Wagner, 25 Colo. App. 129, 136 Pac. 93; Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002.

**8.** North Star Lumber Co. v. Johnson, 196 Fed. 56.

**[a] Filing the affidavit too late** (1) may render the judgment void. Thus where it is filed after the publication no jurisdiction is acquired. **Mich.** Steere v. Vanderberg, 67 Mich. 530, 35 N. W. 110. **Minn.**—Brown v. St. Paul & N. P. Ry. Co., 38 Minn. 506, 38 N. W. 698. **Neb.**—Murphy v. Lyons, 19 Neb. 689, 28 N. W. 328. (2) And the same is true where it is filed four days after verification (Wilson v. Arnold, 5 Mich. 98), (3) or three years after verification (Allen v. Carpenter, 15 Mich. 25), (4) or on the day of judgment. Barber v. Morris, 37 Minn. 194, 33 N. W. 559.

**[b] A warning order** (1) made before affidavit filed is not void. Wilson v. Teague, 95 Ky. 47, 23 S. W. 656. (2) Nor is one made several years after the filing of the affidavit. Steel v.

Stearns Coal & Lumb. Co., 148 Ky. 429, 146 S. W. 721.

**9. Cal.**—Hyde v. Redding, 74 Cal. 493, 16 Pac. 380. **Colo.**—Gibson v. Wagner, 25 Colo. App. 129, 136 Pac. 93; Gibson v. Austin, 23 Colo. App. 220, 128 Pac. 859. **Minn.**—Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198. **Neb.** Atkins v. Atkins, 9 Neb. 191, 2 N. W. 466. **S. D.**—Carter v. Frahm, 31 S. D. 379, 141 N. W. 370.

**[a] Improper Authentication.**—An order of publication is a nullity when based on an affidavit made in another state and not properly authenticated. North Star Lumb. Co. v. Johnson, 196 Fed. 56.

**10. Cal.**—Forbes v. Hyde, 31 Cal. 342. **Kan.**—Harris v. Claflin, 36 Kan. 543, 13 Pac. 830; Shields v. Miller, 9 Kan. 390. **Mo.**—Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002. **Wis.**—Nelson v. Rountree, 23 Wis. 367.

**[a] Insufficient Statement.**—The following statement has been considered insufficient: "That this is one of the causes of action for which the statute authorizes notice by publication." Atkins v. Atkins, 9 Neb. 191, 2 N. W. 466.

**11. Cal.**—Forbes v. Hyde, 31 Cal. 342. **Kan.**—Harris v. Claflin, 36 Kan. 543, 13 Pac. 830; Carey v. Reeves, 32 Kan. 718, 5 Pac. 22; Ogden v. Walters, 12 Kan. 282. **Mich.**—Pettiford v. Zoellner, 45 Mich. 358, 8 N. W. 57. **N. Y.** Kennedy v. New York Ins. & Trust Co., 101 N. Y. 487, 5 N. E. 774; Howe Machine Co. v. Pettibone, 74 N. Y. 68; Welles v. Thornton, 45 Barb. 390; McCracken v. Plamondon, 52 Hun 614, 5 N. Y. Supp. 338; Simpson v. Burch, 4 Hun 315. **Ore.**—Pike v. Kennedy, 15 Ore. 420, 15 Pac. 637.

**[a] Defendant's post office address** must be given or it must appear that the same is unknown. Empire R. & C.

to find defendant,<sup>12</sup> and that he could not be found within the state,<sup>13</sup> or that he was a non-resident.<sup>14</sup> Where the statute requires a positive affidavit, one made merely on information and belief is not sufficient even collaterally.<sup>15</sup>

But where the affidavit is merely defective, as in the mode of stating a material fact or in the degree of proof furnished, the resulting judgment even though erroneous is not subject to collateral attack.<sup>16</sup>

*Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005; *Gibson v. Wagner*, 25 Colo. App. 129, 136 Pac. 93 (not stated positively); *Empire Ranch & Cattle Co. v. Irwin*, 23 Colo. App. 206, 128 Pac. 867; *Empire Ranch & Cattle Co. v. Gibson*, 23 Colo. App. 344, 129 Pac. 520; *Empire Ranch & Cattle Co. v. Mason*, 22 Colo. App. 612, 126 Pac. 1129. But see *Carr's Admr. v. Carr*, 92 Ky. 552, 18 S. W. 453.

12. **U. S.**—*Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47. **Ky.**—*Kreiger v. Sonne*, 151 Ky. 739, 152 S. W. 936. **Mont.**—*Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576.

[a] **Degree of Diligence.**—Where the affidavit must show to the satisfaction of the court that due diligence was used to find the defendant, it cannot be urged to impeach the judgment collaterally that the affidavit fails to state what diligence had been used. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47.

13. **U. S.**—*McDonald v. Cooper*, 13 Sawy. 86, 32 Fed. 745. **Cal.**—*Braly v. Seaman*, 30 Cal. 610; *Swain v. Chase*, 12 Cal. 283. **Ia.**—*Carnes v. Mitchell*, 82 Iowa 601, 48 N. W. 941; *Chase v. Kaynor*, 78 Iowa 449, 43 N. W. 269; *Abell v. Cross*, 17 Iowa 171. **Kan.**—*Shields v. Miller*, 9 Kan. 390. **Minn.**—*Harrington v. Loomis*, 10 Minn. 366; *Maekubin v. Smith*, 5 Minn. 367. **Neb.**—*McGavock v. Pollack*, 13 Neb. 535, 14 N. W. 659. **N. Y.**—*Cook v. Farren*, 12 Abb. Pr. 359, 34 Barb. 95, 21 How. Pr. 286; *Bixby v. Smith*, 3 Hun 60.

[a] **Applicable to Corporations Only.** The requirement that the affidavit state that defendants "cannot be served in this state in the manner prescribed in this chapter," refers to corporations of another state, kingdom or country and not to natural persons who were or are non-residents of the state. *Jones v. Edeman*, 223 Mo. 312, 122 S. W. 1047.

14. *Butterfield v. Miller*, 195 Fed.

200, 115 C. C. A. 152; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109. But see *Palmer v. McCormick*, 30 Fed. 82; *Harris v. Lester*, 80 Ill. 307.

15. *Lougee v. Beenev*, 22 Colo. App. 603, 126 Pac. 1102.

[a] **Post Office Address.**—An affidavit that affiant is informed and believes that the post office addresses of the defendants are unknown will not give the court jurisdiction. *Gibson v. Wagner*, 25 Colo. App. 129, 136 Pac. 93.

[b] If not required by statute to be stated positively, an affidavit on information and belief will suffice. The circumstance that the affidavit is thus made affects merely the degree of proof. Consequently where the court accepts it as legal evidence, it must be deemed sufficient on collateral attack to confer jurisdiction over the subject-matter. *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347. And see *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151; *Van Wyck v. Hardy*, 11 Abb. Pr. (N. Y.) 473, 20 How. Pr. 222 (*affirmed*, 4 Abb. Dec. 496, 39 How. Pr. 392).

16. **U. S.**—*Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347; *Marx v. Ebner*, 180 U. S. 314, 21 Sup. Ct. 376, 45 L. ed. 547; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *Cohen v. Portland Lodge*, 152 Fed. 357, 81 C. C. A. 483. **Ark.**—*Clay v. Bilby*, 72 Ark. 101, 78 S. W. 749. **Ill.**—*Kruse v. Wilson*, 79 Ill. 233. **Kan.**—*Harris v. Burberry*, 85 Kan. 201, 116 Pac. 206; *Long v. Fife*, 45 Kan. 271, 25 Pac. 594. **Ky.**—*Sears' Heirs v. Sears' Heirs*, 95 Ky. 173, 25 S. W. 600; *Hynes v. Oldham*, 3 T. B. Mon. 266; *Benningfield, etc. v. Reed*, 8 B. Mon. 102. **Mich.**—*Adams v. Wayne Circuit Judge*, 98 Mich. 51, 56 N. W. 1051; *Pettiford v. Zoellner*, 45 Mich. 358, 8 N. W. 57. **Mo.**—*Davison v. Bankers' Life Assn.*, 166 Mo. App. 625, 150 S. W. 713. **Neb.**—*Jones*



(CC.) *Order for Publication.*—The order for publication appearing on the record may disclose a fatal insufficiency, rendering the judgment impeachable collaterally,<sup>17</sup> but mere irregularities and omissions therein, not going to the jurisdiction of the court, can have no effect collaterally.<sup>18</sup>

(DD.) *The Publication.*—The publication as shown by the affidavit of publication or other part of the record should substantially comply with the law in order to support the judgment collaterally.<sup>19</sup>

*v. Danforth*, 71 Neb. 722, 99 N. W. 495; *Atkins v. Atkins*, 9 Neb. 191, 2 N. W. 466. **N. Y.**—*Belmont v. Cornen*, 82 N. Y. 256.

[a] **Post Office Address Incorrectly Stated.**—*Moore Realty Co. v. Carr*, 61 Ore. 34, 120 Pac. 742.

[b] **Affidavit Not Entitled.**—*Harris v. Lester*, 80 Ill. 307; *Cason v. Cason*, 31 Miss. 578.

[c] **Venue omitted in the affidavit.** *Crowell v. Johnson*, 2 Neb. 146.

[d] **Jurat Not Signed.**—The fact that the jurat to an affidavit of attachment wanted the officer's signature, is not ground for collateral attack. *Kruse v. Wilson*, 79 Ill. 233; *Steel v. Stearns Coal & Lumber Co.*, 148 Ky. 429, 146 S. W. 721.

[e] **Authority of Notary.**—It is not fatal that the notary who swore to the affidavit of non-residence did not state in his certificate that he was authorized under the laws of the state to administer oaths. *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195.

[f] **Affidavit Amendable.**—If the affidavit in attachment is amendable, it is not void and no objection can be based on it in a collateral proceeding. *Kruse v. Wilson*, 79 Ill. 233; *Daivson v. Bankers' Life Assn.*, 166 Mo. App. 625, 150 S. W. 713.

[g] **Fact of Agency.**—A judgment is not invalid and subject to collateral attack because the affidavit for publication fails to recite that deponent was plaintiff's agent where he was in fact such agent. *Daivson v. Bankers' Life Assn.*, 166 Mo. App. 625, 150 S. W. 713.

[h] **Though sworn to before the attorney for plaintiff**, the affidavit is nevertheless sufficient to sustain the judgment upon collateral attack. *Harris v. Burbery*, 85 Kan. 201, 116 Pac. 206; *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436.

17. *Hedrix v. Hedrix*, 103 Mo. App. 40, 77 S. W. 495.

[a] **Directions for Mailing.**—When required by statute the order should to be valid contain directions for mailing or that mailing be omitted. *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Anderson v. Coburn*, 27 Wis. 558.

18. *Davidson v. Laclede Land & Imp. Co.*, 253 Mo. 223, 161 S. W. 686.

[a] **Order Not Dated.**—An objection that the order of publication is not dated and that therefore it does not appear that such order was made before publication cannot be sustained where the publisher's certificate is annexed to the order and states that it was published, as the order must have been made before it could have been published. *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625.

19. **Ark.**—*Price v. Gunn*, 114 Ark. 551, 170 S. W. 247; *Johnson v. Lesser*, 76 Ark. 465, 91 S. W. 763. **Mo.**—*Kunzi v. Hickman*, 243 Mo. 103, 147 S. W. 1002. **S. D.**—*Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. **Tex.**—*Hopkins v. Cain*, 105 Tex. 591, 143 S. W. 1145.

[a] **As to Period of Publication.** *Guaranty Trust, etc. Co. v. Green Cove S. & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116; *Hopkins v. Cain*, 105 Tex. 591, 143 S. W. 1145; *Houston Oil Co. v. Davis* (Tex. Civ. App.), 132 S. W. 808.

[b] **Where one of several statutory methods of publication is designated by the court's order**, and the affidavit of publication shows that another method was followed, the court will acquire no jurisdiction. *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

[c] **No Publication as to Minor Heirs.**—*Vandervort v. Finnell*, 96 Neb. 515, 148 N. W. 332.

[d] **Description of Land.**—In an action to quiet title a notice by publication which does not describe the land is not sufficient notice to adverse claimants not named in the notice and they may attack the judgment collaterally. *Fenton v. Minnesota Title*

(EE.) *Proof of Publication.*—That the certificate of publication is defective is of no consequence collaterally,<sup>20</sup> unless, perhaps, the court be one of special jurisdiction and jurisdiction does not otherwise appear.<sup>21</sup>

(4.) *Pleadings and Deficiencies Therein.*—(a.) *Necessity of Complaint or Petition.*—The court's power to proceed in a case is called into operation by the declaration, complaint, petition, affidavit, or other statement of the party seeking relief. It is thus that the court's jurisdiction over the subject-matter of the cause is invoked.<sup>22</sup> Where the statute

Ins. & Trust Co., 15 N. D. 365, 109 N. W. 363.

[e] *If insufficient to advise defendants* that a suit was pending against them the notice will not confer jurisdiction. For example a notice in a tax suit for taxes due on the "A. Netherly" survey, which is directed to the unknown owners of the "A. Wetherby" survey is not sufficient, and the judgment based thereon is subject to collateral attack. *Harris v. Hill*, 54 Tex. Civ. App. 437, 117 S. W. 907.

[f] *Variance.*—Where the order of publication recites that "the defendant has deserted the plaintiff, and has absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him," and the affidavit recites that the defendant was a non-resident of the state and for that reason the ordinary process of law could not be served upon him the publication is void. *Kunzi v. Hickman*, 243 Mo. 103, 147 S. W. 1002.

[g] *Mere Irregularities.*—That a published process required the person to appear "before" instead of "at" the day fixed in the order was a harmless irregularity not affecting the court's jurisdiction. *Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561.

[h] *Before Filing of Petition.*—A notice in drainage proceedings has been considered sufficient though published before petition was filed. *Deegan v. State*, 108 Ind. 155, 9 N. E. 148.

[i] *Naming Defendants.*—A decree in a proceeding in personam to enforce a levee assessment against heirs of a deceased person is void where neither the complaint nor the warning order contains the names of such persons. *Indiana & Arkansas Lumb. & Mfg. Co. v. Brinkley*, 164 Fed. 963, 91 C. C. A. 91.

[j] *Idem Sonans.*—If the true name of defendant and the name given in

the publication be substantially alike when printed, it matters not that they are not strictly idem sonans. *Ordean v. Grannis*, 118 Minn. 117, 136 N. W. 575.

20. *Ark.*—*Johnson v. Lesser*, 76 Ark. 465, 91 S. W. 763; *Clay v. Bilby*, 72 Ark. 101, 78 S. W. 749; *Scott v. Pleasants*, 21 Ark. 364. *Colo.*—*Gibson v. Wagner*, 25 Colo. App. 129, 136 Pac. 93. *Ill.*—*Casey v. People*, 165 Ill. 49, 46 N. E. 7.

[a] *That affiant styles himself "proprietor"* of the paper in which the publication was made instead of "printer" is immaterial. *Quivey v. Porter*, 37 Cal. 458.

21. *Haywood v. Collins*, 60 Ill. 328.

[a] *Not Signed by Publisher or Printer.*—Where the certificate of publication is not signed by the publisher or printer as required by statute, and jurisdiction does not otherwise appear, the judgment cannot be sustained. *Haywood v. Collins*, 60 Ill. 328.

22. *U. S.*—*Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655. *Cal.*—*Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988; *Richardson v. Butler*, 82 Cal. 174, 33 Pac. 9; *Friedlander v. Loucks*, 34 Cal. 18; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551. *Colo.*—*Pinacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512. *Conn.*—*Dime Sav. Bank v. McAlenney*, 78 Conn. 208, 61 Atl. 476. *Ill.*—*Lavin v. Board of Comrs.*, 245 Ill. 496, 92 N. E. 291; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108; *Schroeder v. Merchants & Mech. Ins. Co.*, 104 Ill. 71; *Looby v. Austin*, 19 Ill. App. 325. *Ind.*—*Heagy v. Black*, 90 Ind. 534; *Ricketts v. Spraker*, 77 Ind. 371; *Board of Comrs. v. Hall*, 70 Ind. 469; *Faris v. Reynolds*, 70 Ind. 359. *Ia.*—*Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899.

requires written pleadings, the record must disclose a complaint or petition of some kind; its failure to do so, though not perhaps fatal to the judgment of a court of general jurisdiction whose proceedings are supported by every intendment,<sup>23</sup> would render the judgment of other courts subject to collateral attack.<sup>24</sup>

(b.) *Interventions*. In the complaint or petition, not going to the jurisdiction, can in no wise affect the validity of the judgment collaterally.<sup>25</sup> Thus it is of no consequence collaterally that there were mere defects and irregularities in such formal parts of the pleading as the caption<sup>26</sup>

Kan.—McGregor v. Morrow, 49 Kan. 720, 21 Pac. 157. Md.—Bolgiano v. Cooke, 19 Md. 375. Mass.—Betts v. Bagley, 12 Pick. 572. Mich.—Curtis v. Board of Supervisors, 154 Mich. 646, 118 N. W. 618; Peninsular Sav. Bank v. Ward, 79 N. W. 911. Mo.—Smith v. Black, 231 Mo. 681, 132 S. W. 1129; Hope v. Blair, 105 Mo. 85, 89, 16 S. W. 595; Jones v. Driskill, 94 Mo. 190, 7 S. W. 111; Grayson v. Weddle, 63 Mo. 523, 537; State v. Edwards, 192 Mo. App. 413, 182 S. W. 816. Neb.—Bradley v. Missouri P. Ry. Co., 51 Neb. 653, 71 N. W. 282; Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443. N. H.—State v. Bye, 35 N. H. 368; Huntress v. Effingham, 17 N. H. 584. N. Y.—Agricultural Ins. Co. v. Barnard, 96 N. Y. 525, 531, 14 Abb. N. C. 502; Whittlesey v. Frantz, 74 N. Y. 456; Barnes v. Harris, 4 N. Y. 374. N. D.—Shane v. Peoples, 25 N. D. 188, 141 N. W. 737. Pa.—Haines v. Hall, 209 Pa. 104, 58 Atl. 125. S. D.—Carter v. Frahm, 31 S. D. 379, 141 N. W. 370. Tex.—Weems v. Masterson, 80 Tex. 45, 15 S. W. 590; Poor v. Boyce, 12 Tex. 440; Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Wilkin v. Simmons (Tex. Civ. App.), 151 S. W. 1145. Wis.—Darling v. Conklin, 42 Wis. 478; State v. Gary, 33 Wis. 93. Eng.—Reg. v. Bolton, 1 Ad. & El. (N. S.) 66, 41 E. C. L. 439; Cave v. Mountain, 1 Man. & G. 257, 39 E. C. L. 747, 123 Eng. Reprint 370.

See also 14 STANDARD PROC. 788, et seq.

[a] What the controversy or issue, in any case is can only be determined from the pleading. When the court has cognizance of the controversy as it appears from the pleadings, and has the parties before it, then the judgment or order which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal

or writ of error. Hope v. Blair, 105 Mo. 85, 89, 16 S. W. 595.

23. U. S.—Hall v. Law, 102 U. S. 461, 26 L. ed. 217; Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625. Ind.—Brownfield v. Weicht, 9 Ind. 394. N. J.—Vanderveere v. Gaston, 24 N. J. L. 818.

24. Ark.—Reeves v. Clark, 5 Ark. 27. Ill.—Evans v. Bouton, 85 Ill. 579. Ind.—Poult v. Slocum, 3 Blackf. 421. Me.—Small v. Pennell, 31 Me. 267. Mich.—Borland v. Kingsbury, 65 Mich. 51, 59, 31 N. W. 620; Wilson v. Davis, 1 Mich. 156; Spear v. Carter, 1 Mich. 19, 48 Am. Dec. 688. Mo.—Wilson v. Darrow, 223 Mo. 520, 122 S. W. 1077. N. H.—State v. Morse, 50 N. H. 9. N. Y.—Corwin v. Merritt, 3 Barb. 341; Vosburgh v. Welch, 11 Johns. 175; Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264; Harrington v. People, 6 Barb. 607.

[a] **Administrator's Sale.**—An order authorizing an administrator to sell lands made without the written petition required by statute is subject to collateral impeachment. Teverbaugh v. Hawkins, 82 Mo. 180; Finch v. Edmonson, 9 Tex. 504. But see Emerson v. Ross, 17 Fla. 122; Robertson v. Johnson, 57 Tex. 62.

25. U. S.—Christianson v. King County, 239 U. S. 356, 372, 36 Sup. Ct. 114. Ga.—Brooks v. Tinsley, 13 Ga. App. 268, 79 S. E. 160. Ia.—Warthen v. Himstreet, 112 Iowa 605, 84 N. W. 792. Ky.—Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797. Mo.—Sanzenbacher v. Santhuff, 220 Mo. 274, 119 S. W. 395. Pa.—Day v. Allen, 224 Pa. 385, 73 Atl. 456.

26. U. S.—Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931. Ill.—Goudy v. Hall, 36 Ill. 313, 87 Am. Dec. 217. Ind.—Anderson v. Wilson, 100 Ind. 402. Ia.—State v. Barlow, 61 Iowa 572, 16 N. W. 733. Ky.—Harrod v. Harrod, 167 Ky. 308, 180 S. W. 797; Clark



or title, the prayer,<sup>27</sup> the signature,<sup>28</sup> or the verification, which latter may have been irregular,<sup>29</sup> or not sufficiently positive, being made

County *v. Ecton*, 150 Ky. 774, 150 S. W. 1016; *Farnsworth v. Barret*, 146 Ky. 556, 142 S. W. 1049. N. Y.—*People ex rel. Mace v. Oliver*, 66 Barb. 570. Ohio.—*Cadwallader v. Evans*, 1 Disney 585, 12 Ohio Dec. 811. Tex.—*Williams v. Abilene Ind. Tel. & Tel. Co.* (Tex. Civ. App.), 168 S. W. 402.

[a] **Parties Not Named.**—A decree is not subject to collateral attack because the parties duly summoned were not named in the caption. *Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933; *Mullins v. Laurel Coal & Land Co.*, 75 W. Va. 783, 84 S. E. 937.

[b] **Infant defendant not named in caption.** *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797.

[c] **Uncertainty as to the defendant, in the caption, not objectionable collaterally where the body of the petition names him.** *Farnsworth v. Barret*, 146 Ky. 556, 142 S. W. 1049.

[d] **Misnomer.**—(1) A person erroneously sued by an improper name is nevertheless bound collaterally. *Williams v. Abilene Independent Tel. & Tel. Co.* (Tex. Civ. App.), 168 S. W. 402. (2) Thus a judgment forfeited the charter of the "C. & M. Turnpike Company" it is immaterial collaterally that the defendant was described in the caption as the "C. & M. Turnpike Road Company." *Clark County v. Ecton*, 150 Ky. 774, 150 S. W. 1016.

[e] **A petition addressed to the "judge" instead of to the "court"** does not affect the validity of the proceedings. *Brewster v. Ludekins*, 19 Cal. 162.

[f] **Entitling the pleading in the wrong court is not a ground for collateral attack, as for example where the petition is entitled in the "Supreme court of the county of Yuba," where there is no such court.** *Ex parte Fil Ki*, 79 Cal. 584, 21 Pac. 974.

[g] **Where addressed to the court of ordinary instead of to the ordinary, as it should be, an application for homestead is nevertheless sufficient to sustain the judgment setting apart the homestead.** *Brooks v. Tinsley*, 13 Ga. App. 268, 79 S. E. 160.

27. U. S.—*Butterfield v. Miller*, 195 Fed. 200, 115 C. C. A. 152. Cal.

*Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551. N. Y.—*Rockwell v. Perine*, 5 Barb. 573.

[a] **Prayer Omitted.**—(1) Ark. *Sannoner v. Jacobson*, 47 Ark. 31, 14 S. W. 458. Ia.—*State v. Barlow*, 61 Iowa 572, 16 N. W. 733. N. H.—*Fernald v. Noyes*, 30 N. H. 39. (2) A decree dissolving a corporation is not subject to collateral attack on the ground that the prayer for dissolution was omitted from the petition. *James Clark Co. v. Calton*, 91 Md. 195, 46 Atl. 386.

[b] **Demand Excessive.**—*Hart v. Waitt*, 3 Allen (Mass.) 532.

[c] **Failure to ask for personal judgment against the defendants with execution for the balance uncollected under the attachment does not render the proceedings void.** *Butterfield v. Miller*, 195 Fed. 200, 115 C. C. A. 152. 28. *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134.

[a] **The signature of householders to a petition to establish a highway though required by statute, is not an indispensable requisite collaterally.** *Keyes v. Tait*, 19 Iowa 123.

[b] **A petition for adoption, though not signed, will not invalidate the judgment.** *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526.

29. Cal.—*Stow v. Schiefferly*, 120 Cal. 609, 52 Pac. 1000. Ill.—*Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380. Miss.—*Redus v. Wofford*, 4 Smed. & M. 579. Tenn.—*West Tenn. Agricultural Assn. v. Madison*, 9 Lea 407. Tex.—*Canon v. McDaniel*, 46 Tex. 303.

[a] **A guardian's petition to sell land improperly verified by attorney.** *Castleman v. Relfe*, 50 Mo. 583.

[b] **The omission of the jurat does not affect the jurisdiction.** Ill.—*Kruse v. Wilson*, 79 Ill. 233. N. Y.—*Sheldon v. Wright*, 5 N. Y. 497. Wis.—*Royston v. Wilson*, 53 Wis. 625, 11 N. W. 41.

[c] **Though sworn to before the wrong official the pleading is not insufficient collaterally.** Cal.—*Kohlman v. Wright*, 6 Cal. 230. Ind.—*Pickens v. Hill*, 30 Ind. 269. N. J.—*Obert v. Hammel*, 18 N. J. L. 73. But see *Baker v. Everhart*, 65 Cal. 27, 2 Pac. 495; *Small v. Wheaton*, 4 E. D. Smith (N. Y.) 306, 2 Abb. Pr. (N. Y.) 175.

merely on information and belief,<sup>30</sup> or may have been omitted entirely<sup>31</sup> without affecting the binding force of the judgment when questioned collaterally.

(c.) *Sufficiency in Substance*.—(AA.) *Generally*.—Jurisdiction does not depend upon the sufficiency of the allegations as a matter of law. All that is required is that the pleading show a subject-matter and a demand for relief that are within the jurisdiction of the court.<sup>32</sup> Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance collaterally, for, if it states a case belonging to a general class over which the authority

[d] That the wrong party made the verification is not generally fatal on collateral attack. *Ala.*—Spragins v. Taylor, 48 *Ala.* 520. *Kan.*—See Manley v. Headley, 10 *Kan.* 88. *Mo.*—Gilleson v. Knight, 71 *Mo.* 403; Ragle v. Webster, 55 *Mo.* 246; Castleman v. Relfe, 50 *Mo.* 583. *N. J.*—Westcott v. Sharp, 50 *N. J. L.* 392, 13 *Atl.* 242. *Wis.*—See Miller v. Chicago, etc. Ry., 58 *Wis.* 310, 17 *N. W.* 130; Wiley v. C. Aultman & Co., 53 *Wis.* 560, 11 *N. W.* 32.

30. *Sannoner v. Jacobson*, 47 *Ark.* 31, 14 *S. W.* 458; *Booth v. Rees*, 26 *Ill.* 45.

[a] That an attachment or affidavit based on information and belief is void see *Streissguth v. Reigelman*, 75 *Wis.* 212, 43 *N. W.* 1116; *Talbot v. Woodle*, 19 *Wis.* 174; *Ex parte Moore*, 23 *New Bruns. (Can.)* 229.

31. *Ala.*—Spragins v. Taylor, 48 *Ala.* 520. *Ia.*—Myers v. Davis, 47 *Iowa* 325; *McCraney v. McCraney*, 5 *Iowa* 232, 68 *Am. Dec.* 702. *Ky.*—Richardson v. Parrott's Heirs, 7 *B. Mon.* 379; *Lamp-ton v. Usher's Heirs*, 7 *B. Mon.* 57. *Mich.*—Ellsworth v. Hall, 48 *Mich.* 407, 12 *N. W.* 512. *Neb.*—Trumble v. Williams, 18 *Neb.* 144, 24 *N. W.* 716; *Johnson v. Jones*, 2 *Neb.* 126. *N. Y.*—Sheldon v. Wright, 7 *Barb.* 39; *Cooman v. Board of Education*, 37 *Hun* 96; *Miller v. Adams*, 7 *Lans.* 131; *Fleming v. Tourgee*, 16 *N. Y. Supp.* 2. *N. C.*—Overton v. Cranford, 52 *N. C.* 415, 78 *Am. Dec.* 244. *Ore.*—Moore v. Williamette Trans., etc. Co., 7 *Ore.* 359. *Pa.*—Waters v. Bates, 44 *Pa.* 473. *S. C.*—Peake v. Cantey & Johnson, 3 *McCord* 107. *Tex.*—Pleasants v. Dunkin, 47 *Tex.* 343; *Philo v. Hughes*, 43 *Witt.* 521.

32. *Ala.*—Martin v. Martin, 173 *Ala.* 106, 55 *So.* 632. *Ariz.*—Tuba City Min. & Mill. Co. v. Otterson, 16 *Ariz.* 305, 146 *Pac.* 203. *Cal.*—Crouch v. H. L.

Miller & Co., 169 *Cal.* 341, 146 *Pac.* 880; *Le Mesnager v. Variel*, 144 *Cal.* 463, 77 *Pac.* 988; *In re James' Estate*, 99 *Cal.* 374, 33 *Pac.* 1122. *Colo.*—Pin-nacle Gold Min. Co. v. Popst, 54 *Colo.* 451, 131 *Pac.* 413; *Kavanagh v. Hamilton*, 53 *Colo.* 157, 125 *Pac.* 512. *Ill.*—Mulford v. Stalzenback, 46 *Ill.* 303; *Fitzgibbon v. Lake*, 29 *Ill.* 165, 81 *Am. Dec.* 302; *Galena, etc. Ry. v. Pound*, 22 *Ill.* 399; *Young v. Lorain*, 11 *Ill.* 624, 52 *Am. Dec.* 463. *Ind.*—Ricketts v. Spraker, 77 *Ind.* 371. *Ia.*—Mengel v. Mengel, 145 *Iowa* 737, 120 *N. W.* 72, 122 *N. W.* 899; *Ruppin v. McLachlan*, 122 *Iowa* 343, 98 *N. W.* 153. *Kan.*—McGregor v. Morrow, 40 *Kan.* 730, 21 *Pac.* 157. *Mich.*—Peninsular Sav. Bank v. Ward, 79 *N. W.* 911. *Neb.*—Bradley v. Missouri P. Ry. Co., 51 *Neb.* 653, 71 *N. W.* 282; *Moore's Estate v. Moore*, 33 *Neb.* 509, 50 *N. W.* 443. *N. Y.*—Erwin v. Lowry, 7 *How.* 172, 12 *L. ed.* 635. *Tex.*—Taffinder v. Merrell, 95 *Tex.* 95, 65 *S. W.* 177; *Weems v. Master-son*, 80 *Tex.* 45, 15 *S. W.* 590; *Poor v. Boyce*, 12 *Tex.* 440; *Lynch v. Baxter*, 4 *Tex.* 431, 51 *Am. Dec.* 735; *Wilkin v. Simmons (Tex. Civ. App.)*, 151 *S. W.* 1145. *W. Va.*—Mullins v. Laurel Coal & Land Co., 75 *W. Va.* 783, 84 *S. E.* 937; *Jarrell v. Laurel Coal & Land Co.*, 75 *W. Va.* 752, 84 *S. E.* 933.

[a] The rule was stated by the supreme court of Illinois thus: "It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court has jurisdiction of the subject-matter and of the parties nothing further is required. The cause of action may be defectively stated, but that does not destroy jurisdiction. A bill may state conclusions, but if not demurred to and the evidence supports a decree conforming to the general allegations of the bill and the decree is within the power of the court to ren-

of the court extends, jurisdiction attaches and the court has the power to decide whether the pleading is good or bad.<sup>33</sup> The complaint or petition might have been uncertain, irregular or entirely insufficient upon demurrer or motion, but the judgment is nevertheless binding collaterally.<sup>34</sup> And, providing the pleading is sufficient to invoke such jurisdiction as the court possesses over the subject-matter it cannot be objected collaterally that the complaint fails to make material averments, such as the completion of steps preliminary to suit,<sup>35</sup> aver-

der, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction." *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108.

[b] "It would be difficult," says the court in *Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153, "to imagine a case where the court, having jurisdiction in other respects, could not render . . . a judgment proof against collateral attack because of the insufficiency of the petition."

[c] That the legal conclusion which the pleader sought to have drawn from his complaint is not supported by the facts is not a valid objection collaterally. *Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153.

[d] That the relief awarded by the judgment is other than the facts stated in the complaint entitle the plaintiff to, cannot be set up in a collateral attack. *Poor v. Boyce*, 12 Tex. 440.

33. *Ariz.*—*Tube City Min. & Milling Co. v. Otterson*, 16 *Ariz.* 305, 146 *Pac.* 203. *Cal.*—*Crouch v. H. L. Miller & Co.*, 169 *Cal.* 341, 146 *Pac.* 880. *Ill.* *O'Connor v. Board of Trustees*, 247 *Ill.* 54, 93 *N. E.* 124. *Mo.*—*Winningham v. Trueblood*, 149 *Mo.* 572, 51 *S. W.* 399; *Holt County v. Cannon*, 114 *Mo.* 514, 21 *S. W.* 851; *Potter v. Whitten*, 161 *Mo. App.* 118, 142 *S. W.* 453. *Neb.* *In re Nelson's Est.*, 81 *Neb.* 363, 115 *N. W.* 1087; *Logan County v. Carnahan*, 95 *N. W.* 812; *Howell v. Ross*, 69 *Neb.* 1, 94 *N. W.* 955; *Bannard v. Duncan*, 65 *Neb.* 179, 90 *N. W.* 947; *Dryden v. Parrotte*, 61 *Neb.* 339, 85 *N. W.* 287. *N. Y.*—*Hallock v. Doming*, 69 *N. Y.* 238.

*Compare*, 14 *STANDARD PROC.* 789.

[a] **Assessment Lien Expired.**—On collateral attack of a judgment foreclosing a street assessment lien it is immaterial that the complaint in the

foreclosure suit may show that the lien had expired. *Crouch v. H. L. Miller & Co.*, 169 *Cal.* 341, 146 *Pac.* 880.

34. *U. S.*—*Goodman v. City of Ft. Collins*, 164 *Fed.* 970, 91 *C. C. A.* 98; *Edelstein v. United States*, 149 *Fed.* 636, 79 *C. C. A.* 328 (*certiorari denied*, 205 *U. S.* 543, 51 *L. ed.* 922). *Ala.* *Doe ex dem. Hamilton v. Hardy*, 52 *Ala.* 291. *Cal.*—*Town of Hayward v. Pimentel*, 107 *Cal.* 386, 40 *Pac.* 545; *Tyrrell v. Baldwin*, 67 *Cal.* 1, 6 *Pac.* 867; *Aucker v. McCoy*, 56 *Cal.* 524. *Ill.* *Moore v. Mauck*, 79 *Ill.* 391; *Kruse v. Wilson*, 79 *Ill.* 233; *Thomson v. Morris*, 57 *Ill.* 333; *Booth v. Rees*, 26 *Ill.* 45. *Ind.*—*St. Joseph Hydraulic Co. v. Cincinnati, etc. Ry. Co.*, 109 *Ind.* 172, 9 *N. E.* 727; *Griffin v. Cox*, 30 *Ind.* 242. *Mo.*—*Dollarhide v. Parks*, 92 *Mo.* 178, 5 *S. W.* 3; *Burnett v. McCluey*, 92 *Mo.* 230, 4 *S. W.* 694. *Ohio.*—*Spoors v. Coen*, 44 *Ohio St.* 497, 9 *N. E.* 132.

[a] **Averments Inconsistent.**—*Ruppin v. McLachlan*, 122 *Iowa* 343, 98 *N. W.* 153.

[b] **Tax Proceedings.**—It is not ground for collateral attack upon a tax judgment that the petition to sell the land for delinquent taxes does not properly describe the ownership. *Hall v. Morris*, 94 *Ark.* 519, 127 *S. W.* 718. See generally the title "Taxation."

[c] Where the original action was to assess property alleged to have been omitted from taxation it does not invalidate the judgment on collateral attack, that the property sought to be assessed was described in general instead of special terms. *Com. v. Helm*, 169 *Ky.* 194, 183 *S. W.* 502.

[d] **Mere irregularities in an application for a homestead** will not render the judgment of the ordinary setting aside the homestead, void. *Brooks v. Tinsley*, 13 *Ga. App.* 268, 79 *S. E.* 160.

35. *Ariz.*—*Tube City Min. & Mill. Co. v. Otterson*, 16 *Ariz.* 305, 146 *Pac.* 203. *Cal.*—*Barrett v. Carney*, 33 *Cal.*



nents as to incorporation,<sup>35</sup> consideration,<sup>37</sup> as to the right to proceed in equity,<sup>38</sup> and as to other matters.<sup>39</sup>

(BB.) *Jurisdictional Facts*.—Where the court is one possessing jurisdiction over a limited class of cases, it is imperative, even on collateral attack, that the pleadings set forth a subject-matter within one of those classes,<sup>40</sup> though mere deficiencies in the pleadings will not support a collateral attack.<sup>41</sup> These rules have been applied to collateral

530. Mo.—Potter v. Whitten, 161 Mo. App. 118, 142 S. W. 453.

[a] That prior to stockholders bringing suit for the corporation, he had endeavored to procure action by the corporation, need not be alleged. Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. ed. 678.

36. McFall v. Buckeye Grangers' Warehouse Assn., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47; Glenn v. Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032.

[a] An allegation of corporate existence not being necessary to jurisdiction, its omission in the complaint is not available in a collateral attack on the judgment. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 Pac. 880.

37. Lee v. Figg, 37 Cal. 328; Bostic v. Love, 16 Cal. 69; Lauman's Appeal, 8 Pa. 473.

38. Comer v. Bray, 83 Ala. 217, 3 So. 554.

[a] Remedy at Law.—Where a bill in equity fails to show that petitioner did not have an adequate remedy at law the defect is not available collaterally. Thomson v. Morris, 57 Ill. 333.

39. Cal.—Aucker v. McCoy, 56 Cal. 524. Ill.—Bradley v. Drone, 187 Ill. 175, 58 N. E. 304; Cody v. Hough, 20 Ill. 43. N. H.—Proctor v. Andover, 42 N. H. 348.

[a] Possession.—In an action to quiet title against a mortgagee, the omission of an allegation that complainant is in possession of the mortgaged premises is not a ground for collateral attack. Figge v. Rowlen, 185 Ill. 234, 57 N. E. 195.

[b] A partition judgment is not void because it was not alleged that plaintiff was of full age (Lessee of Glover's Heirs v. Ruffin, 6 Ohio 255), nor because of a failure to give the names of those who were of full age. Thompson v. Tolmie, 2 Pet. (U. S.) 157, 164, 7 L. ed. 381.

[c] Defects in an original assess-

ment petition, not appearing upon the record of the confirmation proceedings, cannot be availed of in an application for an order of sale for non-payment of the assessment. Perisho v. People, 185 Ill. 334, 56 N. E. 1134.

[d] A judgment imposing a lien upon lands, in favor of one who has paid the taxes thereon, is not void even where the petition fails to aver that the plaintiff was seized of, or had the care of the lands, although in view of the statute upon which the proceeding is based such averments would seem to be material. Moore v. Woodall, 40 Ark. 42.

[e] The citizenship of parties in a petition in a United States court. McCormick v. Sullivan, 10 Wheat. 192, 6 L. ed. 300.

40. U. S.—Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625. Ala.—Martin v. Martin, 173 Ala. 106, 55 So. 632. Ind. Brownfield v. Weicht, 9 Ind. 394.

As to presumptions in favor of the judgments of such courts, see *supra*, XVII, A, 7, c, (IV), (B), (3) to (5).

41. See preceding section.

[a] Failure of a creditor's petition to have a debtor declared bankrupt to aver that the debtor was not a wage earner or a person engaged chiefly in farming or in tilling the soil as required by the bankruptcy act, is not available collaterally. Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, writ of certiorari denied, 205 U. S. 543, 27 Sup. Ct. 791, 51 L. ed. 922.

[b] "Attached on Contract." Where the petition in involuntary bankruptcy did not show that the estate of the debtor had been "attached on contract" it is not fatal collaterally. Partridge v. Hannum, 2 Mete. (Mass.) 569.

[c] Consent of Creditors.—A petition for discharge in bankruptcy need not show the consent of those holding the necessary amount of debts to be

attacks on adjudications in probate proceedings to appoint executors and administrators,<sup>42</sup> to sell decedent's property,<sup>43</sup> or distribute the estate,<sup>44</sup> or for a guardian's sale.<sup>45</sup>

(5.) *Recitals of Jurisdiction.*—(a.) *Generally.*—Recitals in a judgment, decree or other adjudication, to be evidence of jurisdiction on collateral attack, need not set forth the fact showing how jurisdiction was acquired, but it is sufficient that they state in some general way, the fact that jurisdiction was duly and regularly obtained in accord-

good on collateral attack. *Frary v. Dakin*, 7 Johns. (N. Y.) 75.

[d] **Conditions precedent** such as residence for six months, need not be shown. *Barrett v. Carney*, 33 Cal. 530.

42. *Johnson v. Johnson's Estate*, 66 Mich. 525, 33 N. W. 413; *Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737.

[a] **The amount and value** of an estate are not jurisdictional. *Lucas v. Todd*, 28 Cal. 182.

43. *Howell v. Hughes*, 168 Ala. 460, 53 So. 105; *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129; *Grayson v. Weddle*, 63 Mo. 523, 537; *Pattee v. Thomas*, 58 Mo. 163; *Overton v. Johnson*, 17 Mo. 442.

[a] **Necessity of Showing Statutory Grounds.**—The jurisdiction of the court does not depend upon the showing in the application of one of the statutory causes for the sale. The absence of such showing or the statement of a reason which would not authorize the sale might make the order of sale erroneous but not void. *Abernathy v. O'Reilly*, 90 Ala. 495, 7 So. 919; *Taffinger v. Merrell*, 95 Tex. 95, 65 S. W. 177; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Poor v. Boyce*, 12 Tex. 440; *Finch's Heirs v. Edmonson*, 9 Tex. 504; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Wilkin v. Simmons* (Tex. Civ. App.), 151 S. W. 1145. But see *McNally v. Haynes*, 59 Tex. 583.

[b] **Failure of the petition to allege the estate on hand and the amount of claims allowed and paid**, though irregular, does not make the sale attackable collaterally. **Ill.**—*Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304; *Moffitt v. Moffitt*, 69 Ill. 641. **Ia.**—*Myers v. Davis*, 47 Iowa 325; *Read v. Howe*, 39 Iowa 553. **N. Y.**—*Germon v. Swartwout*, 3 Wend. 282.

[c] **Negating Power of Sale.** Where such a petition shows the existence of a will, it must negative a power of sale in the will for under the statute that is the only contingency in which

the court has power to order the sale. *Howell v. Hughes*, 168 Ala. 460, 53 So. 105; *Wilson v. Holt*, 83 Ala. 528, 3 So. 321; *Arnett v. Bailey*, 60 Ala. 435; *Hall's Heirs v. Hall*, 47 Ala. 290, 298.

[d] **Filing Inventory.**—It is not necessary to the validity of a sale of decedent's property that the inventory appraisement, lists and accounts of the estate be filed with the petition as required by statute. *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129; *Grayson v. Weddle*, 63 Mo. 523; *Pattee v. Thomas*, 58 Mo. 163; *Overton v. Johnson*, 17 Mo. 442.

[e] **A request for allotment of dower** in a proceeding for the sale of land, though not authorized by statute, will not affect the court's jurisdiction to order the sale. *Swearegen v. Gulick*, 67 Ill. 208.

44. *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

[a] **Heirs Unknown.**—Where the statute authorizes the issue and service by publication of a warning order to unknown heirs when the fact appears in the complaint that the names of such heirs are unknown to plaintiff, an averment in the complaint to that effect is indispensable to the validity of such an order and service. *Indiana & Arkansas Lumb. & Mfg. Co. v. Brinkley*, 164 Fed. 963, 91 C. C. A. 91.

45. *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Watts v. Cook*, 24 Kan. 278.

[a] **Failure to state a case within court's authority** will not render the decree selling infant's property a mere nullity. *Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123.

[b] **That statutory grounds** (1) are not averred does not avoid the sale (*Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590), (2) but failure to set out a debt for which the sale could be allowed has been held fatal. *Coffield v. McLean*, 49 N. C. 15.

ance with the law;" and this is true whether the recitals have reference to a jurisdiction obtained on personal service,<sup>47</sup> or appearance,<sup>48</sup> or on service by publication.<sup>49</sup>

46. **Ala.**—McMahan v. Browne, 185 Ala. 472, 64 So. 553. **Cal.**—Quincy v. Porter, 37 Cal. 458. **Ill.**—Young v. People, 171 Ill. 299, 49 N. E. 503; Casey v. People, 165 Ill. 49, 46 N. E. 7; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740; Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589; Hannas v. Hannas, 110 Ill. 53. **Ind.**—Goar v. Maranda, 57 Ind. 339; Treharne v. Matson, 46 Ind. App. 705, 93 N. E. 553; Jenners v. Spraker, 2 Ind. App. 100, 27 N. E. 117. **Mo.**—State ex rel. Polster v. Miles, 149 Mo. App. 638, 129 S. W. 731. **Tex.**—Hollingsworth v. Cameron & Co. (Tex. Civ. App.), 160 S. W. 644; Oliver v. Bordner (Tex. Civ. App.), 145 S. W. 656; Mangum v. Kenley (Tex. Civ. App.), 145 S. W. 316; Estey & Camp v. Williams (Tex. Civ. App.), 133 S. W. 470.

As to necessity for recitals, see *supra*, XI, E, 2.

[a] Identifying Writ.—The recital need not identify the precise writ upon which the court acted. Gibbs v. Scales, 54 Tex. Civ. App. 96, 118 S. W. 188.

47. **Ala.**—McMahan v. Browne, 185 Ala. 472, 64 So. 553. **Cal.**—Crouch v. Miller, 169 Cal. 341, 146 Pac. 880; McCauley v. Fulton, 44 Cal. 355; Sharp v. Brunings, 35 Cal. 528. **Ga.**—McDaniel v. Westberry, 74 Ga. 380; Brown v. Redwyne, 16 Ga. 67. **Ill.**—Waterbury Nat. Bank v. Reed, 231 Ill. 246, 83 N. E. 188; Law v. Grommes, 158 Ill. 492, 41 N. E. 1030; Matthews v. Hoff, 115 Ill. 201; Carson v. Hixon, 78 Ill. 339. **Ind.**—Doe v. Smith, 1 Ind. 451. **Ia.**—Toliver v. Morgan, 75 Iowa 619, 34 N. W. 858. **Kan.**—O'Driscoll v. Soper, 19 Kan. 574. **Ky.**—Baker v. Baker, Eccles & Co., 162 Ky. 683, 173 S. W. 109; Newcomb's Exrs. v. Newcomb's Exrs., 13 Bush 544, 26 Am. Rep. 222. **Miss.**—Monk v. Horne, 38 Miss. 100, 75 Am. Dec. 94. **Mo.**—State ex rel. Polster v. Miles, 149 Mo. App. 638, 129 S. W. 731. **N. Y.**—Mott v. Fort Edward Waterworks Co., 79 App. Div. 179, 79 N. Y. Supp. 1100; Steinhart v. Baker, 20 Misc. 470, 46 N. Y. Supp. 707. **Ore.**—Ladd v. Higley, 5 Ore. 296. **Tenn.**—Netherland v. Johnson, 5 Lea 340. **Tex.**—Estey & Camp v. Williams

(Tex. Civ. App.), 133 S. W. 470; Carr v. Miller, 58 Tex. Civ. App. 57, 123 S. W. 1158. **W. Va.**—Central Dist. & P. T. Co. v. Parkersburg & O. V. E. Ry., 88 S. E. 65.

[a] Process "Duly and Regularly Served."—McDonald v. Ft. Smith & W. R. Co., 105 Ark. 5, 150 S. W. 135; Empire Ranch & Cattle Co. v. Gibson, 23 Colo. App. 476, 130 Pac. 615.

[b] "Were each duly served with summons personally on each of them."—Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589.

[c] That defendants were "duly cited."—Oliver v. Bordner (Tex. Civ. App.), 145 S. W. 656.

[d] "That the law in all things has been complied with and that the defendants have been regularly served with notice of plaintiff's suit."—Hollingsworth v. Wm. Cameron & Co. (Tex. Civ. App.), 160 S. W. 644.

48. **Ala.**—Owings v. Binford, 80 Ala. 421; Hunt v. Ellison, 32 Ala. 173. **Cal.**—Leese v. Clark, 28 Cal. 26. **Ind.**—Strange v. Prince, 17 Ind. 524. **Ky.**—Bustard v. Gates, 4 Dana 429. **Tex.**—Smith v. Wood, 37 Tex. 616.

49. **U. S.**—Foster v. Givens, 67 Fed. 634, 14 C. C. A. 625. **Ala.**—McMahan v. Browne, 185 Ala. 472, 64 So. 553; Souldard v. Vacuum Oil Co., 109 Ala. 387, 19 So. 414; White v. Simpson, 107 Ala. 386, 18 So. 151; Diston v. Hood, 83 Ala. 331, 3 So. 746. **Ark.**—Price v. Gunn, 114 Ark. 551, 170 S. W. 247; Beasley v. Equitable Securities Co., 72 Ark. 601, 84 S. W. 224. **Cal.**—Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138; McCauley v. Fulton, 44 Cal. 355. **Ill.**—Reedy v. Camfield, 159 Ill. 254, 42 N. E. 833; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740; Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589. **Mo.**—Vincent v. Means, 184 Mo. 327, 82 S. W. 96; Brawley v. Ranney, 67 Mo. 280. **Ohio.**—Winemiller v. Laughlin, 51 Ohio St. 421, 38 N. E. 111; Cincinnati, etc. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. 464. **Tex.**—Davis v. Robinson, 70 Tex. 394, 7 S. W. 749; Jameson v. O'Neill (Tex. Civ. App.), 145 S. W. 680; Mangum v. Kenley (Tex. Civ. App.), 145 S. W. 316; Houston Oil Co. v. Bayne (Tex.



(b.) *Conclusiveness of Recitals.* — Jurisdictional recitals are in respect to certain proceedings, sometimes made conclusive by statute.<sup>50</sup> Such recitals in a judgment of a court of general jurisdiction are presumed to be true,<sup>51</sup> and they cannot in a collateral proceeding be contradicted or in any way varied by evidence dehors the record itself.<sup>52</sup> In a few

Civ. App.), 141 S. W. 544; Gibbs v. Seales, 54 Tex. Civ. App. 96, 118 S. W. 188.

[a] A recital in a default judgment that an order of publication had been "duly made and filed" is sufficient on collateral attack in the absence of record evidence showing non-compliance with the statute. Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625.

[b] By publication in a newspaper "in all respects as provided by statute." Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589.

[c] "Due proof of publication of notice." Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740.

[d] "Due notice as required by law has been given by publication." Casey v. People, 165 Ill. 49, 46 N. E. 7.

[e] "Duly notified of the pendency of said petition by publication in accordance with the statute in such case made and provided." Harris v. Lester, 80 Ill. 307.

50. In tax suits, a recital that all owners and claimants of the property have been duly summoned to answer the complaint and have made default are by statute made conclusive of those facts. Branson v. Caruthers, 49 Cal. 374; Truman v. Robinson, 44 Cal. 623; Reily v. Lancaster, 39 Cal. 354.

51. U. S.—United States v. Lumber Co., 202 Fed. 35. Ala.—McMahan v. Browne, 185 Ala. 272, 64 So. 553; Owings v. Binford, 80 Ala. 421. Cal.—Crouch v. Miller, 169 Cal. 341, 146 Pac. 880; McCauley v. Fulton, 44 Cal. 355; Sharp v. Brunnings, 35 Cal. 528; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. Colo.—Empire Ranch & Cat. Co. v. Gibson, 23 Colo. App. 476, 130 Pac. 615. Ga.—McDaniel v. Westberry, 74 Ga. 380; Brown v. Redwyne, 16 Ga. 67. Ill.—Law v. Grommes, 153 Ill. 492, 41 N. E. 1080; Matthews v. Hoff, 113 Ill. 90; Coursen v. Hixon, 78 Ill. 339. Ind.—Strange v. Prince, 17 Ind. 524; Doe v. Smith, 1 Ind. 451. Ia.—Toliver v. Morgan, 75 Iowa 619, 34 N. W. 858. Kan.—O'Driscoll v. Soper, 19 Kan. 574; Haynes v. Cowen, 15 Kan. 637. Ky.—Baker v. Baker,

Eccles & Co., 162 Ky. 683, 173 S. W. 109; Newcomb's Exrs. v. Newcomb's Exrs., 13 Bush 544, 26 Am. Rep. 222; Bustard v. Gates, 4 Dana 429. Miss.—Monk v. Horne, 38 Miss. 100, 75 Am. Dec. 94. Mo.—Nevatt v. Springfield Normal School, 79 Mo. App. 198. N. Y.—Belden v. Meeker, 2 Lans. 470; Barber v. Winslow, 12 Wend. 102; Mott v. Ft. Edward Waterworks Co., 79 App. Div. 179, 79 N. Y. Supp. 1100; Steinhart v. Baker, 20 Misc. 470, 46 N. Y. Supp. 707. N. C.—Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364. N. D.—Leach v. Roulette County, 29 N. D. 593, 151 N. W. 768. Ore.—Ladd v. Higley, 5 Ore. 296. Tenn.—Walker v. Cottrell, 6 Baxt. 257; Netherland v. Johnson, 5 Lea 340. Utah.—Hoagland v. Hoagland, 19 Utah 103, 57 Pac. 20. Vt.—Carpenter v. Millard, 38 Vt. 9. Va.—Craig v. Sebrell, 9 Gratt. (50 Va.) 131. W. Va.—Winding Gulf Colliery Co. v. Campbell, 72 W. Va. 449, 78 S. E. 384.

52. U. S.—Applegate v. Lexington, etc. Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, 29 L. ed. 892; McCormick v. Sullivan, 10 Wheat. 192, 6 L. ed. 600; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; United States v. Hiawasee Lumb. Co., 202 Fed. 35, 120 C. C. A. 289; Butterfield v. Miller, 195 Fed. 200, 115 C. C. A. 152; Foster v. Givens, 67 Fed. 684, 14 C. C. A. 625; Bigelow v. Chatterton, 51 Fed. 614, 2 C. C. A. 402; Cohen v. Portland Lodge No. 142 B. P. O. E., 140 Fed. 774; United States v. Gayle, 45 Fed. 107. Ala.—Powell v. Union Bank & Trust Co., 173 Ala. 332, 56 So. 123; Perry v. King, 117 Ala. 533, 23 So. 783; Whitlow v. Echols, 78 Ala. 206; Massey v. Smith, 73 Ala. 173. Cal.—Stow v. Schiefflerly, 120 Cal. 609, 52 Pac. 1000; Branson v. Caruthers, 49 Cal. 374; McCauley v. Fulton, 44 Cal. 355; Reily v. Lancaster, 39 Cal. 354; Quivey v. Porter, 37 Cal. 458; Sharp v. Brummings, 35 Cal. 528; Musser v. Fitting, 26 Cal. App. 746, 148 Pac. 536. Conn.—Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688. Haw.—Carey v. Hawaiian Lumb. Mills, 11 Hawaii 311.

jurisdictions, however, such contrary evidence has been held admissible.<sup>53</sup>

- Ill.**—*Kuzak v. Anderson*, 267 Ill. 609, 108 N. E. 662; *Gage v. People*, 207 Ill. 377, 69 N. E. 849; *Glover v. People*, 188 Ill. 576, 59 N. E. 429; *Lancaster v. Snow*, 184 Ill. 524, 56 N. E. 813; *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *McLitt v. McLitt*, 69 Ill. 641; *Osgood v. Blackmore*, 59 Ill. 261. **Ind.**—*Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151; *Bateman v. Miller*, 118 Ind. 245, 21 N. E. 292; *Rogers v. Beauchamp*, 102 Ind. 33, 1 N. E. 185; *Reid v. Mitchell*, 93 Ind. 469; *Frankel v. Voss* (Ind. App.), 109 N. E. 55. **Ia.**—*Day v. Goodwin*, 104 Iowa 374, 73 N. W. 861; *Wright v. Mahaffey*, 76 Iowa 96, 40 N. W. 112. **Ky.**—*Siler v. Carpenter*, 155 Ky. 640, 160 S. W. 186; *Newcomb's Exrs. v. Newcomb's Exrs.*, 13 Bush 544, 26 Am. Rep. 222; *Simmons v. McKay*, 5 Bush 255; *Bustard v. Gates*, 4 Dana 429. **La.**—*Dufour v. Camfranc*, 11 Mart. (O. S.) 607, 13 Am. Dec. 360. **Me.**—*Blaisdell v. Pray*, 68 Me. 269; *Granger v. Clark*, 22 Me. 123. **Md.**—*Clark v. Bryan*, 16 Md. 171. **Mass.**—*Cook v. Darling*, 18 Pick. 393. But see *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. **Mich.**—*Belcher v. Curtis*, 119 Mich. 1, 77 N. W. 310; *Allured v. Voller*, 112 Mich. 357, 70 N. W. 1037; *Clark v. Holmes*, 1 Dougl. 390. **Miss.**—*Martin v. Miller*, 103 Miss. 754, 60 So. 772; *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231; *Vicksburg Gro. Co. v. Brennan*, 20 So. 845; *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101; *Duncan v. McNeill*, 31 Miss. 704; *Frisby v. Harrison*, 30 Miss. 452. **Mo.**—*Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977; *Fulkerson v. Davenport*, 70 Mo. 541; *Nevatt v. Springfield Normal School*, 79 Mo. App. 198; *Wise v. Loring*, 54 Mo. App. 258. **Mont.**—*Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966. **Nev.**—*Blasdel v. Kean*, 8 Nev. 205. **N. H.**—*Carlton v. Patterson*, 29 N. H. 580. **N. M.**—*Union Trust Co. v. Atchison, T. & St. F. Ry. Co.*, 8 N. M. 159, 42 Pac. 89. **N. C.**—*Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797; *State v. Ridley*, 114 N. C. 827, 19 S. E. 149; *Isley v. Boon*, 113 N. C. 249, 18 S. E. 174; *Brickhouse v. Sutton*, 99 N. C. 103, 5 S. E. 380. **N. D.**—*Leach v. Rolette County*, 29 N. D. 593, 151 N. W. 768. **Okla.**—*Crist v. Cosby*, 11 Okla. 635, 69 Pac. 885. **Ore.**—*Heatherly v. Hadley*, 4 Ore. 1. **Pa.**—*Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679. **S. C.**—*McCullough v. Hicks*, 63 S. C. 542, 41 S. E. 761; *Reese v. Meetze*, 51 S. C. 333, 29 S. E. 73; *Prince v. Dickson*, 39 S. C. 477, 18 S. E. 33; *Martin v. Bowie*, 37 S. C. 102, 15 S. C. 736. **S. D.**—*Phillips v. Phillips*, 13 S. D. 231, 83 N. W. 94. **Tenn.**—*Wilkins v. McCorkle*, 112 Tenn. 688, 80 S. W. 834; *Reinhardt v. Nealis*, 101 Tenn. 169, 46 S. W. 446; *Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781; *Harris v. McClanahan*, 11 Lea 181. **Tex.**—*Moore v. Hanscom*, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Douglas v. State* (Tex. Crim.), 124 S. W. 933; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158; *Hollingsworth v. Cameron & Co.* (Tex. Civ. App.), 160 S. W. 644; *Waterman Lumb, etc. Co. v. Robins* (Tex. Civ. App.), 159 S. W. 360; *Gibson v. Oppenheimer* (Tex. Civ. App.), 154 S. W. 694; *Batjer v. Roberts* (Tex. Civ. App.), 148 S. W. 841; *Estey & Camp v. Williams* (Tex. Civ. App.), 133 S. W. 470. **Utah.**—*Hoagland v. Hoagland*, 19 Utah 103, 57 Pac. 20. **Va.**—*Pugh v. McCue*, 86 Va. 475, 10 S. E. 715; *Wilcher v. Robertson*, 78 Va. 602. **Wash.**—*Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064. **W. Va.**—*Central Dist. & Pr. Tel. Co. v. Parkersburg & O. V. E. Ry.* (W. Va.), 85 S. E. 65. [a] **Recital of Entry.**—A recital in a judgment that is regular and valid on its face that it was entered by the court cannot, in a collateral proceeding be contradicted by evidence de hors the records showing that it was in fact entered by the clerk without an order from the clerk. *Carey v. Hawaiian Lumb. Mills*, 21 Haw. 311. [b] **In a direct attack upon the judgment the recitals are only prima facie evidence and their falsity may be shown either by the record or by evidence de hors.** *Roman v. Morgan*, 162 Ala. 133, 50 So. 273; *McKinney v. Adams*, 95 Miss. 832, 50 So. 474; *Sivley v. Summers*, 57 Miss. 712; *Cramford v. Redus*, 54 Miss. 700. 53. **Ark.**—*Griffin v. State*, 37 Ark. 437. **D. C.**—*Tenney v. Taylor*, 1 App.

(c.) *Consideration of Remainder of Record.*—Judgment recitals must be construed in connection with other parts of the record, with which the court will endeavor to reconcile them if possible; but if the balance of the record affirmatively shows that jurisdiction was not in fact obtained, this will rebut the presumption arising from the recitals.<sup>54</sup> When, for example, all that was actually done to obtain jurisdiction appears in the officer's return,<sup>55</sup> or in the proof of publication,<sup>56</sup> and these are insufficient to confer jurisdiction, they will prevail over the judgment recitals. Where, however, the record does not purport to show all that was done to obtain jurisdiction, the mere presence therein

Cas. 223. **Ga.**—Dozier *v.* Richardson, 25 Ga. 90. **Kan.**—Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588; Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149. **Minn.**—Thelen *v.* Thelen, 75 Minn. 423, 78 N. W. 108. **Neb.**—German Nat. Bank *v.* Kautter, 55 Neb. 103, 75 N. W. 566; Kayrs *v.* Nason, 54 Neb. 143, 74 N. W. 408. **N. Y.**—Ferguson *v.* Crawford, 86 N. Y. 609; Sire *v.* Merriek, 17 Civ. Pr. 325, 15 Daly 346, 6 N. Y. Supp. 661; Brown *v.* Balde, 3 Lans. 283; Bonnet *v.* Lachman, 65 Hun 554, 20 N. Y. Supp. 514; Dutton *v.* Smith, 10 App. Div. 566, 42 N. Y. Supp. 80. **Ohio.**—Kingsborough *v.* Tousley, 56 Ohio St. 450, 47 N. E. 541. **Wis.**—Pollard *v.* Wegener, 13 Wis. 569.

[a] Recitals in a justice's judgment may be contradicted by evidence aliunde. Leonard *v.* Sparks, 63 Mo. App. 585.

As to contradiction of recitals in foreign judgment, see *infra*, XVIII.

54. **U. S.**—Applegate *v.* Levington, etc. Min. Co., 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. ed. 892; Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; North Star Lumb. Co. *v.* Johnson, 196 Fed. 56. **Ariz.**—Boyle *v.* Oro Plata Min. & Mill. Co., 14 Ariz. 484, 131 Pac. 155. **Ark.**—Price *v.* Gunn, 114 Ark. 551, 170 S. W. 247; Porter *v.* Tallman, 68 Ark. 211, 56 S. W. 1071; Porter *v.* Dooley, 66 Ark. 1, 49 S. W. 1083; McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731; McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597. **Cal.**—Sacramento Bank *v.* Montgomery, 146 Cal. 745, 81 Pac. 138; Hahn *v.* Kelley, 34 Cal. 391, 94 Am. Dec. 742. **Ill.**—Waterbury Nat. Bank *v.* Reed, 231 Ill. 246, 83 N. E. 188; Harris *v.* Lester, 80 Ill. 307; Turner *v.* Jenkins, 79 Ill. 228; Pardon *v.* Dwire, 23 Ill. 572. **Ind.**—Coan *v.* Clow, 83 Ind. 417. **Kan.**—Mickel *v.* Hicks, 19 Kan. 578, 27 Am.

Rep. 161. **Ky.**—Sidwell *v.* Worthington's Heirs, 8 Dana 74, 77. **Mich.**—Curtis *v.* Board of Supervisors, 154 Mich. 646, 118 N. W. 618; Gould *v.* Jacobson, 58 Mich. 288, 25 N. W. 194. **Mo.**—Kunzi *v.* Hickman, 243 Mo. 103, 147 S. W. 1002; Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831; Higgins *v.* Beckwith, 102 Mo. 456, 14 S. W. 931; State *ex rel.* Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731. **Ore.**—Harris *v.* Sargeant, 37 Ore. 41, 60 Pac. 608. **S. D.**—Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891. **Tex.**—Gibbs *v.* Scales, 54 Tex. Civ. App. 96, 118 S. W. 188. **Va.**—Pope *v.* Harrison, 16 Lea 82. **W. Va.**—Central Dist. & P. Tel. Co. *v.* Parkersburg & O. V. E. Ry., 85 S. E. 65. **Wis.**—Falkner *v.* Guild, 10 Wis. 563.

55. **Ariz.**—Boyle *v.* Oro Plata Min. & Mill. Co., 14 Ariz. 484, 131 Pac. 155. **Ill.**—Spring Creek Drainage Dist. *v.* Comrs., 238 Ill. 521, 87 N. E. 394; Illinois Cent. Ry. Co. *v.* People, 189 Ill. 119, 59 N. E. 609; Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Harris *v.* Lester, 80 Ill. 307; Turner *v.* Jenkins, 79 Ill. 228; Boyland *v.* Boyland, 18 Ill. 551. **Ind.**—Coan *v.* Clow, 83 Ind. 417. **Kan.**—Mickel *v.* Hicks, 19 Kan. 578, 27 Am. Rep. 161. **Mich.**—Gould *v.* Jacobson, 58 Mich. 288, 25 N. W. 194. **Mo.**—Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831; Higgins *v.* Beckwith, 102 Mo. 456, 14 S. W. 931; Cloud *v.* Pierce City, 86 Mo. 357. **Ore.**—Harris *v.* Sargeant, 37 Ore. 41, 60 Pac. 608. **Wis.**—Falkner *v.* Guild, 10 Wis. 563.

[a] A certified copy of a missing summons and return may not be used to impeach the recitals of service in the judgment unless the evidence shows beyond a reasonable doubt, the correctness of the copy. Kavanagh *v.* Hamilton, 53 Colo. 157, 125 Pac. 512.

56. Senichka *v.* Lowe, 74 Ill. 274.



of a defective summons,<sup>57</sup> or return,<sup>58</sup> or order,<sup>59</sup> or certificate of publication,<sup>60</sup> will not overcome the recitals of jurisdiction in the judgment, for in such case it will be presumed that the court acted on other and sufficient evidence. It will not suffice to overcome the recitals in the judgment that the record is otherwise silent as to jurisdictional steps.<sup>61</sup>

(8.) *Adjudication of Jurisdiction.*—A court of general jurisdiction in assuming the power to proceed in a case, thereby impliedly adjudges that the requisite jurisdictional facts exist and, though its determination in this respect be erroneous, the judgment is not for that reason subject to collateral attack.<sup>62</sup> If in the particular case the question

57. *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304; *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415. See *Law v. Grommes*, 158 Ill. 492, 41 N. E. 1080.

[a] *Writ Misdated.*—Where one of two writs of scire facias found in the papers bears date subsequent to the judgment, it will be presumed from a recital in the judgment that two separate writs of scire facias issued that there was another and proper writ issued and returned, which was lost from the files or destroyed. *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415.

[b] *Replacing Void Summons.*—Although the summons in a proceeding be void, it will be presumed from the recital in the decree that all the parties were properly served, that a second and valid summons was issued. *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304.

58. *Drake v. Duvonick*, 45 Cal. 455; *Rivard v. Gardner*, 39 Ill. 125.

[a] *An immaterial variance in the return will not overcome a recital in the decree.* *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512.

[b] *Where the place of service is not stated in the acknowledgment of service, the presumption arising from a recital of service is not thereby rebutted.* *Stoddard Mfg. Co. v. Mattice*, 10 S. D. 253, 72 N. W. 891.

[c] *Time of Making Return.*—The fact that the return upon the summons was not made within the statutory period will not contradict a recital in the decree of proper service. *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

[d] *Service on Wrong Person.*—A judgment recital of proper service is not rebutted by the sheriff's return

showing service on the wrong person. *Quivey v. Porter*, 37 Cal. 458.

59. *Order Not Dated.*—A recital that the order of publication against a non-resident had been published according to law will prevail though the record shows an order of publication which bears no date. *Foster v. Givens*, 67 Fed. 684, 14 C. C. A. 625.

60. *Ark.*—*Price v. Gunn*, 114 Ark. 551, 170 S. W. 247; *Crittenden Lumb. Co. v. McDougal*, 101 Ark. 390, 395, 142 S. W. 836. *Ill.*—*Young v. People*, 171 Ill. 299, 49 N. E. 503; *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *Dickey v. People*, 160 Ill. 633, 43 N. E. 606; *Hertig v. People*, 159 Ill. 237, 42 N. E. 879; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; *Harris v. Lester*, 80 Ill. 307; *Barnett v. Wolf*, 70 Ill. 76.

61. *McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597; *Central Dist. & P. Tel. Co. v. Parkersburg & O. V. E. Ry.* (W. Va.), 85 S. E. 65.

[a] *That an affidavit of non residence does not appear in the record will not rebut a recital that such affidavit was filed.* *Millett v. Pease*, 31 Ill. 377.

[b] *Where the return cannot be found and the judgment recites jurisdiction, the record affirmatively shows jurisdiction.* *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512.

[c] *Appointment of Conservator.* Where the decree recited that the court found a conservator had been appointed for defendant, and the record was silent as to service of process, the service of process will be conclusively presumed in a collateral proceeding. *Searl v. Galbraith*, 73 Ill. 269.

62. *U. S.*—*Magruder v. Drury*, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. ed. 151; *Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123; *Grignon's*

of jurisdiction was litigated and directly passed upon by the court, its decision is no more subject to collateral attack than would be its

*Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34; *Edelstein v. United States*, 149 Fed. 636, 79 C. C. A. 328; *Foltz v. St. Louis & S. F. R. Co.*, 60 Fed. 316, 8 C. C. A. 635. **Ala.**—*Kling v. Connell*, 105 Ala. 590, 17 So. 121. **Cal.**—*Irwin v. Scriber*, 18 Cal. 499. **D. C.**—*Richmond & D. R. Co. v. Gorman*, 7 App. Cas. 91. **Ill.**—*O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124; *Balsewicz v. Chicago, B. & Q. R. Co.*, 240 Ill. 238, 88 N. E. 734. **Ind.**—*Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353; *Carr v. State*, 103 Ind. 548, 3 N. E. 375; *Platter v. County of Elkhart*, 103 Ind. 360, 2 N. E. 544; *Cauldwell v. Curry*, 93 Ind. 363; *Board of Comrs. v. Hall*, 70 Ind. 469. **Ia.** *Goodnow v. Burrows*, 74 Iowa 256, 23 N. W. 253, 37 N. W. 322. **Mass.**—*Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601. **Mich.**—*Peninsular Sav. Bank v. Ward*, 79 N. W. 911. **Mo.** *State v. Edwards*, 192 Mo. App. 413, 182 S. W. 816. **Neb.**—*Bradley v. Missouri P. Ry. Co.*, 51 Neb. 653, 71 N. W. 282; *Moore's Estate v. Moore*, 33 Neb. 509, 50 N. W. 443. **N. J.**—*Plume v. Howard Saving Inst.*, 46 N. J. L. 211. **N. Y.**—*Colton v. Beardsley*, 38 Barb. 29. **Tenn.**—*Railway Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652; *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650. **Wis.**—*Jordan v. Chicago & N. W. Ry. Co.*, 125 Wis. 581, 104 N. W. 803.

[a] "If, then, jurisdiction consists in the power to hear and determine . . . and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general and not special jurisdiction, if under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority." *Hine v. Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123.

[b] Where the court allows an in-

formation in lunacy to be filed by a daughter against her mother, its determination that the daughter has sufficient interest to file such information, is conclusive collaterally. *State ex rel. Gardiner v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012.

[c] **Residence of the deceased** at the time of his death within the territorial jurisdiction of the court is essential to give the probate court jurisdiction to grant administration of an estate. But the probate court having general jurisdiction of the subject-matter of the settlement of estates, if such court has assumed jurisdiction of a particular estate and granted administration thereof then in accordance with the rule in regard to the acts of courts of general jurisdiction that all intendments of law are in favor of such acts and that they are presumed to have jurisdiction to give the judgments they render until the contrary appears, such grant of administration is conclusive and not subject to collateral attack. *Balsewicz v. Chicago, B. & Q. R. Co.*, 240 Ill. 238, 88 N. E. 734.

[d] **Whether a debt was of an equitable nature** and therefore cognizable in the circuit court sitting in equity cannot be determined in a collateral attack on the decree. *Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267, 68 C. C. A. 19.

[e] **Whether Indictment Charged Offense Against Laws of United States.** In the leading case of *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650, wherein a prisoner asked release on habeas corpus on the ground that no offense against the United States was charged in the indictment, Chief Justice Marshall said: "Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which this court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment; and, until reversed, cannot be disregarded."

adjudication on any other matter submitted to it.<sup>63</sup> Consequently where the court expressly finds that sufficient personal service was had in the case,<sup>64</sup> or that appearance was made,<sup>65</sup> or that there was due service by publication,<sup>66</sup> such findings are evidence that the court possessed jurisdiction to render the judgment,<sup>67</sup> and parol evidence is

63. **U. S.**—*Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. ed. 520; *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. ed. 463; *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. ed. 368; *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. ed. 113; *Phelps v. Mutual Reserve Fund Life Assn.*, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; *Sipe v. Copwell*, 59 Fed. 970, 8 C. C. A. 419; *Bartlett v. Okla. Oil Co.*, 218 Fed. 380. **Ala.** *Wyatt v. Steele*, 26 Ala. 639. **Ariz.** *Tube City Min. & Mill. Co. v. Otterson*, 146 Pac. 203. **Ark.**—*Scotts v. Pleasants*, 21 Ark. 364; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217. **Cal.**—*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. **Ga.**—*Milner v. Neel*, 114 Ga. 118, 39 S. E. 890; *Flannery v. Baldwin Fertilizer Co.*, 94 Ga. 696, 21 S. E. 587. **Ill.**—*Kuzak v. Anderson*, 267 Ill. 609, 108 N. E. 662; *Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380; *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Swift v. Yanaway*, 153 Ill. 197, 38 N. E. 589; *Searl v. Galbraith*, 73 Ill. 269. **Ind.**—*Baltimore & O. R. Co. v. Freeze*, 160 Ind. 370, 82 N. E. 761; *Bruce v. Osgood*, 154 Ind. 375, 56 N. E. 25; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *State v. Wenzel*, 77 Ind. 428; *Dequindre v. Williams*, 31 Ind. 444; *Spencer v. Spencer*, 31 Ind. App. 321, 67 N. E. 1018. **Ia.**—*Ketchum v. White*, 72 Iowa 193, 33 N. W. 627. **Kan.**—*Miller v. Miller*, 89 Kan. 151, 130 Pac. 681; *Axman v. Dueker*, 45 Kan. 179, 25 Pac. 582. **Ky.**—*Horton v. Botts*, 158 Ky. 11, 164 S. W. 352. **Md.**—*Hamilton v. Annapolis & E. R. Co.*, 1 Md. Ch. 107. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537. **Mo.** *Seafeld v. Bohne*, 169 Mo. 537, 69 S. W. 1051; *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Vosler v. Brock*, 84 Mo. 574; *State v. Young*, 84 Mo. 90; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Evans v. Haefer*, 29 Mo. 141; *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628; *Hadley v.*

*Bernero*, 103 Mo. App. 549, 78 S. W. 64. **N. J.**—*Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10. **N. Y.**—*Bumstead v. Read*, 31 Barb. 661; *Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028. **Ohio.**—*Kohl v. Hannaford*, 5 Ohio Dec. (Reprint) 306; *Lessee of Merritt v. Horne*, 5 Ohio St. 307. **Okla.** *Blackwell v. McCall*, 153 Pac. 815. **Phil.** *Edl.*—*Navarro v. Jimenez*, 23 Phil. 151. 557. **S. D.**—*Bunker v. Taylor*, 13 S. D. 423, 83 S. W. 555. **Tenn.**—*Wilkins v. McCorkle*, 112 Tenn. 688, 9 S. W. 834. **Tex.**—*Brockenborough v. Melton*, 55 Tex. 493; *International & G. N. Ry. Co. v. Moore* (Tex. Civ. App.), 32 S. W. 379. **Wash.**—*State ex rel. Neal v. Kauffman*, 149 Pac. 656. **Wis.**—*Johnson v. Brewers' Fire Ins. Co.*, 51 Wis. 570, 8 N. W. 297, 9 N. W. 657.

64. **U. S.**—*Sipe v. Copwell*, 59 Fed. 970, 8 C. C. A. 419; *Smith v. Pomeroy*, 2 Dill. 414, 22 Fed. Cas. No. 13,092. **Ill.**—*Davis v. Dresback*, 81 Ill. 393. **Ind.**—*Hiatt v. Darlington*, 152 Ind. 570, 53 N. E. 825; *Goodell v. Starr*, 127 Ind. 198, 26 N. E. 793. **Ia.**—*Rotch v. Humboldt College*, 89 Iowa 480, 56 N. W. 658; *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611; *Schee v. La Grange*, 78 Iowa 101, 42 N. W. 616; *Ostby v. Secor*, 94 N. W. 571. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537; *Kipp v. Fallerton*, 4 Minn. 473. **Neb.**—*Muchmore v. Guest*, 96 N. W. 194. **Ohio.**—*Cincinnati, etc. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464. **Wash.**—*Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525.

65. *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454, 459; *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6.

66. **Ill.**—*Boege v. Bowlen*, 185 Ill. 234, 57 N. E. 195. **Ind.**—*Goodell v. Starr*, 127 Ind. 198, 26 N. E. 793; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090; *Dowell v. Labr*, 97 Ind. 146. **Ohio.**—*Fowler's Lessee v. Whiteman*, 2 Ohio St. 270; *Boswell's Lessee v. Sharp*, 15 Ohio 447; *Laughlin v. Vogel song*, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200. **Tex.**—*Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

67. **Cal.**—*Great Western Power Co.*



not admissible, in a collateral proceeding, to vary or contradict them.<sup>68</sup> Unless overcome by other portions of the record affirmatively showing that jurisdiction did not in fact exist such findings are therefore conclusive.<sup>69</sup>

d. *Fraud and Collusion.* — (I.) *In General.* — Judgments and decrees are frequently drawn in question collaterally on the ground of fraud and collusion. Unless the fraud goes to the jurisdiction of the court,<sup>70</sup> the parties themselves may not impeach the judgment on that ground, for it is their business to see that the judgment was not so

v. Pillsbury, 170 Cal. 180, 149 Pac. 35. Ill.—Spring Creek Drainage Dist. v. Comrs., 238 Ill. 521, 87 N. E. 394; Miller v. Pence, 115 Ill. 576, 4 N. E. 496; Cigler v. Kleinath, 167 Ill. App. 65. Ind.—State v. Wenzel, 77 Ind. 428. Mo.—Vosler v. Brock, 84 Mo. 574. N. J.—Crawford v. Lees, 84 N. J. Eq. 324, 93 Atl. 201. Ohio.—Boswell's Lessee v. Sharp, 15 Ohio 447. S. D. Bunker v. Taylor, 13 S. D. 433, 83 N. W. 555. Wash.—State v. Kauffman, 86 Wash. 172, 149 Pac. 656; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525.

68. U. S.—DesMoines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. ed. 202. Conn. Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688. Ill. Spring Creek Drainage Dist. v. Comrs., 238 Ill. 521, 87 N. E. 394; Stack v. People, 217 Ill. 220, 75 N. E. 347; Reedy v. Camfield, 159 Ill. 254, 42 N. E. 833; Hertig v. People, 159 Ill. 237, 42 N. E. 879; Harris v. Lester, 80 Ill. 307. But see Goudy v. Hall, 30 Ill. 109. Ind.—Ricketts v. Spraker, 77 Ind. 371; Stoddard v. Johnson, 75 Ind. 20; Evansville, I. & C. S. L. R. Co. v. Evansville, 15 Ind. 395; Strohmer v. Stumph, Wils. 304; Larimer v. Krau, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936. Ia.—Shawhan v. Loffer, 24 Iowa 217; Bonsall v. Isett, 14 Iowa 309. Me.—Waterhouse v. Cousins, 40 Me. 333; Agry v. Betts, 12 Me. 415. But see Taber v. Douglass, 101 Me. 363, 64 Atl. 653. Mass.—Betts v. Bagley, 12 Pick. 572. Minn.—Kipp v. Fullerton, 4 Minn. 473. N. J.—Crawford v. Lees, 84 N. J. Eq. 324, 93 Atl. 201. N. Y.—Porter v. Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Sheldon v. Wright, 5 N. Y. 497. R. I.—Angell v. Robbins, 4 R. I. 493. Wis.—Hungerford v. Cushing, 8 Wis. 324.

69. Ariz.—Allen v. Evans, 7 Ariz. 354, 64 Pac. 414. Ill.—Senichka v. Lowe, 74 Ill. 274; Barnett v. Wolf, 70

Ill. 76; Botsford v. O'Conner, 57 Ill. 72; Cigler v. Keinath, 167 Ill. App. 65; Bannon v. People, 1 Ill. App. 496. Ia.—Ostby v. Secor, 94 N. W. 571. Neb.—Muchmore v. Guest, 96 N. W. 194.

[a] Where the return shows that the only service made in the case was insufficient to confer jurisdiction, it will overcome the court's finding that jurisdiction was acquired. Barnett v. Wolf, 70 Ill. 76; Law v. Grommes, 55 Ill. App. 312.

[b] *Certificate of Publication.* Where the only evidence of the notice by the collector that he would apply for judgment for delinquent taxes was the certificate of the publisher printed at the conclusion of the list of delinquent lands, and without any separate certificate made since the publication, the court obtained no jurisdiction in the matter, notwithstanding its finding as to due publication. Senichka v. Lowe, 74 Ill. 274.

70. *Adversary Proceeding Prevented.* Where by fraud practiced in the litigation the court apparently had jurisdiction of the cause and the parties but in reality the court had no jurisdiction of the subject-matter or of the adverse party because he was not duly served with notice or did not have a hearing on account of the fraud practiced on him, the trial is not one of adversary rights in a proper subject-matter and the judgment is null and void. Lucy v. Deas, 59 Fla. 552, 52 So. 515; Kwentsky v. Sirovy, 142 Iowa 385, 121 N. W. 27.

[a] A judgment of conviction in a criminal case on a plea of guilty induced by the fraud of the party seeking to avail himself of it may be attacked collaterally. Johnson v. Girdwood, 7 Misc. 651, 28 N. Y. Supp. 151.

[b] *Fraud Upon the Court.*—“Judgment obtained by fraud upon a court, binds not such court or any other, and

obtained and they are estopped from setting up the fraud in an independent proceeding.<sup>71</sup> Fraud inhering in the proceeding itself is

its nullity upon that ground though it has not been set aside or reversed, may be alleged in a collateral proceeding." *Mumfreville v. Reynolds*, 68 N. Y. 528. See also *Eysaman v. Nelson*, 79 Misc. 304, 140 N. Y. Supp. 183.

[c] **Service of Process Secured by Fraud.**—Plaintiff, a resident of Wisconsin, desired to serve process on a Pennsylvania insurance company, having no agent in Wisconsin. Being a policy holder in the insurance company, he represented to the company that he wished to pay his premiums through the cashier of a local bank, and to obtain a receipt for a renewal premium at the same time. The company complied with his wishes. Plaintiff paid the premium to the cashier and on the same day caused summons in an action against the company to be served on him, relying on a Wisconsin statute which constitutes any person who collects any premium for insurance an agent of the company. Such service, it was held, on collateral attack, having been obtained by fraud or trick, was insufficient to confer jurisdiction. *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259.

**71. U. S.**—*American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293; *Helena v. United States*, 104 Fed. 113, 43 C. C. A. 429; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468; *Morris v. Travelers' Ins. Co.*, 189 Fed. 211. **Ala.**—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *Howell v. Randle*, 171 Ala. 451, 54 So. 563; *Logan v. Central Iron & Coal Co.*, 139 Ala. 548, 36 So. 729. **Alaska.**—*Ebner v. Heid*, 2 Alaska 600. **Ark.**—*Lewis v. St. Louis, I. M. & S. R. Co.*, 107 Ark. 41, 154 S. W. 198; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *James v. Gibson*, 73 Ark. 440, 84 S. W. 485. **Cal.**—*Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642, 17 Pac. 928; *Carpentier v. Oakland*, 30 Cal. 439. **Conn.**—*Peck v. Woodbridge*, 3 Day 30. **D. C.**—*Felsing v. Nelson*, 32 App. Cas. 420; *Richmond & D. R. Co. v. Gorman*, 7 App. Cas. 91. **Ga.**—*Bowen v. Gaskins*, 144 Ga. 1, 85 S. E. 1007; *Williams v. Martin*, 7 Ga. 377; *Hammeck v. McBride*, 6 Ga. 178. **Ill.**—*Burton v. Perry*, 146 Ill.

71, 34 N. E. 60; *Myer v. McDougal*, 47 Ill. 278; *Goodwin v. Mix*, 38 Ill. 115. **Ind.**—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278; *Kirby v. Kirby*, 142 Ind. 419, 41 N. E. 809; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; *Weiss v. Guerineau*, 109 Ind. 438, 9 N. E. 399; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Fidler v. Gilchrist* (Ind. App.), 109 N. E. 796. **Ia.** *Kwentsky v. Sirovy*, 142 Iowa 385, 121 N. W. 27; *Mahoney v. State Ins. Co.*, 133 Iowa 570, 110 N. W. 1041; *Graves v. Graves*, 132 Iowa 199, 109 N. W. 707; *Edmunson v. Independent School Dist.*, 98 Iowa 639, 67 N. W. 671; *Toof v. Foley*, 87 Iowa 8, 54 N. W. 59; *Bacon v. Chase*, 83 Iowa 521, 50 N. W. 23; *Phelan v. Johnson*, 80 Iowa 727, 46 N. W. 68; *Dunlap & Co. v. Cody*, 31 Iowa 260, 7 Am. Rep. 129; *Smith v. Smith*, 22 Iowa 516; *Mason v. Mesinger*, 17 Iowa 261. **Ky.**—*Com. v. Helm*, 169 Ky. 194, 183 S. W. 502; *Gaines v. Johnston*, 12 Ky. L. Rep. 779, 15 S. W. 246. **La.**—*Smith v. Henderson*, 23 La. Ann. 649. **Me.**—*Davis v. Davis*, 61 Me. 395. **Md.**—*McCambridge v. Walraven*, 88 Md. 378, 41 Atl. 928. **Mass.**—*Boston & W. R. Corp. v. Sparhawk*, 1 Allen 448; *Greene v. Greene*, 2 Gray 361, 61 Am. Dec. 454. **Mich.** *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Eureka Iron & Steel Works v. Bresnahan*, 66 Mich. 489, 495, 33 N. W. 834. **Minn.**—*State v. Ries*, 123 Minn. 397, 143 N. W. 981. **Mo.**—*Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124; *Callahan v. Griswold*, 9 Mo. 784; *Einstein v. Strother* (Mo. App.), 182 S. W. 122; *Haley v. Branham*, 192 Mo. App. 125, 180 S. W. 423. **Neb.**—*Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995. **N. Y.**—*Mosely v. Mosely*, 15 N. Y. 334; *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252; *People v. Downing*, 4 Sandf. 189; *Curtis v. Dunkirk Sav. & Loan Assn.*, 163 App. Div. 469, 148 N. Y. Supp. 860. **N. H.**—*Blanchard v. Webster*, 62 N. H. 467. **N. D.**—*Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737. **Ore.**—*Morrill v. Morrill*, 20 Ore. 96, 25 Pac. 362, 11 L. R. A. 155. **Pa.** *Ogle v. Baker*, 137 Pa. 378, 20 Atl. 998; *Otterson v. Middleton*, 102 Pa. 78; *Jackson v. Summerville*, 13 Pa. 359; *Lowber & Wilmer's Appeal*, 8 Watts & S. 387; *Townsend v. Kerns*, 2 Watts

not available to the parties collaterally.<sup>72</sup> Thus where the fraud relates to the cause of action it does not invalidate the judgment.<sup>73</sup> Nor does fraud which consists in the production of false evidence,<sup>74</sup> or

& S. 180, 183. **Tenn.**—*Kelley v. Mize*, 3 Sneed 59. **Tex.**—*Brown v. Foster Lumb. Co.* (Tex. Civ. App.), 178 S. W. 787; *Young v. Bank of Miami* (Tex. Civ. App.), 175 S. W. 1102. **Vt.**—*Hammond v. Wilder*, 25 Vt. 342. **Wis.** *Cody v. Cody*, 98 Wis. 445, 74 N. W. 217.

[a] **Waiver by Stipulation.**—An objection that a judgment in another suit was obtained by fraud, cannot be set up by one who as defendant in the other suit had stipulated that the judgment should stand. *Haley v. Branham*, 192 Mo. App. 125, 180 S. W. 423.

[b] **Where an agreement to enter judgment** is made by the husband in fraud of the wife's homestead rights, the judgment so entered cannot for that reason be impeached collaterally by her. *Brown v. Foster Lumb. Co.* (Tex. Civ. App.), 178 S. W. 787.

[c] **Where an affirmance on appeal** is obtained by fraud, the appellate court's judgment is nevertheless valid. *Edmunson v. Independent School Dist.*, 98 Iowa 639, 67 N. W. 671.

[d] **Collusive Divorce.**—A decree of divorce though obtained by the collusion of the parties is not void and neither of the guilty parties is entitled to impeach the decree on that ground. *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706.

[e] **As to Truth of Allegations.**—A false statement made by plaintiff out of court, that the allegations of his complaint are true, will not invalidate the judgment unless perhaps the defendant is induced thereby to default. *Town of Andes v. Millard*, 70 Fed. 515.

[f] **In the federal courts** a judgment of a state court cannot be collaterally impeached by the parties for fraud in its procurement. *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 435, 21 C. C. A. 468.

[g] **A patent** obtained by fraud or collusion or by illegal procedure in a suit to procure its issuance can be attacked only by the government. *Western Glass Co. v. Schmertz Wire Glass Co.*, 185 Fed. 738, 109 C. C. A. 1.

[h] **The county council** has no such interest in a judgment against the

county to authorize it to attack such judgment for fraud, in a collateral proceeding. *Owen County v. State*, 175 Ind. 610, 95 N. E. 253.

72. *Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899; *Young v. Bank of Miami* (Tex. Civ. App.), 175 S. W. 1102.

[a] **The fraudulent appointment of an administrator** on the court's own motion may not be urged collaterally. *Kuck v. Dixon* (Tex. Civ. App.), 127 S. W. 910.

[b] **Fraud on part of probate court** in allowing a certain debit against an administrator is not ground for collateral attack. *Bonner v. Gorman*, 71 Ark. 480, 77 S. W. 602.

73. *Einstein v. Strother* (Mo. App.), 182 S. W. 122; *Vivian v. Challenger*, 45 Pa. Super. 1.

[a] **Fraud in obtaining the contract** upon which the judgment was given is not a ground for collateral attack. *Lang v. Dunn*, 145 Iowa 363, 124 N. W. 192.

74. **U. S.**—*Town of Andes v. Millard*, 70 Fed. 515. **Ark.**—*Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250. **Ill.**—*Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Bowman v. Wilson*, 64 Ill. App. 73; *Trogon v. Cleveland Stone Co.*, 53 Ill. App. 206. **Ia.**—*Mahoney v. State Ins. Co.*, 133 Iowa 570, 110 N. W. 1041. **Mo.** *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458. **N. Y.**—*Seaward v. Tasker*, 143 N. Y. Supp. 257.

[a] **The introduction of forged papers** in evidence is not ground for collateral attack. *Mahoney v. State Ins. Co.*, 133 Iowa 570, 110 N. W. 1041.

[b] **A false affidavit** supporting a motion for temporary alimony, will not invalidate the subsequent decree. *Mengel v. Mengel*, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899.

[c] **That the affidavit for publication** was fraudulent may not be set up in a collateral attack upon the judgment. *Gibbs v. Scales*, 54 Tex. Civ. App. 96, 118 S. W. 188.



which prevents the introduction of evidence,<sup>75</sup> or the interposition of a meritorious defense.<sup>76</sup>

(II.) **Fraud Against Creditors and Others.**—Fraud and collusion practiced upon strangers to the record, such as creditors, renders the judgment voidable as to them even in a collateral proceeding.<sup>77</sup> But the

75. *State v. Ries*, 123 Minn. 397, 143 N. W. 981.

76. *Morris v. Travelers' Ins. Co.*, 189 Fed. 211; *Town of Andes v. Milard*, 70 Fed. 515; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841; *Carr v. Miner*, 42 Ill. 179.

[a] Procuring the absence of an attorney for property owners, at a hearing to confirm the organization of an irrigation district is not such fraud as will invalidate the subsequent judgment. *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399.

77. **U. S.**—*Pacific Railroad v. Missouri Pac. Ry.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. ed. 498; *Michaels v. Post*, 21 Wall. 398, 22 L. ed. 520; *Gaines v. Relf*, 12 How. 472, 13 L. ed. 1071; *Northern Pac. Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Guardian Trust Co. v. Kansas City So. Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615; *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293; *Safe Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421; *Wright v. Wright*, 103 Fed. 580. **Ark.**—*Scott v. Penn.*, 68 Ark. 492, 60 S. W. 235. **Cal.**—*Bennett v. Wilson*, 133 Cal. 379, 65 Pac. 880; *Hackett v. Manlove*, 14 Cal. 85. **Conn.**—*Cook v. Morris*, 66 Conn. 137, 33 Atl. 594. **Ga.**—*Wilson v. Williams*, 115 Ga. 474, 41 S. E. 629; *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. 406; *Scott v. Pound*, 61 Ga. 579. **Ill.**—*French v. Thomas*, 252 Ill. 65, 96 N. E. 564; *Perry v. United States School Furniture Co.*, 232 Ill. 101, 83 N. E. 444. **Ind.**—*De Armond v. Adams*, 25 Ind. 455. **Ky.**—*Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, 13 Am. Dec. 161. **La.**—*Boisse v. Dickson*, 31 La. Ann. 741; *Smith v. Henderson*, 23 La. Ann. 649; *Bedell's Heirs v. Hayes*, 21 La. Ann. 643; *Dinkgrave v. Norwood*, 10 La. Ann. 564; *Meeker's Assignees v. Williamson*, 4 Mart. (O. S.) 625. **Me.**—*Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Caswell v. Caswell*, 28 Me. 232; *Childs v. Ham.*, 23 Me. 74. **Mass.**—*Fall River v. Riley*, 140 Mass. 488, 5 N. E. 481; *Leonard v. Bryant*, 11 Met. 370; *Downs v. Ful-*

*ler*, 2 Met. 135, 35 Am. Dec. 393; *Greene v. Greene*, 2 Gray 361, 365, 61 Am. Dec. 454. **Mich.**—*Eureka I. W. v. Bresnahan*, 60 Mich. 332, 27 N. W. 524; *Hinchman v. Town*, 10 Mich. 508. **Miss.**—*Valentine v. McGrath*, 52 Miss. 112. **Mont.**—*Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585. **Neb.**—*Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309. **N. H.**—*Great Falls Mfg. Co. v. Worster*, 45 N. H. 110. **N. J.**—*McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. **N. Y.**—*Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275, 281; *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252. **N. D.**—*Mathews v. Hanson*, 19 N. D. 692, 124 N. W. 1116. **Pa.**—*Sager v. Mead*, 164 Pa. 125, 30 Atl. 284; *Hanika's Estate*, 138 Pa. 330, 22 Atl. 90; *Ogle v. Baker*, 137 Pa. 378, 20 Atl. 998; *Lenning's Appeal*, 93 Pa. 301; *Appeal of Titusville Nat. Bank*, 85 Pa. 528; *Miners' Trust Co. Bank v. Roseberry*, 81 Pa. 309; *Reed's Appeal*, 71 Pa. 378; *Girard Life Ins., etc. Co. v. Farmers', etc. Nat. Bank*, 57 Pa. 388; *Lewis v. Rogers*, 16 Pa. 18; *In re Dougherty's Est.*, 9 Watts & S. 189, 42 Am. Dec. 326; *Lowber's Appeal*, 8 Watts & S. 387, 42 Am. Dec. 302; *Blau v. Bernagozzi*, 54 Pa. Super. 111. **S. C.**—*Bank of Hampton v. Fennell*, 55 S. C. 379, 33 S. E. 485; *Sullivan v. Ball*, 55 S. C. 343, 33 S. E. 486; *Darby & Co. v. Shannon*, 19 S. C. 526. **Vt.**—*Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361. **Va.**—*Young's Admr. v. McClung*, 9 Gratt. (50 Va.) 336. **Eng.**—*Rex v. Kingston*, 20 How. St. Tr. 335; *Crosby v. Leng*, 12 East 409, 104 Eng. Reprint 160; *Veale v. Gatesdon*, W. Jon. 91, 82 Eng. Reprint 48; *Termor's Case*, 3 Coke 77, 76 Eng. Reprint 800; *Bandon v. Beecher*, 3 Clark & F. 479, 6 Eng. Reprint 1517.

[a] If the impeachment be successful in such cases the effect is not to vacate the judgment but only to disallow its interfering lien so far as such subsequent creditors are concerned, leaving it in force as between the original parties, and for all other purposes. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

fraud which will authorize a creditor to impeach a judgment, obtained by another, against his debtor must be fraud against such creditor participated in by the debtor, not a mere overreaching of the debtor in his litigation.<sup>78</sup>

e. *Errors and Irregularities in the Proceedings.*—(I.) In General. Jurisdiction once having been acquired in the case, no errors or irregularities in the subsequent proceedings which do not actually induce a loss of such jurisdiction will render the judgment subject to collateral impeachment.<sup>79</sup>

[b] No presumption as to fraud exists in such cases. The collusion and fraudulent intent should be alleged in some appropriate written instrument or pleading and it must in all cases be satisfactorily proved. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

[c] Attack by Stockholders.—A judgment obtained against one stockholder by fraud and collusion may be collaterally attacked by other stockholders who were not parties to the suit. *Gund v. Ballard*, 73 Neb. 547, 103 N. W. 309.

[d] A creditor of a mortgagor may collaterally attack a collusive foreclosure decree, even though his rights were acquired pendente lite. *Northern Pac. Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18, affirmed, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. ed. 931.

[e] Subsequent creditors and plaintiffs in junior judgments may collaterally impeach the senior judgment as having been entered or obtained by collusion between plaintiff and defendant, with intent to defraud or hinder such subsequent creditors. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

[f] An abandonment of the fraudulent purpose to defraud the creditor will not defeat his right to attack the judgment. *Bunn, Raiguel & Co. v. Ahl*, 29 Pa. 387.

[g] A sheriff, against whom a judgment is sought to be used, may attack it by showing that it is in fraud of the creditors whom he represents. *Clark v. Foxcroft*, 6 Greenl. (Me.) 296, 20 Am. Dec. 309.

[h] Attack by Grantee.—Where property conveyed is levied upon under a judgment recovered against the grantor upon a prior indebtedness, the grantee may in a collateral proceeding show that such indebtedness was fraudulent and the judgment was a col-

lusive one. *Bergman v. Hutcheson*, 60 Miss. 872.

[i] A judgment collusively confessed in a case where no indebtedness whatever existed, is fraudulent and any one whose interest might be affected may attack it. *Martin v. Judd*, 60 Ill. 78; *Phillips v. Demoss*, 14 Ill. 410; *Ransom v. Jones*, 2 Ill. 291; *Denton v. Noyer*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

78. Ind.—*McAlpine v. Sweetser*, 76 Ind. 78. N. J.—*Vanderveere v. Gaston*, 24 N. J. L. 818. Pa.—*Miners' Trust Co. Bank v. Roseberry*, 81 Pa. 309; *Sheetz v. Hanbest*, 81 Pa. 100; *Thompson's Appeal*, 57 Pa. 175; *Lewis v. Rogers*, 16 Pa. 18; *In re Dougherty's Est.*, 9 Watts & S. 189, 42 Am. Dec. 326; *In re Rowland's Estate*, 4 Clark 199, 7 Pa. L. J. 312; *Blau v. Bernaguzzi*, 54 Pa. Super. 111.

[a] Fraud upon the defendants in the judgment is not sufficient ground for collateral attack upon it by junior creditors. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

[b] Like a fraudulent deed, a fraudulent judgment is good against all but the interests intended to be defrauded. *Thompson's Appeal*, 57 Pa. 175.

79. U. S.—*Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518; *Cushman v. Warren-Scharf Asphalt Pav. Co.*, 220 Fed. 857, 135 C. C. A. 289; *Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177; *Lively v. Pieton*, 218 Fed. 401, 134 C. C. A. 189; *Missouri, K. & T. Ry. Co. v. Goodrich*, 213 Fed. 339, 129 C. C. A. 559; *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, 136 Fed. 27, 68 C. C. A. 577; *Ryan v. Staples*, 76 Fed. 721, 23 C. C. A. 541; *United States v. Terminal Assn. of St. Louis*, 197 Fed. 446; *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. 790. Ala.—*City of Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664; *Powell v. Union Bank & Trust*

(II.) Presumptions as to Regularity. — (A.) COURTS OF GENERAL JURISDICTION. Where the court rendering the judgment is one of general jurisdiction,

- Co., 173 Ala. 322, 36 So. 123; *Driggers v. Cassidy*, 71 Ala. 529; *Doe ex dem. Saltounali v. Riley*, 28 Ala. 164; *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199. Ark.—*Lewis v. St. Louis, I. M. & S. R. Co.*, 107 Ark. 41, 154 S. W. 198; *Clay v. Bilby*, 72 Ark. 101, 78 S. W. 749; *Arbuckle v. Matthews*, 73 Ark. 27, 83 S. W. 326; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Shaver & Son v. Shell*, 24 Ark. 122. Cal.—*Hall v. Brittain*, 171 Cal. 424, 153 Pac. 906; *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880; *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238; *Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536; *Klumpke v. Moreno*, 24 Cal. App. 35, 140 Pac. 289, 313; *Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. Colo.—*Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Brown v. Whetstone*, 25 Colo. App. 371, 138 Pac. 61. Conn.—*Dime Sav. Bank v. McAlenney*, 78 Conn. 208, 61 Atl. 476; *Morey v. Hoyt*, 62 Conn. 462, 26 Atl. 127; *De Forest v. Strong*, 8 Conn. 513. D. C.—*Willett v. Otterback*, 9 Mackey 324. Fla.—*Finley v. Chamberlain*, 46 Fla. 581, 35 So. 1. Ga.—*Wade v. Hurst*, 143 Ga. 26, 84 S. E. 65; *Stanford v. Bradford*, 45 Ga. 97; *Skrine v. Simmons*, 36 Ga. 402, 91 Am. Dec. 771; *Dickerson v. Powell*, 21 Ga. 143; *Brooks v. Tinsley*, 13 Ga. App. 268, 79 S. E. 160. Haw.—*Kapio-lani Est. v. Atcherly*, 14 Hawaii 651; *Ex parte Smith*, 14 Hawaii 245. Ill.—*Waller v. Village of River Forest*, 259 Ill. 223, 102 N. E. 290; *Lavin v. Board of Comrs.*, 245 Ill. 496, 92 N. E. 291; *Swift v. Yanaway*, 153 Ill. 197, 38 N. E. 589; *People v. Seelye*, 146 Ill. 189, 32 N. E. 458; *Harris v. Lester*, 80 Ill. 307; *Kruse v. Wilson*, 79 Ill. 223, 233; *Bermudez Asphalt Pav. Co. v. Gibson*, 106 Ill. App. 6; *French v. Baker*, 21 Ill. App. 432. Ind.—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278; *Winer v. Mast*, 146 Ind. 177, 45 N. E. 66; *Benbow v. Studebaker*, 51 Ind. App. 450, 99 N. E. 1033; *Northern Indiana Ry. Co. v. Lincoln Nat. Bank*, 47 Ind. App. 98, 92 N. E. 384. Ia.—*Hunt v. Johnston*, 105 Iowa 311, 75 N. W. 103; *Witter v. Fisher*, 27 Iowa 9; *Hart v. Jewett*, 11 Iowa 276; *Burton v. Warren Dist. Tp.*, 11 Iowa 166; *Delany v. Reade*, 4 Iowa 292. Kan.—*Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001; *Garrett v. Struble*, 57 Kan. 508, 46 Pac. 943; *Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69; *Santa Fe Bank v. Haskell County Bank*, 51 Kan. 50, 32 Pac. 627; *Barnum v. Kennedy*, 21 Kan. 141; *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320. Ky.—*Paducah v. Paducah Traction Co.*, 168 Ky. 198, 181 S. W. 1093; *Torian v. Caldwell*, 167 Ky. 670, 181 S. W. 373; *Shields' Admsrs. v. Chesser*, 167 Ky. 532, 180 S. W. 968; *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231; *Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113; *Clark County v. Ecton*, 150 Ky. 774, 150 S. W. 1016; *Cecil's Committee v. Cecil*, 149 Ky. 605, 149 S. W. 965; *Young's Admr. v. Chesapeake & O. R. Co.*, 136 Ky. 784, 125 S. W. 241; *Newcomb v. Newcomb*, 13 Bush 544, 26 Am. Rep. 222. La.—*Weil v. Schwartz*, 51 La. Ann. 1547, 26 So. 475; *Folger & Son v. Slaughter*, 33 La. Ann. 341; *Dupuy v. Bemiss*, 2 La. Ann. 509. Me.—*Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134. Md.—*Long v. Long*, 62 Md. 33; *Clark v. Bryan*, 16 Md. 171; *Hunter v. Hatton*, 4 Gill 115, 45 Am. Dec. 117. Mich.—*Curtis v. Board of Supervisors*, 154 Mich. 646, 118 N. W. 618; *Griffin v. McGavin*, 117 Mich. 372, 75 N. W. 1061; *Newton v. Auditor Gen.*, 131 Mich. 547, 91 N. W. 1030; *Huyek v. Graham*, 82 Mich. 353, 46 N. W. 781; *Shickle, etc. Iron Co. v. Wiley Constr. Co.*, 61 Mich. 226, 28 N. W. 77. Minn.—*State v. Ries*, 123 Minn. 397, 143 N. W. 981; *West Duluth Land Co. v. Bradley*, 75 Minn. 275, 77 N. W. 964; *Hall v. Sauntry*, 72 Minn. 420, 75 N. W. 720; *Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540; *Hotchkiss v. Cutting*, 14 Minn. 537. Miss.—*State v. Ricketts*, 67 Miss. 409, 7 So. 282; *Moore v. Ware*, 51 Miss. 206; *Wall v. Wall*, 28 Miss. 409. Mo.—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39; *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129; *Santenbacher v. Santenbach*, 220 Mo. 274, 119 S. W. 395; *Yeoman v. Younger*, 83 Mo. 424; *Martin v. McLean*, 49 Mo. 361; *Gunby v. Cooper*, 177 Mo. App. 354, 164 S. W. 152. Mont.—*Burke v. Inter State Sav., etc. Assn.*, 25 Mont. 315, 61 Pac. 579. Neb.—*Cowles v.*



its proceedings are presumed regular and proper, whether jurisdictional facts appear affirmatively on the record or not.<sup>80</sup>

Kyd, 91 Neb. 274, 135 N. W. 1010; *In re Nelson's Estate*, 81 Neb. 363, 115 N. W. 1087; *Toogood v. Russell*, 3 Neb. (Unof.) 189, 91 N. W. 249; *Bannard v. Duncan*, 65 Neb. 179, 90 N. W. 947; *Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W. 245. **Nev.**—*Daly v. Lahontan Mines Co.*, 151 Pac. 514. **N. H.**—*Holland v. Laconia Bldg. & L. Assn.*, 68 N. H. 480, 41 Atl. 178; *Morrison v. Woolson*, 23 N. H. 11; *Smith v. Knowlton*, 11 N. H. 191. **N. J.**—*Crawford v. Lees*, 84 N. J. Eq. 324, 93 Atl. 201; *Palmer v. Board of Chosen Freeholders*, 77 N. J. L. 143, 71 Atl. 285; *Stothoff v. Dunham*, 19 N. J. L. 181. **N. Y.** *Bloomer v. Sturges*, 58 N. Y. 168; *Althaus v. Radde*, 3 Bosw. 410; *Becker v. Studeman*, 86 App. Div. 94, 83 N. Y. Supp. 538; *Brown v. Beekmann*, 53 App. Div. 257, 65 N. Y. Supp. 740; *Brooks v. New York*, 10 N. Y. Supp. 773. **N. C.** *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634; *Burgess v. Kirby*, 94 N. C. 575. **N. D.**—*St. Anthony & Dakota Elevator Co. v. Martineau*, 30 N. D. 425, 153 N. W. 416; *Nichols, etc. Co. v. Paulson*, 10 N. D. 440, 87 N. W. 977. **Ohio.**—*Children's Home v. Fetter*, 90 Ohio St. 110, 106 N. E. 761; *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669; *Sheldon v. Newton*, 3 Ohio St. 494. **Okla.**—*Coblentz v. Cochran*, 44 Okla. 158, 143 Pac. 658. **Ore.**—*Northwest Townsite Co. v. Conn.*, 74 Ore. 484, 145 Pac. 1058. **Pa.**—*In re Metzger's Estate*, 242 Pa. 69, 88 Atl. 915; *Collins v. Phillips*, 236 Pa. 386, 84 Atl. 854; *Day v. Allen*, 224 Pa. 385, 73 Atl. 456; *Hughes v. Schreiner*, 202 Pa. 488, 52 Atl. 30. **Phil. Isl.**—*Trono Felipe v. Director of Prisons*, 24 Phil. Isl. 121. **R. I.**—*Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625. **S. C.**—*James v. Smith*, 2 S. C. 183; *Upson v. Horn*, 3 Strobb. 108, 49 Am. Dec. 633. **S. D.**—*Phillips v. Phillips*, 13 S. D. 231, 83 N. W. 94; *Green v. Sabin*, 12 S. D. 496, 81 N. W. 904; *Davis v. Cook*, 9 S. W. 319, 69 N. W. 18. **Tenn.**—*Puckett v. Wynns*, 132 Tenn. 513, 178 S. W. 1184. **Tex.** *White v. Bedell* (Tex. Civ. App.), 173 S. W. 624; *Williams v. Abilene Ind. Tel. & Tel. Co.* (Tex. Civ. App.), 168 S. W. 402; *Vineyard v. Heard* (Tex. Civ. App.), 167 S. W. 22; *Lester v. Gatewood* (Tex. Civ. App.), 166 S. W. 389;

*Jameson v. O'Neill* (Tex. Civ. App.), 145 S. W. 680; *Carr v. Miller*, 58 Tex. Civ. App. 57, 123 S. W. 1158. **Vt.** *Doolittle v. Holton*, 26 Vt. 588; *State v. Vernon*, 25 Vt. 244; *Ex parte Kellogg*, 6 Vt. 509. **Va.**—*Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249; *Fox v. Cottage Bldg. Fund Assn.*, 81 Va. 677. **Wash.**—*Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748. **W. Va.** *Linn v. Collins*, 87 S. E. 934; *Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561. **Wis.**—*Cowie v. Strohmeier*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Halfhill v. Malick*, 145 Wis. 200, 129 N. W. 1086; *Morrison v. Austin*, 14 Wis. 601. **Wyo.**—*Holt v. City of Cheyenne*, 22 Wyo. 212, 137 Pac. 876.

[a] Disobedience of the plain provisions of the law in the exercise of jurisdiction once rightly acquired, does not render the judgment impeachable collaterally. *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704.

80. **Ala.**—*Johnson v. Johnson*, 182 Ala. 376, 62 So. 706; *McLaughlin v. Hardwick* (Ala. App.), 70 So. 305; *Ex parte Rodgers*, 12 Ala. App. 218, 67 So. 710. **Ark.**—*Clay v. Barnes*, 181 S. W. 303. **Cal.**—*Morrissey v. Gray*, 162 Cal. 638, 124 Pac. 246; *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462; *Bagley v. City and County of San Francisco*, 19 Cal. App. 255, 125 Pac. 931. **Colo.**—*Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512; *Hughes v. Webster*, 52 Colo. 475, 122 Pac. 789; *Ross v. Newsom*, 25 Colo. App. 393, 138 Pac. 1015; *Empire Ranch & Cattle Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522. **Ga.**—*Flanders v. Sutton*, 143 Ga. 764, 85 S. E. 914. **Ill.**—*Dickinson v. Belden*, 268 Ill. 105, 108 N. E. 1011; *Peters v. Dieus*, 254 Ill. 379, 98 N. E. 560. **Ind.**—*Frankel v. Voss* (Ind. App.), 109 N. E. 55; *White v. Suggs*, 56 Ind. App. 572, 104 N. E. 55; *Baker v. Osborne*, 55 Ind. App. 518, 104 N. E. 97. **Ky.**—*Harrod v. Harrod*, 167 Ind. 308, 180 S. W. 797; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Cole v. Lewis*, 159 Ky. 747, 169

(B.) COURTS OF LIMITED AND INTERIOR JURISDICTION.—When it affirmatively appears upon the record that jurisdiction has attached, the same presumptions as to regularity attend the proceedings of courts of limited and inferior jurisdiction as are indulged to sustain those of general and superior jurisdiction.<sup>81</sup>

(C.) PRESUMPTIONS AS TO PARTICULAR MATTERS.—In the absence, therefore, of any showing on the record to the contrary, a presumption of regularity upholds the proceedings at every stage. Thus it will be presumed that the cause of action was complete when the proceedings

S. W. 490; *Steel v. Stearns Coal & Lumb. Co.*, 148 Ky. 429, 146 S. W. 721. **Mo.**—*Bryan v. McCaskill*, 175 S. W. 961; *Davison v. Bankers' Life Assn.*, 196 Mo. App. 625, 159 S. W. 713; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111. **Neb.**—*Herter v. Herter*, 97 Neb. 260, 149 N. W. 795. **Ore.**—*Claypool v. O'Neill*, 65 Ore. 511, 133 Pac. 349. **Tex.**—*Hopkins v. Cain*, 143 S. W. 1145; *Lester v. Gatewood (Tex. Civ. App.)*, 166 S. W. 389; *Hill & Jahns v. Lofton (Tex. Civ. App.)*, 165 S. W. 67; *Wilkin v. Simmons (Tex. Civ. App.)*, 151 S. W. 1145; *Blunt v. Houston Oil Co. (Tex. Civ. App.)*, 146 S. W. 248; *Stephenson v. Wiess (Tex. Civ. App.)*, 145 S. W. 287. **Wash.**—*Kline Bros. & Co. v. North Coast Fire Ins. Co.*, 80 Wash. 609, 142 Pac. 7.

81. **U. S.**—*Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34. **Ala.**—*Medley v. Shipes*, 177 Ala. 94, 58 So. 304; *Arnett v. Bailey*, 60 Ala. 435; *Todd v. Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Ward v. Hudspeth*, 44 Ala. 215; *Wilson's Heirs v. Wilson's Admr.*, 18 Ala. 176. **Ark.**—*Currie v. Franklin*, 51 Ark. 338, 11 S. W. 477. **Cal.**—*Lucas v. Todd*, 28 Cal. 182; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. **Conn.**—*Bulkley v. Andrews*, 39 Conn. 523; *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760. **Ind.**—*Alexander v. Gill*, 130 Ind. 485, 30 N. E. 525; *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *Hutts v. Hutts*, 62 Ind. 214; *Board of Comrs. v. Markle*, 46 Ind. 96; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526. **Ia.**—*Oskendom v. Barnes*, 43 Iowa 615; *Parsley v. Hays*, 22 Iowa 11, 92 Am. Dec. 350; *State v. Berry*, 12 Iowa 58; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **Kan.**—*Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69; *Vincent v. Davidson*, 1 Kan. App. 606, 42 Pac. 390. **La.**—*Grevenberg v. Bradford*, 44 La. Ann. 400, 10 So. 786; *Neal's Succession*, 25 La. Ann. 125; *Woods v. Lee*, 21 La. Ann. 505. **Me.**—*Paul v. Hussey*, 35 Me. 97. **Mass.**—*Sumner v. Parker*, 7 Mass. 79; *Wales v. Willard*, 2 Mass. 120. **Mich.**—*Cole v. Potter*, 135 Mich. 326, 97 N. W. 774; *Miller v. Smith*, 115 Mich. 427, 73 N. W. 418; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188; *Reed v. Gage*, 33 Mich. 179. **Miss.**—*Adams v. First Nat. Bank*, 103 Miss. 744, 60 So. 770; *Hendricks v. Pugh*, 57 Miss. 157. **Mo.**—*Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097; *Karnes v. Alexander*, 92 Mo. 660, 4 S. W. 518; *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86; *Fulkerson v. Davenport*, 70 Mo. 541; *Baker v. Baker*, 70 Mo. 134; *Jeffries v. Wright*, 51 Mo. 215; *State v. St. Gemme*, 31 Mo. 230; *State ex rel. Gardiner v. Dickman*, 175 Mo. App. 543, 157 S. W. 1012; *School Dist. No. 58 v. Chappel*, 155 Mo. App. 498, 135 S. W. 75; *State ex rel. Polster v. Miles*, 149 Mo. App. 638, 129 S. W. 731. **N. H.**—*State v. Weare*, 38 N. H. 314. **N. J.**—*Reeves v. Townsend*, 22 N. J. L. 396; *Van Kleeck v. O'Hanlon*, 21 N. J. L. 582; *Maxwell v. Pittenger*, 3 N. J. Eq. 156. **N. M.**—*Van Patten v. Boyd*, 20 N. M. 250, 150 Pac. 917. **N. Y.**—*Rowe v. Parsons*, 6 Hun 338; *Bogardus v. Clarke*, 4 Paige 623. **N. C.**—*State v. Conoly*, 28 N. C. 243. **Ohio.**—*McClelland v. Miller*, 28 Ohio St. 488; *Adams v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 477. **Pa.**—*Northrup v. Pike Tp.*, 242 Pa. 1, 88 Atl. 781; *Willis v. Willis*, 12 Pa. 159. **S. C.**—*Kincaid v. Neall*, 3 McCord 201. **S. D.**—*Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20. **Tenn.**—*McCarroll v. Weeks*, 2 Overt. 215. **Tex.**—*Wilkin v. Simmons (Tex. Civ. App.)*, 151 S. W. 1145; *Brooks v. Powell (Tex. Civ. App.)*, 29 S. W. 809. **Utah.**—*Salt Lake County v. Salt Lake City*, 42 Utah 548, 131 Pac. 560. **Wash.**—*In re*

were instituted;<sup>82</sup> that the party maintaining the suit had a right to do so;<sup>83</sup> that the tribunal rendering the judgment was a lawful one;<sup>84</sup> sitting at an authorized term;<sup>85</sup> or if rendered in vacation, that proper authority of law to render judgment at that time existed.<sup>86</sup> It will be presumed that the necessary pleadings were filed in the case;<sup>87</sup> that all matters covered by the judgment were properly in issue;<sup>88</sup> and that there was sufficient evidence before the court to warrant its conclusions upon such issues.<sup>89</sup> Further illustrations of the principle will be found in the notes.<sup>90</sup>

Bell's Estate, 70 Wash. 498, 127 Pac. 100. Wis.—Storm v. Adams, 56 Wis. 137, 14 N. W. 69; Baizer v. Lasch, 28 Wis. 268.

82. Austin v. Austin, 43 Ill. App. 488; Cahn v. Farmers' & Traders' Bank, 1 S. D. 237, 46 N. W. 185.

83. Glidden-Felt Mfg. Co. v. Robinson, 163 Mo. App. 488, 143 S. W. 1111.

[a] Identity in Names of Parties. Where the record discloses that the names of plaintiff and defendant were identical, it will not be presumed, in a collateral action, that the parties were the same person, thus invalidating the judgment. Allen v. Evans, 7 Ariz. 354, 64 Pac. 414; Miller v. Miller, 96 Cal. 376, 31 Pac. 247.

84. Feltner v. Huff, 118 S. W. 936; Mankin v. State, 2 Swan (Tenn.) 206. Compare, *supra*, XVII, A, 7, b.

85. Talbert v. Hopper, 42 Cal. 397; Horn v. Metzger, 234 Ill. 240, 84 N. E. 893.

[a] That a special term of the probate court at which an assailed order of the court was made was properly held, will be presumed. Cook v. Renick, 19 Ill. 598; Carter v. Carter, 237 Mo. 624, 141 S. W. 873; State *ex rel.* Bell v. Nolan, 99 Mo. 569, 12 S. W. 1047.

86. Johnson v. Johnson, 182 Ala. 376, 62 So. 706.

87. U. S.—The Acorn, 2 Abb. 434, 1 Fed. Cas. No. 29. Ind.—Indianapolis & C. G. R. Co. v. State, 105 Ind. 37, 4 N. E. 316. Tex.—Gibson v. Oppenheimer, 154 S. W. 694; Tom v. Sayers, 64 Tex. 339; American Const. Co. v. Seelig (Tex. Civ. App.), 131 S. W. 655.

Compare, *supra*, XVII, A, 7, c, (IV), (C), (4), (a).

[a] That before nonsuit was taken, pleadings were filed, will be presumed. Blunt v. Houston Oil Co. (Tex. Civ. App.), 146 S. W. 248.

88. United States v. Sommers, 171

Fed. 57, 96 C. C. A. 299; Catron v. Com., 140 Ky. 61, 130 S. W. 951.

[a] "In the absence of all showing, we cannot assume that the court undertook to pass upon matters which were not submitted to it for decision. No doubt, if a court by mere *brutum fulmen* should assume to adjudicate matters wholly outside the actual litigation, its judgment would be void; but such conduct is so foreign to the ordinary proceedings of courts of record that it may be seriously doubted whether evidence, however strong, would be received to impeach a judgment collaterally upon such grounds." United States v. Sommers, 171 Fed. 57, 96 C. C. A. 299.

89. Ala.—Johnson v. Johnson, 182 Ala. 376, 62 So. 706; State v. Mobile & G. R. Co., 108 Ala. 29, 18 So. 801; Burke v. Mutch, 66 Ala. 568; Burnett v. Nesmith, 62 Ala. 261; Pettus v. McClannahan, 52 Ala. 55; Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757. Ill. Reedy v. Camfield, 159 Ill. 254, 42 N. E. 833; Harris v. Lester, 80 Ill. 307; Barnett v. Wolf, 70 Ill. 76; Kanorowski v. People, 113 Ill. App. 468; Banks v. Banks, 31 Ill. App. 162. Ind.—Young v. Wiley, 183 Ind. 449, 107 N. E. 278; Stingley v. Nichols, Shepherd & Co., 131 Ind. 214, 30 N. E. 34. Kan.—North v. Moore, 8 Kan. 143. Ky.—Catron v. Com., 140 Ky. 61, 130 S. W. 951. Mich. Peninsular Sav. Bank v. Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911. Mo.—Harter v. Petty, 266 Mo. 296, 181 S. W. 39. Pa.—Allen v. Macdellan, 12 Pa. 328, 51 Am. Dec. 608. Tex.—Gibson v. Oppenheimer (Tex. Civ. App.), 154 S. W. 694. Vt.—Town of Huntington v. Charlotte, 15 Vt. 46.

90. A stipulation of the attorneys attached to the decree, consenting that it might be entered, will not overcome the presumption that the decree was the act of the court. Drake v. Duvenick, 45 Cal. 455.



(III.) Objections as to Parties.—(A.) GENERALLY.—No question can be raised in a collateral proceeding as to the right or legal capacity of the plaintiff in the original suit to maintain the same,<sup>91</sup> or as to the legal disability of any party defendant arising from infancy,<sup>92</sup> in-

[a] **Orders of Fiscal Court.**—When the record of the fiscal court is fair and regular on its face and shows when and where the court was held and who were present and the record is signed by the county judge or presiding judge, if the county judge be absent, the presumption arising from the record will be that the proceedings were read by the clerk and signed by the judge with the approval of the justices present. *Fox v. Lantrip*, 169 Ky. 759, 185 S. W. 136.

[b] **An adjournment** (1) will be presumed where the proceedings would thereby be made regular. *State v. Weare*, 36 N. H. 314; *State v. Conoly*, 28 N. C. 243. (2) And the adjournment will be presumed to have been regular. *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760; *Baizer v. Lasch*, 28 Wis. 268.

[c] That personal judgment was authorized though the service was by publication. *Traylor v. Lide* (Tex.), 7 S. W. 58.

[d] That a proceeding was pending so as to authorize the appointment of a receiver. *Potter v. Merchants'*, etc., 28 N. Y. 641, 86 Am. Dec. 273.

[e] **Appraisers presumed qualified** and properly sworn. *Indiana Oolitic Limestone Co. v. Louisville*, etc. Ry. Co., 107 Ind. 301, 7 N. E. 244.

[f] **That Land Was Duly Appraised.** *Coscius v. Tool*, 36 Iowa 82.

[g] **Notice of application for sale** of lands in course of administration, presumed. *Wilkin v. Simmons* (Tex. Civ. App.), 151 S. W. 1145.

[h] **Default presumed** not prematurely rendered. *Storm v. Adams*, 56 Wis. 137, 14 N. W. 69.

[i] **That a day for hearing** as required by statute was assigned by the surrogate court before appointing a guardian. *People ex rel. Wilcox v. Wilcox*, 22 Barb. (N. Y.) 178.

[j] **Proper venue** presumed in foreclosure proceedings. *Markel v. Evans*, 47 Ind. 326.

91. **U. S.**—*Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 8 C. C. A. 635. **Cal.**—*McFall v. Buckeye Grangers' Warehouse Assn.*, 122 Cal. 468, 55 Pac.

253. **Ill.**—*Wenner v. Thornton*, 98 Ill. 156. **Ind.**—*Roberts v. Hill*, 137 Ind. 215, 36 N. E. 843. **Md.**—*Simpson v. Bailey*, 80 Md. 421, 30 Atl. 622. **Mich.** *Campbell v. Western Elec. Co.*, 113 Mich. 333, 71 N. W. 644; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 193. **N. Y.**—*Abbott v. Curran*, 98 N. Y. 665; *Guliano v. Whitenack*, 9 Misc. 562, 30 N. Y. Supp. 415. **N. C.**—*Brown v. Harding*, 86 S. E. 1010; *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217; *Sumner v. Sessoms*, 94 N. C. 371. **Tex.**—*Thompson v. Morrow* (Tex. Civ. App.), 147 S. W. 706.

[a] **Real Party in Interest.**—An objection that the plaintiff was not the real party in interest cannot be raised collaterally. *Cates v. Riley* (Tex. Civ. App.), 55 S. W. 979; *Halfhill v. Malick*, 145 Wis. 200, 129 N. W. 1086.

[b] **The corporate character** of plaintiff cannot be questioned collaterally. *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111.

[c] **Not Qualified Electors.**—An order calling an election is not subject to collateral attack on the ground that some of the petitioners for the election were not qualified electors as provided by statute. *Ex parte Koen*, 58 Tex. Crim. 279, 125 S. W. 401.

[d] **That permission to sue receiver** was not given is not ground for collateral attack. *Ridge v. Manker*, 132 Fed. 599, 67 C. C. A. 596.

[e] **Incapacity of Receiver.**—Where a receiver, appointed by the court in a creditor's suit, prosecutes an action for an unassigned dower interest of the debtor, the judgment therein obtained cannot be collaterally attacked on the ground that such action could not be prosecuted by the receiver but should have been maintained by the debtor personally. *Doty v. Irwin*, 168 Ill. 50, 47 N. E. 768.

92. **U. S.**—*Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. ed. 520; *Corker v. Jones*, 110 U. S. 317, 4 Sup. Ct. 19, 28 L. ed. 161; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381; *Hatch v. Ferguson*, 68 Fed. 43, 15 C. C. A. 201. **Cal.**—*Reed v. Ring*, 93 Cal. 96, 28

sanity,<sup>93</sup> or coverture.<sup>94</sup> Neither failure to appoint a guardian ad litem<sup>95</sup>

Pae. 851; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Regla v. Martin*, 19 Cal. 463. Conn.—*Clark v. Platt*, 30 Conn. 282. Ga.—*Lowe v. Equitable Mtg. Co.*, 102 Ga. 103, 29 S. E. 148. Ill.—*Mulford v. Stalzenback*, 46 Ill. 303; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463. Ind.—*Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920; *Hawkins v. McDougal*, 126 Ind. 539, 25 N. E. 820. Ia.—*Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Dahms v. Alston*, 72 Iowa 411, 34 N. W. 182. Ky.—*Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231; *Bourne v. Simpson*, 9 B. Mon. 454. La.—*Le Blanc v. His Creditors*, 16 La. 120. Md. *Long v. Long*, 62 Md. 33; *Hunter v. Hutton*, 4 Gill 115, 45 Am. Dec. 117. Miss.—*Cocks v. Simmons*, 57 Miss. 183; *Doe ex dem. Smith v. Bradley*, 6 Smed. & M. 485. Mo.—*Reineman v. Larkin*, 222 Mo. 156, 121 S. W. 307. Neb. *Weddle v. Specht*, 97 Neb. 693. N. Y. *Mutual Life Ins. Co. v. Schwaner*, 36 Hun 373. N. C.—*Weeks v. McPhail*, 128 N. C. 130, 38 S. E. 472; *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200; *Ludwick v. Fair*, 29 N. C. 422, 47 Am. Dec. 333. Pa.—*Kennedy v. Baker*, 159 Pa. 146, 28 Atl. 252. S. C.—*McCroskey v. Parks*, 13 S. C. 90. Tenn.—*Kindell v. Titus*, 9 Heisk. 727; *Andrews v. Andrews*, 7 Heisk. 234. Tex.—*McGhee v. Romatka*, 92 Tex. 38, 45 S. W. 552; *Montgomery v. Carlton*, 56 Tex. 361; *Bouldin v. Miller* (Tex. Civ. App.), 26 S. W. 133. W. Va.—*McSwegin v. Howard*, 63 W. Va. 92.

See also 10 STANDARD PROC. 726; 12 STANDARD PROC. 774.

93. Ind.—*Judd v. Gray*, 156 Ind. 278, 59 N. E. 849. N. C.—*Thomas v. Hunsucker*, 108 N. C. 720, 13 S. E. 221. Ohio.—*McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93. Pa.—*Weaver v. Brenner*, 145 Pa. 299, 21 Atl. 1010.

See 13 STANDARD PROC. 613.

94. U. S.—*Corker v. Jones*, 110 U. S. 317, 4 Sup. Ct. 19, 28 L. ed. 161. Ala. *Childress v. Taylor*, 33 Ala. 185. Cal. *Gambette v. Brock*, 41 Cal. 78. D. C. *Magruder v. Armes*, 15 App. Cas. 379. Ga.—*Wingfield v. Rhea*, 73 Ga. 477; *Mashburn v. Gouge*, 61 Ga. 512; *Glover v. Moore*, 60 Ga. 189. Ind.—*Lieb v. Lichtenstein*, 121 Ind. 483, 23 N. E. 284; *Wright v. Wright*, 97 Ind. 444;

*Long v. Dixon*, 55 Ind. 352. Ia.—*Guthrie v. Howard*, 32 Iowa 54; *Wolff v. Van Metre*, 19 Iowa 134. Kan.—*Keith v. Keith*, 26 Kan. 26. Ky.—*Wren v. Ficklen*, 109 Ky. 472, 59 S. W. 746; *Sypert v. Harrison*, 88 Ky. 461, 11 S. W. 435. La.—*Equitable Securities Co. v. Bloch*, 51 La. Ann. 478, 25 So. 271. Mich.—*Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. 285. Mo.—*Truesdail v. McCormick*, 126 Mo. 39, 28 S. W. 885. Mont.—*Vantilburg v. Black*, 3 Mont. 459. N. C.—*Grantham v. Kennedy*, 91 N. C. 148; *Green v. Branton*, 16 N. C. 500, 504. Ohio.—*Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448. Ore. *Farris v. Hayes*, 9 Ore. 81. Pa.—*Michaels v. Brawley*, 109 Pa. 7. R. I. *Smith v. Borden*, 17 R. I. 220, 21 Atl. 351, 33 Am. St. Rep. 867, 11 L. R. A. 585. Tenn.—*Adcock v. Mann*, 38 S. W. 99; *Chatterton v. Young & Walker*, 2 Tenn. Ch. 768; *Howell v. Hale*, 5 Lea 405. Tex.—*Phelps v. Brackett*, 24 Tex. 236; *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395; *Benson v. Cahill* (Tex. Civ. App.), 37 S. W. 1088. Va.—*McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610.

But see 11 STANDARD PROC. 801, et seq.

95. Ark.—*McDonald v. Ft. Smith & W. R. Co.*, 105 Ark. 5, 150 S. W. 135; *Trapnall's Admx. v. State Bank*, 18 Ark. 53. Ill.—*Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468; *Barnett v. Wolf*, 70 Ill. 76. Ind.—*Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920; *McBride v. State*, 130 Ind. 525, 30 N. E. 699; *Blake v. Douglass*, 27 Ind. 416; *Evans v. Ashby*, 22 Ind. 15. Kan.—*Walkenhorst v. Lewis*, 24 Kan. 420. Ky. *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797; *Simmons v. McKay*, 5 Bush 25; *Porter v. Robinson*, 3 A. K. Marsh. 253, 13 Am. Dec. 153. Mass.—*Austin v. Charleston Female Seminary*, 8 Mete. 192, 196, 41 Am. Dec. 497. Miss. *McLemore v. Chicago, etc. R. R. Co.*, 58 Miss. 514; *Smith v. Bradley*, 6 Smed. & M. 485. N. Y.—*Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726; *McMurray v. McMurray*, 66 N. Y. 175; *Croghan v. Livingston*, 17 N. Y. 218; *Matter of Becker*, 28 Hun 207. N. C. *Burgess v. Kirby*, 94 N. C. 575. Ohio. *Lessee of Morgan v. Burnet*, 18 Ohio 535. Tex.—*Montgomery v. Carlton*, 56

for an infant, or insane person,<sup>66</sup> nor an irregularity in the appointment of such guardian,<sup>67</sup> will render the judgment any the less conclusive collaterally. The omission to make some person a party as required by law, does not render the decree void and subject to collateral impeachment by the persons made parties and over whom the court had jurisdiction,<sup>68</sup> but a decree entered in the absence of necessary parties may be disputed collaterally by those not made parties.<sup>69</sup>

Where the court has in fact obtained jurisdiction of a party, it is immaterial on collateral attack that the party was not described or was improperly described,<sup>1</sup> or that a party was sued in the wrong

Tex. 361. **W. Va.**—*Linn v. Collins*, 87 S. E. 934.

See 10 **STANDARD PROC.** 726.

96. *Cecil's Committee v. Cecil*, 149 Ky. 605, 149 S. W. 965. See 13 **STANDARD PROC.** 613.

[a] A judgment of foreclosure entered against an insane person without the appointment of a guardian ad litem is conclusive on collateral attack. *Dunn v. Dunn*, 114 Cal. 210, 46 Pac. 5.

97. *McCroskey v. Parks*, 13 S. C. 90; *Greenlaw v. Kernahan*, 36 Tenn. 371.

[a] **Appointment Premature.**—The appointment of a guardian ad litem before the service of legal process is not cause for avoiding the proceedings collaterally. *Paulin v. Sparrow*, 91 Ohio 279, 110 N. E. 528.

[b] **Person Suggested by Adversary.**—It is not ground for collateral attack that the court appointed a guardian ad litem suggested by the other party. *Young v. Wiley*, 183 Ind. 449, 107 N. E. 278.

98. **Cal.**—*Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238. **D. C.**—*Bursey v. Lyon*, 30 App. Cas. 597. **Ill.**—*Harris v. Lester*, 80 Ill. 307. **Ind.**—*White v. Webster*, 58 Ind. 233; *Doe ex dem. Hain v. Smith*, 1 Ind. 451. **Ia.**—*Tod v. Crisman*, 123 Iowa 693, 99 N. W. 686. **Mass.**—*Rice v. Smith*, 14 Mass. 431. **Tex.**—*Stark v. Carroll*, 66 Tex. 393, 1 S. W. 188.

[a] **Failure to make guardian of minor defendants a party in a proceeding by an executor to sell lands to pay decedent's debts will not render the decree void as to persons made parties.** *Harris v. Lester*, 80 Ill. 307.

[b] **Heirs.**—An omission to make all the heirs or devisees parties to an administrator's proceeding to sell land does not avoid the order to sell the land, as to those made parties. *Harris v. Lester*, 80 Ill. 307; *Botsford v.*

*O'Connor*, 57 Ill. 72; *Downing's Heirs v. Ford*, 9 Dana (Ky.) 391. But see *Rule v. Broach*, 58 Miss. 552; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Hamilton v. Lockhart*, 41 Miss. 460.

[c] **One joint land owner who was made a party to a foreclosure on the joint property, may not collaterally attack the judgment on the ground that other joint owners were omitted.** *Dwiggins v. Cook*, 71 Ind. 579.

[d] **A judgment laying out a highway is not subject to collateral attack by parties served, because other owners or claimants were not made parties.** *Proctor v. Andover*, 42 N. H. 348; *State v. Weare*, 38 N. H. 314; *State v. Richmond*, 26 N. H. 232.

[e] **Foreclosure Proceedings.**—The fact that a subsequent grantee of the mortgagor (*Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47), or a lienor (*Board of Supervisors v. Mineral Point R. R. Co.*, 24 Wis. 93), was not made a party to a foreclosure, the judgment therein is not for that reason void as to those served.

[f] **That the owner of an equity of redemption was not made a party to a suit to quiet title in the property, could not be urged in a collateral attack upon the decree.** *Browning v. Smith*, 139 Ind. 280, 37 N. E. 540.

99. *Tod v. Crisman*, 123 Iowa 693, 99 N. W. 686. See *supra*, XVII, A, 6.

1. **Ala.**—*Harrison v. Harrison*, 19 Ala. 499. **Cal.**—*Campbell v. Adams*, 50 Cal. 203. **Ind.**—*McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7. **Mich.**—*Vieborn v. Pollock*, 133 Mich. 524, 95 N. W. 576. **Neb.**—*Oakley v. Pegler*, 30 Neb. 628, 46 N. W. 920. **Wis.**—*Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

[a] **Failure to substitute the proper name of defendant in the complaint in place of the fictitious name "John**



capacity,<sup>2</sup> or that there was a misjoinder of parties.<sup>3</sup>

(B.) DEATH OF PARTY. — Whether a judgment is collaterally attackable because the person for or against whom it was rendered was dead either at the time of the institution of the suit or when judgment was rendered, depends entirely upon whether such a judgment is regarded as wholly void or merely voidable,<sup>4</sup> a matter which is elsewhere discussed.<sup>5</sup>

(IV.) Objections Relating to the Cause of Action. — The existence or non-existence of a cause of action is wholly immaterial to the validity of the judgment when the latter is collaterally assailed.<sup>6</sup> Hence an objection cannot be collaterally urged that the alleged debt or claim upon which the judgment was founded, was not a subsisting obligation,<sup>7</sup> or that the alleged debt or claim was illegal and void,<sup>8</sup> or was

Doe" is not a ground for collateral attack. *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880.

[b] Describing defendant by his initials instead of by his full Christian name is not fatal collaterally. *Vieborn v. Pollock*, 133 Mich. 524, 95 N. W. 576.

[c] Mere surplusage in the description of a party will not render the judgment invalid. *McAfee's Estate v. Gregg*, 140 N. C. 448, 53 S. E. 304.

2. *Harris v. Lester*, 80 Ill. 307.

[a] Describing Guardian.—It is a matter of no consequence on collateral attack that a guardian who is in fact made a defendant with the heirs and brought into court, was not described as guardian. *Harris v. Lester*, 80 Ill. 307.

3. Ind.—*Dwiggins v. Cook*, 71 Ind. 579. Ia.—*Perry v. Miller*, 54 Iowa 277, 5 N. W. 727, 6 N. W. 302. Mo.—*Yates v. Johnson*, 87 Mo. 213. Pa.—*Levan v. Milholland*, 114 Pa. 49, 7 Atl. 194.

4. If merely voidable a judgment may not be collaterally attacked. See *supra*, XVII, A, 7, a; XVII, A, 7, e, (I).

5. See 14 STANDARD PROC. 782, et seq.

6. See cases in following notes.

Failure of complaint to state a cause of action as ground of collateral attack, see *supra*, XVII, A, 7, e, (IV), (C), (4), (c).

7. Conn.—*Fish v. Smith*, 73 Conn. 377, 47 Atl. 711. Mo.—*Jones v. Ede-man*, 223 Mo. 312, 122 S. W. 1047; *Hammett v. Hutton*, 189 Mo. App. 567, 176 S. W. 1078. Pa.—*Hughes v. Schreimer*, 202 Pa. 488, 52 Atl. 30. Vt.—*Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976.

[a] Whether a lien foreclosed was a valid existing one may not be inquired into collaterally. *Tube City Min. & Mill. Co. v. Otterson (Ariz.)*, 146 Pac. 203.

[b] Res Judicata.—It cannot be urged collaterally that the subject-matter of the suit was res judicata. *Beaty v. Thos. Goggan & Bro. (Tex. Civ. App.)*, 131 S. W. 631.

[c] A tax judgment is not open to the objection that the taxes had been paid. *McCarter v. Neil*, 50 Ark. 188, 6 S. W. 731.

[d] Mortgage Satisfied.—The fact that the judgment was based on a mortgage which had been satisfied is not available. *Blythe v. Richards*, 10 Serg. & R. (Pa.) 261, 13 Am. Dec. 672.

8. U. S.—*Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *United States v. Board of Auditors*, 28 Fed. 407. Ala.—*Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718. Cal.—*Mayo v. Foley*, 40 Cal. 281; *Eitel v. Foote*, 39 Cal. 439. Ill.—*Chicago Driving Park v. West*, 35 Ill. App. 496. Ia.—*Kerr v. Kennedy*, 119 Iowa 239, 93 N. W. 353. Ky.—*Jacob v. Hill*, 111 Ky. 926, 65 S. W. 21; *Harpending's Exrs. v. Wylie*, 13 Bush 158. Mass.—*Dublin v. Chadbourn*, 16 Mass. 433. Miss.—*Wall v. Wall*, 28 Miss. 409. Mo.—*State v. Rainey*, 74 Mo. 229. N. H.—*Jennes v. Berry*, 17 N. H. 549. N. J.—*McCannless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. N. Y.—*Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; *Wells v. Stearns*, 35 Hun 323. Ohio.—*Wooster Bank v. Stevens*, 1 Ohio St. 233. Pa.—*Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781, judgment on void mortgage. But see *Bowlby v. Thunder*, 105 Pa. 173; Ed-

unjust.<sup>9</sup> And the same is true as to the objection that the proceedings were prematurely instituted.<sup>10</sup>

*menson v. Nichols*, 22 Pa. 74. **Va.**—*Vaughan v. Doe ex dem. Green*, 1 Leigh (28 Va.) 287; *Parker's Exrs. v. Brown*, 6 Gratt. (47 Va.) 554. **Wis.**—*Wood v. Blythe*, 46 Wis. 650, 1 N. W. 341; *State v. Gary*, 33 Wis. 93.

[a] **A judgment based on a gambling transaction in cotton futures is not open to collateral impeachment on the ground of illegality.** *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039. In that case the court said: "The laws of Mississippi making dealing in futures a misdemeanor, and providing that contracts of that sort made without intent to deliver the commodity or to pay the price, 'shall not be enforced by any court'" merely lay down a rule of decision. This is merely another way of saying "an action shall not be brought."

[b] **Indebtedness in Excess of Constitution.**—A judgment against a public corporation cannot be collaterally attacked on the ground that the indebtedness upon which it was based is in excess of the constitutional limit. **U. S.**—*Davenport v. County of Dodge*, 105 U. S. 237, 26 L. ed. 1018; *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Helena v. United States*, 104 Fed. 113, 43 C. C. A. 429; *Board of Comrs. v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *Aetna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329; *United States v. Board of Auditors*, 28 Fed. 407. **Colo.**—*Board v. Burpee*, 24 Colo. 57, 48 Pac. 539. **Ia.**—*Edmundson v. Independent School Dist.*, 98 Iowa 639, 67 N. W. 671; *Sioux City & St. P. R. Co. v. Osceola Co.*, 45 Iowa 163. **S. D.**—*Howard v. City of Huron*, 5 S. D. 539, 59 N. W. 833. **Wash.**—*State ex rel. Ledger Pub. Co. v. Gloyd*, 14 Wash. 5, 44 Pac. 103. **Wyo.**—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 45 Pac. 494.

[c] **A judgment based upon a void judgment is valid collaterally.** **Cal.**—*Moore v. Martin*, 38 Cal. 428. **Ga.**—*Dunn v. Brogden*, 68 Ga. 63. **Ill.**—*Kelly v. Donlin*, 70 Ill. 378. **Ky.**—*Prince v. Antle*, 90 Ky. 138, 13 S. W. 436. **N. Y.**—*Rocco v. Hackett*, 2 Bosw. 579. **Pa.**—*Walker v. Lyon*, 3 Ben. & W. 98.

[d] **Also the revival of a void judgment.** **Ala.**—*Martin v. Tally*, 72 Ala. 23. **Ind.**—*Comparet v. Hanna*, 34 Ind. 74; *Carpenter v. Doe ex dem. Schaffner*,

2 Ind. 465. **N. C.**—*Jennings v. Stafford*, 23 N. C. 404. **Pa.**—*Buchler's Heirs v. Buffington*, 43 Pa. 278.

[e] **But a revival of a void judgment has been deemed void.** **Ark.**—*Ex parte Pile*, 9 Ark. 336. **Del.**—*Frankel v. Satterfield*, 9 Houst. 201, 19 Atl. 898. **La.**—*McCutcheon v. Askew*, 34 La. Ann. 340.

[f] **Void Bond.**—A judgment on a bond which is void for want of seal, is valid. *McComb v. Ellett*, 8 Smed. & M. (Miss.) 505.

[g] **That an unconstitutional statute was the basis of the cause of action cannot be urged.** *United States v. Rothstein*, 187 Fed. 268, 109 C. C. A. 521.

[h] **Repealed Statute.**—That the act upon which the action was based was previously appealed, cannot be urged collaterally. *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 74 N. W. 620.

[i] **Ordinance Defective.**—It is no ground for collateral impeachment that the action was based on a defective ordinance. *People v. Lingle*, 165 Ill. 65, 46 N. E. 10.

[j] **In Violation of Sunday Laws.** *Jenness v. Berry*, 17 N. H. 549.

[k] **Judgment against a married woman upon a contract which she has no capacity to make, see 11 STANDARD PROC. 800, and Merchants and Mechanics Bank v. Poore, 231 Pa. 362, 80 Atl. 525.**

9. **U. S.**—*Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421; *Wright v. Wright*, 103 Fed. 580. **Fla.**—*Lucy v. Deas*, 59 Fla. 552, 52 So. 515. **Ind.**—*Watson v. Camper*, 119 Ind. 60, 21 N. E. 323. **Pa.**—*Thompson's Appeal*, 57 Pa. 175. **S. C.**—*Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426.

10. **Ala.**—*Foster v. Thompson*, 10 Ala. App. 365, 65 So. 414. **Ark.**—*Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983. **Cal.**—*Hall v. Brittain*, 171 Cal. 424, 153 Pac. 906. **Fla.**—*Lord v. F. M. Dowling Co.*, 52 Fla. 313, 42 So. 585. **Ill.**—*Bush v. Hanson*, 70 Ill. 480; *Rockwell v. Jones*, 21 Ill. 279. **Ind.**—*Robertson v. Huffman*, 92 Ind. 247; *Cornwell v. Hungate*, 1 Ind. 156. **Tex.**—*Mikeska v. Leon & Blum*, 63 Tex. 44.

[a] **Where the right to institute a partition suit depended upon the happening of a contingency specified in a**

Misjoinder of cause of action does not furnish ground for attacking the judgment collaterally.<sup>11</sup>

(V.) **Wrong Form of Action or Remedy.** — Where the court had jurisdiction of the parties and the subject-matter, its judgment may not be questioned collaterally upon the ground that the form of action or remedy pursued was not a proper one by which to determine the rights involved.<sup>12</sup> But the remedy pursued must have been one which the court had jurisdiction to administer.<sup>13</sup>

(VI.) **Objections as to Venue, Change of, and Removal.** — Neither objections relating to the venue of the action,<sup>14</sup> nor those based on errors

former decree it will be presumed in a collateral attack upon the judgment in partition, that the court in proceeding with the partition suit had the prior decree before it and properly interpreted it. *Hall v. Brittain*, 171 Cal. 424, 153 Pac. 906.

[b] **Note Not Due.**—That one of the notes sued upon was not due at the commencement of the action, but became due before the declaration was filed will not affect the validity of the judgment when questioned collaterally. *Lord v. F. M. Dowling & Co.*, 52 Fla. 313, 42 So. 585.

[c] **But a foreign attachment on note not yet due** has been held subject to collateral attack. *Cal.*—*Davis v. Eppinger*, 18 Cal. 378, 79 Am. Dec. 184. *Kan.*—*Connelly v. Woods*, 31 Kan. 359, 2 Pac. 773. *S. C.*—*Walker & Bradford v. Roberts*, 4 Rich. L. 561.

11. *Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267, 68 C. C. A. 19.

[a] **If after removal to a federal court, a case uniting equitable and legal causes of action, proceeds to judgment in the federal court, without a proper separation of the two causes of action to accord with the practice in the federal courts, such judgment is not open to collateral impeachment.** *Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267, 68 C. C. A. 19.

12. *Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Potter v. Whitten*, 161 Mo. App. 118, 142 S. W. 453.

[a] **That an action to quiet title was brought instead of ejectment is not fatal.** *Barnett v. Bauer Cooperage Co.*, 145 Ky. 163, 140 S. W. 146.

[b] **A suit in equity where there is an adequate remedy at law.** *Mellen v. Moline Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. ed. 178; *Thomson v. Morris*, 57 Ill. 333.

[c] **A motion instead of a suit or action.** *Nims v. Sabine*, 44 How. Pr. (N. Y.) 252.

[d] **Legal proceeding instead of an equitable one.** *Miles v. Davis*, 19 Mo. 408.

13. See *Cauly v. Blue*, 62 Ala. 77, and *supra*, XVII, A, 7, c, (II).

14. *Stark v. Ratcliff*, 111 Ill. 75; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Cole v. Potter*, 135 Mich. 326, 97 N. W. 774.

[a] **An administration opened in a county other than that in which the deceased resided is not invalid.** *Farmer v. Saunders* (Tex. Civ. App.), 128 S. W. 941.

[b] **County Where Land Situated.** That a suit concerning land was not brought in the county in which it was situated is not material collaterally. *Bonner v. Hearne*, 75 Tex. 242, 251, 12 S. W. 38; *De La Vega v. League*, 64 Tex. 205; *Houston Oil Co. v. Bayne* (Tex. Civ. App.), 141 S. W. 544; *Dittman v. Iselt* (Tex. Civ. App.), 52 S. W. 96.

[c] **In Wrong Township or County.** (1) An objection that neither of the parties lived in a township adjoining the residence of the justice is not available collaterally. *Cole v. Potter*, 135 Mich. 326, 97 N. W. 774. (2) Nor is an objection that the parties were not residents of the county where the justice resided. *Miller v. Smith*, 115 Mich. 427, 73 N. W. 418; *Franse v. Owens*, 25 Mo. 329.

[d] **Proceedings Void.**—A suit for taxes due upon land lying in one county could not under the law be instituted in another county and the judgment would therefore be void. *Hill & Jahns v. Lofton* (Tex. Civ. App.), 165 S. W. 67.



committed in proceedings for change of venue or removal of causes<sup>15</sup> can be raised in a collateral proceeding.

(VII.) Continuances. — Decisions of the court in granting or refusing continuances though erroneous are not reviewable in a collateral proceeding.<sup>16</sup>

Amendments. — That the court may have erred in its rulings in respect to amendments will not warrant a collateral assault upon the judgment.<sup>17</sup>

(VIII.) Reference to Advisory Officers. — Failure to refer matters in issue to masters, referees, and other advisory officers in accordance with proper practice does not subject the judgment to collateral attack<sup>18</sup> unless a reference in the particular case is made indispensable by statute.<sup>19</sup> Errors in the appointment of advisory officers such as viewers,<sup>20</sup> assessors,<sup>21</sup> commissioners,<sup>22</sup> and the like is not an available objection collaterally. Nor will errors and irregularities in the proceedings of any such advisory officers as the court may have ap-

15. Cal.—*Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855. Ill.—*Bryant v. Ballance*, 66 Ill. 188. Ind.—*Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886; *Smeizer v. Lockhart*, 97 Ind. 315. Ia.—*Tennis v. Anderson*, 55 Iowa 625, 8 N. W. 177; *City of Ottumwa v. Schaub*, 52 Iowa 515, 3 N. W. 529; *Swan v. Bournes*, 47 Iowa 501, 29 Am. Rep. 492. Kan.—*Barnhart v. Davis*, 30 Kan. 520, 2' Pac. 633. Miss.—*Work v. Harper*, 24 Miss. 517. Mo.—*Ex parte Bedard*, 106 Mo. 616, 17 S. W. 693; *Stearns v. St. Louis & S. F. Ry. Co.*, 94 Mo. 317, 7 S. W. 270; *State v. Six*, 80 Mo. 61; *Colvin v. Six*, 79 Mo. 198; *Potter v. Adams' Exrs.*, 24 Mo. 159; *Chouteau v. Nuckolls*, 20 Mo. 442. Okla.—*Ex parte Murphy*, 1 Okla. 288, 29 Pac. 652; *Ex parte Harlan*, 1 Okla. 48, 27 Pac. 920.

[a] That the nearest county was not selected, as required by statute, is not ground for collateral attack of the order of transfer. *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855.

[b] Removal to Federal Court.—A decision as to the removability of a cause from a state to a federal court is conclusive collaterally. *Ex parte Roe*, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. ed. 1217.

16. Colo.—*In re Garvey*, 7 Colo. 502, 4 Pac. 758. Ind.—*McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111. Ia.—*Hildreth v. Harney*, 62 Iowa 420, 17 N. W. 581. Kan.—*In re McMicken*, 30 Kan. 406, 18 Pac. 473. Mich.—*Millar v.*

*Babeock*, 29 Mich. 526. N. H.—*Leach v. Pillsbury*, 18 N. H. 525. N. Y.—*Hunt v. Wickwire*, 10 Wend. 102, 25 Am. Dec. 545; *Rigney v. Coles*, 6 Bosw. 479. Ohio.—*Ex parte McGehan*, 22 Ohio St. 442. Wis.—*Ruhland v. Supervisors*, 55 Wis. 664, 13 N. W. 877.

17. U. S.—*Goodman v. Ft. Collins*, 164 Fed. 970, 91 C. C. A. 98. Ind.—*Logansport v. La Rose*, 99 Ind. 117. Ia.—*Arland's Succession*, 42 La. Ann. 320, 7 So. 532. N. H.—*Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316. N. Y.—*Williams v. Weaver*, 75 N. Y. 30. Ohio.—*Paulin v. Sparrow*, 91 Ohio St. 279, 110 N. E. 528.

18. *Calkins v. Packer*, 21 Barb. 275; *Wimbish v. Breeden*, 77 Va. 324.

19. In proceedings to sell infant's property the statutory requirement that reference be made to a master or referee to determine the merits of the application must be followed, otherwise the sale may be attacked in a collateral proceeding. *Ellwood v. Northrup*, 106 N. Y. 172, 12 N. E. 590.

20. *Cauldwell v. Curry*, 93 Ind. 363.

21. *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283.

22. Del.—*Wood v. Wilson*, 4 Houst. 94. Ind.—*Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249. Me.—*Goodwin v. Hallowell*, 12 Me. 271. Md.—*Hunter v. Hatton*, 4 Gill 115, 45 Am. Dec. 117. N. Y.—*Van Steenberg v. Bigelow*, 3 Wend. 42. Pa.—*Pittsburgh v. Cluley*, 74 Pa. 262. Tex.—*Quayle v. Missouri, K. & T. Ry. Co.*, 63 Mo. 465.

pointed,<sup>23</sup> or in the report rendered by such officers<sup>24</sup> be fatal, unless a strict compliance with the statute is a jurisdictional essential in the particular case.<sup>25</sup> An erroneous rejection of a report rendered by advisory officers will not defeat the judgment collaterally.<sup>26</sup>

(IX.) **Errors in Matters of Evidence.**—Errors committed by the court in passing upon matters of evidence cannot in any way deprive it of jurisdiction and are therefore not ground for collateral attack upon the judgment. The court may have been mistaken in its rulings upon the competency of witnesses,<sup>27</sup> the admissibility of evidence,<sup>28</sup> or the manner of conducting the examination,<sup>29</sup> but the judgment would not for such reasons be open to attack except in some direct proceeding. Insufficiency of evidence to justify the judgment is not ground for collateral attack.<sup>30</sup>

(X.) **Findings.**—If the court has jurisdiction to render the decree, all the findings upon which that decree proceeds are likewise conclusive and inquiry cannot be made into the propriety of the same.<sup>31</sup>

(XI.) **Errors or Defects in Judgment.**—Providing the court does not exceed the limits of its jurisdiction, its decision upon questions either of law or fact, though palpably erroneous or inequitable, is not subject to collateral attack.<sup>32</sup> Thus the judgment cannot be collaterally im-

23. Ill.—*Lane v. Bommelmman*, 17 Ill. 95. Ind.—*Cauldwell v. Curry*, 93 Ind. 363. Md.—*Hunter v. Hatton*, 4 Gill 115, 45 Am. Dec. 117. Vt.—*Tute v. James*, 50 Vt. 124.

[a] **Oath.**—Failure of highway viewers to take the required oath does not invalidate proceedings. *Henline v. People*, 81 Ill. 269.

24. *McMullen v. State*, 105 Ind. 334, 4 N. E. 903; *Hartshorne v. Johnson*, 7 N. J. L. 108.

[a] **Seal.**—That the report of commissioners in partition was not under seal as required by statute is not a ground for impeaching the partition collaterally. *Lane v. Bommelmman*, 17 Ill. 95.

25. *State v. Horn*, 34 Kan. 556, 9 Pac. 208; *Chapman v. Swan*, 65 Barb. (N. Y.) 210.

26. *Grimwood v. Macke*, 79 Ind. 100; *In re* *Petition of Farwell*, 2 N. H. 123.

27. *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231; *Appeal of Peebles*, 15 Serg. & R. (Pa.) 39.

28. *Lucy v. Deas*, 59 Fla. 552, 52 So. 515; *Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W. 245.

[a] **Copy of Will.**—Whether an authenticated copy of a will and a certificate of probate were in due form are questions which the court has power to pass upon and its decision cannot

be questioned collaterally. *Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113.

29. *State v. Seaton*, 61 Iowa 563, 16 N. W. 736; *People ex rel. Mitchell v. Sheriff*, 7 Abb. Pr. (N. Y.) 96.

30. See *infra*, XVII, A, 7, e, (XI).

31. *U. S.*—*Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751; *Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47. Cal.—*Johnson v. Friant*, 140 Cal. 402, 73 Pac. 1052. Colo.—*Pinnacle Gold Min. Co. v. Popst*, 54 Colo. 451, 131 Pac. 413. Ill.—*Goudy v. Hall*, 30 Ill. 109. Mass.—*Connor v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601. Mo.—*School Dist. No. 58 v. Chappel*, 155 Mo. App. 498, 135 S. W. 75. Pa.—*Cierlinski v. Rys.*, 225 Pa. 312, 74 Atl. 172.

[a] **A finding as to place of residence of deceased made by a probate court is conclusive collaterally.** *Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601.

[b] **Instrument Foreclosed Not a Mortgage.**—It cannot be urged collaterally that the instrument foreclosed was a deed and not a mortgage, when the court found it to be the latter. *Johnson v. Friant*, 140 Cal. 260, 73 Pac. 993.

32. *U. S.*—*Burnet v. Desmornes y Alvares*, 226 U. S. 145, 33 Sup. Ct. 63, 57 L. ed. 159; *Lively v. Picton*, 218

peached on the ground that it is not warranted by the evidence,<sup>33</sup> nor,

Fed. 401, 134 C. C. A. 189; *Walker v. Sturbans*, 38 Fed. 298. **Cal.**—*Stambach v. Emerson*, 139 Cal. 282, 72 Pac. 991. **Conn.**—*Huntington v. Newport News & M. V. Co.*, 78 Conn. 35, 61 Atl. 59. **Ill.**—*O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124; *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. 1065; *Rockwell v. Jones*, 21 Ill. 279; *Swigart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418. **Ind.**—*Eller v. Evans*, 128 Ind. 156, 27 N. E. 418. **Ia.**—*Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153. **Ky.**—*Torian v. Caldwell*, 167 Ky. 670, 181 S. W. 373; *Board of Prison Comrs. v. De Moss*, 157 Ky. 289, 163 S. W. 183; *Houser v. Paducah Lands Co.*, 157 Ky. 252, 162 S. W. 1113; *Chambers v. Thomas*, 3 A. K. Marsh. 536; *Robinson v. Redman*, 2 Duv. 82. **Mass.**—*White v. Morse*, 139 Mass. 162, 29 N. E. 539. **Mo.**—*Harter v. Petty*, 266 Mo. 296, 181 S. W. 39. **Neb.**—*Staats v. Wilson*, 76 Neb. 204, 107 N. W. 230, 109 N. W. 379; *Maryott v. Gardner*, 50 Neb. 320, 69 N. W. 837. **Tex.**—*Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177; *Wilkin v. Simmons* (Tex. Civ. App.), 151 S. W. 1145. **Va.**—*Moomaw v. Jordan*, 87 S. E. 569. **W. Va.**—*Linn v. Collins*, 87 S. E. 934. **Eng.**—*Durrant v. Boys*, 6 T. R. 580, 101 Eng. Reprint 714.

[a] A decree in partition is good upon collateral attack though it includes lands to which the parties had no title. *Austin v. Charlestown Female Seminary*, 8 Mete. 196, 41 Am. Dec. 497.

[b] A decree of distribution is merely erroneous when made in accordance with the terms of a void trust. *Crew v. Pratt*, 119 Cal. 131, 51 Pac. 41.

[c] **Judgment of Tax Board.**—(1) On collateral attack on a tax proceeding it is immaterial that there was an over valuation of the property assessed. *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000. (2) "The property was subject to taxation by the authority and for the purpose alleged. True, the result reached was erroneous, because of the willful disregard in the proceeding of the law requiring uniformity in the valuation of property for taxation within the jurisdiction of

the defendant. Still, the proceeding being quasi judicial, and the subject-matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it cannot be questioned in an action at law to recover back the one-half of the tax as illegal." *Balfour v. Portland*, 28 Fed. 738.

[d] **Mortgage of Deceased's Property.**—An order of the probate court authorizing a mortgage of deceased's real estate to pay a debt of deceased is not impeachable collaterally because it does not include all the debts. *Stambach v. Emerson*, 139 Cal. 282, 72 Pac. 991.

[e] **A sale of minor's lands, ordered on the ground that "it is for the best interests of the minors that said real estate be sold," though unauthorized by statute is nevertheless not void.** *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177.

[f] **Error in Application of Proceeds of Sale.**—A decree ordering a sale of mining claims to satisfy liens is not void because it permits a lien which only attached to one piece to share pro rata in the proceeds of all. *Ryan v. Staples*, 76 Fed. 721, 23 C. C. A. 541.

**Exceeding Jurisdiction.**—See *supra*, XVII, A, 7, c, (II).

33. **Ala.**—*Pollard v. American Freehold Land Mtg. Co.*, 103 Ala. 289, 295, 16 So. 801. **Cal.**—*McCauley v. Harvey*, 49 Cal. 497; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42. **Ga.**—*Wade v. Hurst*, 143 Ga. 26, 84 S. E. 65. **Ill.**—*Bush v. Hanson*, 70 Ill. 480; *Cody v. Hough*, 20 Ill. 43; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *McLachlan v. Pease*, 66 Ill. App. 634. **Mich.**—*Benjamin v. Early*, 123 Mich. 93, 81 N. W. 973. **Mo.**—*Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078. **Neb.**—*Wabaska Electric Co. v. City of Blue Springs*, 84 Neb. 577, 122 N. W. 21; *George v. Dill*, 83 Neb. 825, 120 N. W. 447; *Gillilan v. Murphy*, 49 Neb. 779, 69 N. W. 98. **N. D.**—*Borden v. Graves*, 127 N. W. 104.

[a] A judgment by confession rendered after the court obtained jurisdiction but without the oral testimony required by statute concerning confessions of judgment is merely irregular



in fact, that it was entered in the absence of any evidence.<sup>34</sup> The amount of the judgment cannot, as a rule, be questioned collaterally,<sup>35</sup> though in some instances the judgment, where excessive, has been held void as to the excess.<sup>36</sup> Errors in regard to costs are not available in such proceedings.<sup>37</sup> No objections going merely to the character of the relief granted can avail collaterally,<sup>38</sup> unless the court thereby exceeds its jurisdiction.<sup>39</sup> Thus too broad or too limited relief<sup>40</sup> may

and cannot be impeached collaterally. *Bush v. Hanson*, 70 Ill. 480.

[b] Whether sale of infant's lands was necessary cannot be determined in a collateral attack upon the decree of court directing the sale. *Sockey v. Winstock*, 43 Okla. 758, 144 Pac. 372.

34. *Ark.*—*McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704. *Cal.*—*Siskiyou County v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Clark v. Superior Court*, 55 Cal. 199; *Ex parte Bennett*, 44 Cal. 84; *Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733. *Colo.*—*Brown v. Whetstone*, 25 Colo. App. 371, 138 Pac. 61. *D. C.*—*Bursey v. Lyon*, 30 App. Cas. 597. *Ind.*—*Young v. Wiley*, 183 Ind. 449, 107 N. E. 278. *Kan.*—*Garner v. State*, 28 Kan. 790.

35. *Ark.*—*Bonner v. Gorman*, 71 Ark. 480, 77 S. W. 602. *Ill.*—*Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206. *Ia.*—*Warthen v. Himstreet*, 112 Iowa 605, 84 N. W. 702. *S. D.*—*Green v. Sabin*, 12 S. D. 496, 81 N. W. 904. *Tex.*—*Lester v. Gatewood* (Tex. Civ. App.), 166 S. W. 389.

[a] Interest.—(1) Failure to award interest on the judgment, does not affect its validity (*Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259), (2) nor does an error in computing the interest. *Huntington v. Newport News & M. V. Co.*, 78 Conn. 35, 61 Atl. 59.

[b] That taxes were improperly included in the judgment does not avoid it. *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190.

36. *Md.*—*Bernstein v. Hobelman*, 70 Md. 29, 16 Atl. 374. *Mass.*—*Com. v. Weiher*, 3 Mete. 445. *N. H.*—*Proctor v. Andover*, 42 N. H. 348. *N. Y.*—*Butler v. Potter*, 17 Johns. 145. *Tex.*—*Eustis v. City of Henrietta*, 91 Tex. 325, 43 S. W. 259; *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340; *May v. Jackson* (Tex. Civ. App.), 73 S. W. 988.

[a] Excessive Interest.—A judgment drawing a higher interest than the statute authorizes is void as to

the excess. *Berry v. Makepeace*, 3 Ind. 154.

37. *Ark.*—*Citizens' Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102. *Cal.*—*Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259; *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. *Ill.*—*Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206. *Mass.*—*White v. Morse*, 139 Mass. 162, 29 N. E. 539. *S. D.*—*Green v. Sabin*, 12 S. D. 496, 81 N. W. 904.

[a] Costs Paid.—It cannot be urged that the judgment for costs was rendered after the costs were paid. *Guy v. Edmundson* (Tex. Civ. App.), 135 S. W. 615.

38. *Compare, supra*, XVII, A, 7, e, (V).

39. See *supra*, XVII, A, 7, e, (II).

40. *Cal.*—*Mayo v. Foley*, 40 Cal. 281. *Ill.*—*Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634; *Kruse v. Wilson*, 79 Ill. 233. *N. Y.*—*Delafield v. Brady*, 108 N. Y. 524, 15 N. E. 428.

[a] Erroneously barring a right of redemption does not invalidate the foreclosure decree. *U. S.*—*Andrews v. National Foundry & Pipe Works*, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153. *Ill.*—*Maloney v. Dewey*, 127 Ill. 395, 19 N. E. 848. *Ia.*—*Moore v. Jeffers*, 53 Iowa 202, 4 N. W. 1084. *Kan.*—*Ogden v. Walters*, 12 Kan. 282.

[b] A tax judgment including land outside the county limits is valid though the statute authorizes the auditor to list lands that are within the county only. *Williams v. Harris*, 4 Sneed (Tenn.) 332. But see *Barger's Lessee v. Jackson*, 9 Ohio 163.

[c] Provision for Resale Omitted. The failure of a foreclosure decree to provide for resale in case there is no redemption, is not fatal. *Huyck v. Graham*, 82 Mich. 353, 46 N. W. 781.

[d] Where a life estate instead of a fee is given in a foreclosure decree, the judgment is merely erroneous though the party was entitled to the

be granted, or the relief may be inconsistent,<sup>41</sup> joint instead of several,<sup>42</sup> or several instead of joint,<sup>43</sup> personal instead of in rem, where the court has jurisdiction of the parties,<sup>44</sup> or of a kind not strictly war-

latter estate. *Derr v. Wilson*, 84 Ky. 14.

A decree which fails to reserve to an infant defendant his day in court is not for that reason collaterally attackable. See 12 *STANDARD PROC.* 777.

[e] That all the matters submitted were not disposed of by the judgment does not impair its conclusiveness. *Horton v. Simon*, 5 Neb. (Unof.) 172, 97 N. W. 604.

[f] A *replevin* judgment (1) for value only, and not for the return of the property is valid collaterally (*Robertson v. Davidson*, 14 Minn. 554), *Wright v. Card*, 16 R. I. 719, 19 Atl. 709. (2) As is also one for the return of the property, omitting the value (*Manrix v. Franke*, 9 Kan. 132), (3) or one wherein both provisions are omitted. *Fromlet v. Poor*, 3 Ind. App. 425, 29 N. E. 1081. But see *Beemis v. Wylie*, 19 Wis. 318.

[g] That a refunding bond was not required by a decree of distribution is not a fatal omission. *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517.

[h] Right to Appeal.—Failure of a justice to inform the defendant of his right to appeal and to make an entry that such information was given is of no significance collaterally. *Jacoby v. Waddell*, 61 Iowa 247, 16 N. W. 119.

[i] Heirs Not Named.—A decree of distribution is conclusive though it fail to name the testator's heirs and the proportion each should take. *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132.

[j] A partition decree (1) which fails to take security to pay the difference where a larger share is assigned to one cotenant, is not void. *White v. Clapp*, 8 Mete. (Mass.) 365. (2) But such a decree has been held void as to minor children when it failed to take security to pay for their shares. *Townsend's Lessee v. Rees*, 2 Har. (Del.) 324.

41. Though two distinct and inconsistent reliefs are awarded by the decree it is not thereby rendered void. *Merillat v. Hensey*, 34 App. Cas. (D. C.) 398, 401.

42. U. S.—*Reynard v. Abbott*, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. ed. 629;

*Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535. Ark. *Cheek v. Pugh*, 19 Ark. 574. Cal. *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238; *Anderson v. Rider*, 46 Cal. 134. Kan.—*Pritchard v. Madren*, 31 Kan. 38, 2 Pac. 691. Me. See *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589. Mass.—*Brimmer v. Boston*, 102 Mass. 19. Mo.—*Asbury v. Odell*, 83 Mo. 264; *Holton v. Towner*, 81 Mo. 360; *Gray v. Bowles*, 74 Mo. 419; *Brawley v. Ranney*, 67 Mo. 280; *Lenox v. Clarke*, 52 Mo. 115. Mont. *Wells v. Clarkson*, 5 Mont. 336, 5 Pac. 894. N. J.—*Schuyler v. McCrea*, 16 N. J. L. 248. N. C.—*Carter v. Spencer*, 29 N. C. 14. Ohio.—*Lessee of Douglass v. Massie*, 16 Ohio 271. Ore. *Swift, Hurlburt & Co. v. Stark*, 2 Ore. 97, 88 Am. Dec. 463. Tenn.—*Winchester v. Beardin*, 10 Humph. 247. Tex. *Hollis v. Dashiell*, 52 Tex. 187; *Mangum v. Kenley* (Tex. Civ. App.), 145 S. W. 316. Va.—*Gray v. Stuart*, 33 Gratt. (74 Va.) 351.

[a] A tax judgment against "the unknown owners of land" instead of against them individually is valid. *Mangum v. Kenley* (Tex. Civ. App.), 145 S. W. 316.

43. A several judgment on a joint note, though contrary to the statute is not void. *Allen v. Mills*, 26 Mich. 123.

44. *Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267, 271, 68 C. C. A. 19.

[a] On Secured Note.—A personal judgment rendered on a note secured by a mortgage not yet foreclosed is not void. *Staples v. Shiver* (Ky.), 122 S. W. 826.

[b] A personal judgment (1) against a garnishee is merely erroneous (*Citizens' Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102; *Rasmussen v. McCabe*, 43 Wis. 471; *Rector v. Drury*, 3 Pin. [Wis.] 298, 4 Chand. 24), (2) unless absolutely prohibited by statute in which case it is void. *Giles v. Hicks*, 45 Ark. 271; *Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846.

[c] Where on substituted service the court renders a general and personal judgment the same is open to

ranted,<sup>45</sup> but these are matters which must be taken advantage of in a direct proceeding.

The finality of the judgment cannot be questioned collaterally for mere clerical errors,<sup>46</sup> nor because the judgment is irregular in form,<sup>47</sup>

collateral attack. *Givens v. Harlow*, 251 Mo. 231, 158 S. W. 355.

[d] A judgment against a married woman cannot be collaterally attacked on the ground that it was general and not against her sole and separate property. *Magruder v. Armes*, 15 App. Cas. (D. C.) 379.

45. *Citizens' Bank v. Commercial Nat. Bank*, 107 Ark. 142, 155 S. W. 102.

[a] A divorce decree is merely irregular which grants personal property instead of money. *Crews v. Mooney*, 74 Mo. 26. But see *Crain v. Cavana*, 62 Barb. (N. Y.) 109, where a grant of money instead of specific property in satisfaction of future dower rights was held void.

[b] Decreeing alimony in gross instead of in annual payments is irregular at most. *Taylor v. Gladwin*, 40 Mich. 232.

[c] A decree confirming a private sale of decedent's property, is not subject to collateral attack, notwithstanding the statute required such a sale to be made at public auction. *Sheffey v. Davis Colliery Co.*, 219 Fed. 465, 135 C. C. A. 177; *Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703.

46. **Taxing Costs.**—A clerical error in not taxing costs in accordance with the terms of the decree does not affect the validity of the decree. *Clark v. Barber*, 21 App. Cas. (D. C.) 274.

[a] **Wrong Amount.**—A default judgment entered for the wrong amount is binding collaterally. *Bond v. Pacheco*, 30 Cal. 530.

47. *Cal.*—*Lynch v. Kelly*, 41 Cal. 232. *Dak.*—*Porter v. Parker*, 4 Dak. 397, 33 N. W. 70. *Ill.*—*Wales v. Bogue*, 31 Ill. 464; *Lancaster v. Lane*, 19 Ill. 242; *Agnew v. Lichten*, 19 Ill. App. 79; *Schemerhorn v. Mitchell*, 15 Ill. App. 418. *Ind.*—*State v. Trout*, 75 Ind. 563; *Stone v. State*, 75 Ind. 235; *Eltzroth v. Voris*, 74 Ind. 459; *Mavity v. Eastridge*, 67 Ind. 211; *Miller v. McAllister*, 59 Ind. 491; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. *Ia.*—*State v. Pitman*, 38 Iowa 252; *Barrett v. Garragan*, 16 Iowa 47. *Mich.*—*Gaines v. Betts*, 2 Doug. 99; *Overall v. Pero*,

7 Mich. 315. *Miss.*—*Ladnier v. Ladnier*, 64 Miss. 368, 1 So. 492; *Swain v. Gilder*, 61 Miss. 667. *Mo.*—*Franse v. Owens*, 25 Mo. 329. *Neb.*—*Marsh v. Snyder*, 14 Neb. 8, 14 N. W. 804. *N. Y.*—*Felter v. Mulliner*, 2 Johns. 181. *Ohio.*—*Fairchild v. Keith*, 29 Ohio St. 156. *Pa.*—*County of Cumberland v. Boyd*, 113 Pa. 52, 4 Atl. 346. *Tex.*—*Davis v. Rankin*, 50 Tex. 279; *Wahrenberger v. Horan*, 18 Tex. 57. *Wis.*—*Nett v. Serwe*, 28 Wis. 663.

[a] That the amount is in figures instead of words does not invalidate the judgment. *Cal.*—*Dyke v. Bank*, 90 Cal. 397, 27 Pac. 304. *Ill.*—*Kopperl v. Nagy*, 37 Ill. App. 23; *Schemerhorn v. Mitchell*, 15 Ill. App. 418; *Thatcher v. Maack*, 7 Ill. App. 635. *Ind.*—*Hopper v. Lucas*, 86 Ind. 43. *Ky.*—*Long v. Ray*, 1 Dana 430. *Mich.*—*Overall v. Pero*, 7 Mich. 315. *Mo.*—*Jeffries v. Wright*, 51 Mo. 215. *Neb.*—*McNamara v. Cabon*, 21 Neb. 589, 33 N. W. 259. *N. C.*—*State v. Witherspoon*, 75 N. C. 222. *Pa.*—*Kase v. Best*, 15 Pa. 101, 53 Am. Dec. 573. *Tenn.*—*Cowan v. Loury*, 7 Lea 620; *Anderson v. Kimbrough*, 5 Coldw. 260; *Bell v. Williams*, 4 Sneed 196; *Hall v. Heffly*, 6 Humph. 444. *Tex.*—*Heck v. Martin*, 75 Tex. 469, 13 S. W. 51. *Vt.*—*Starbird v. Moore*, 21 Vt. 529.

[b] "Against" the Defendant Omitted.—(1) A judgment is not invalid which fails to state that it is "against" the defendant but states that it is in favor of plaintiff (*Aldrich v. Maitland*, 4 Mich. 205), (2) or which runs against the defendant but not in favor of the plaintiff. *Madison County Court v. Rutz*, 63 Ill. 65.

[c] **Unauthorized use of abbreviations** does not affect the conclusiveness of the judgment collaterally. *Jackson v. Cummings*, 15 Ill. 449; *Crowell v. Johnson*, 2 Neb. 146.

[d] **Amount Blank.**—That the amount of a judgment on a note is blank is not fatal where the irregularity can be corrected by amendment. *Ind.*—*Pittsburg, C. & St. L. Ry. Co. v. Elwood*, 79 Ind. 306. *Ia.*—*Lind v. Adams*, 10 Iowa 398, 77 Am. Dec. 123. But see



or is not filed or enrolled.<sup>48</sup> Mistakes or uncertainty in the judgment in the description of persons affected thereby,<sup>49</sup> or of lands involved,<sup>50</sup> or of money awarded,<sup>51</sup> would not invalidate the judgment and subject it to collateral attack when such defective description can be helped out by the pleadings, process or other portions of the record.

f. *Defenses Not Made.*—Defenses which were or might have been interposed in the original action<sup>52</sup> are not available in a collateral attack

Case *v. Plato*, 54 Iowa 64, 6 N. W. 128. Mass.—*Wells v. Dench*, 1 Mass. 232.

48. **On Confession of Judgment.** Failure to file a written decision in a jury waived case as required by Sec. 1747 of the Revised Laws, as amended by Act 117 of the Laws of 1909, does not render the judgment void and collaterally impeachable in a case in which the defendant confesses judgment for a specified sum and the plaintiff accepts the confession. *Carey v. Hawaiian Lumb. Mills Ltd.*, 21 Hawaii 311.

[a] **Decree Not Enrolled.**—"While enrollment . . . into the minutes of the court furnishes the only memorial by which an operative decree can be properly proved, nevertheless enrollment does not make the decree nor does its omission destroy it. It is of course true that when a decree is rendered in vacation it is not enough that it is reduced to writing and signed by the judge. It must also be filed by him with the register for enrollment as a decree." *Johnson v. Johnson*, 182 Ala. 376, 62 So. 706.

[b] **A decree foreclosing a mortgage** is not rendered invalid because not recorded, especially where the commissioner's deed made pursuant to the decree sets out the foreclosure proceedings and is properly filed. *Bryan v. McCaskill* (Mo.), 175 S. W. 961.

As to entry of judgment, see 14 STANDARD PROC. 813, 898, 988.

49. **Cal.**—*Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565. **Ill.**—*People v. Weber*, 164 Ill. 412, 45 N. E. 723; *Hammond v. People*, 32 Ill. 446, 83 Am. Dec. 286. **Ind.**—*Hopper v. Lucas*, 86 Ind. 43; *Bridges v. Layman*, 31 Ind. 384. **Tenn.** *Wilson & Wheeler v. Nance & Collins*, 11 Humph. 189; *Parker & Collier v. Swan*, 1 Humph. 80. **Vt.**—*Moulthrop's Admr. v. School District*, 59 Vt. 381, 9 Atl. 609.

50. **U. S.**—*Barnes v. Chicago, etc. R. Co.*, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. ed. 1128. **Ala.**—*King v. Martin*, 67 Ala. 177. **Ark.**—*Montgomery v. John-*

*son*, 31 Ark. 74. **Ga.**—*Davie v. McDaniel*, 47 Ga. 195; *Doe ex dem. Clements v. Henderson*, 4 Ga. 148, 48 Am. Dec. 216. **Ill.**—*Swift v. Lee*, 65 Ill. 336. **Ind.**—*Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795; *Allen v. Shannon*, 74 Ind. 164; *Ruston v. Grimwood*, 30 Ind. 364; *Mossman v. Forrest*, 27 Ind. 233. **Mich.**—*Morse v. Hewett*, 28 Mich. 481. **N. J.**—*Pittenger's Admr. v. Pittenger*, 3 N. J. Eq. 156. **N. Y.**—*Jaub v. Buckmiller*, 17 N. Y. 620; *Jackson ex dem. Bear v. Irwin*, 10 Wend. 442. **N. C.**—*Pendleton v. Trueblood*, 48 N. C. 96. **Tenn.**—*Planters' Bank v. Chester*, 11 Humph. 578. **Tex.**—*Robertson v. Johnson*, 57 Tex. 62; *Hurley v. Barnard*, 48 Tex. 83; *Davis v. Touchstone*, 45 Tex. 490. **Eng.** *Rorke v. Errington*, 7 H. L. Cases 617, 11 Eng. Reprint 246.

[a] **Description by reference** is sufficient. A decree, therefore, which instead of describing the land sold refers to a deed which contains the description is not invalid collaterally. *Thain v. Rudisill*, 126 Ind. 272, 26 N. E. 46.

51. **Ill.**—*Lawrence v. Post*, 20 Ill. 338, 71 Am. Dec. 274; *Atkins v. Hinman*, 7 Ill. 437. **Kan.**—*Dickens v. Crane*, 33 Kan. 344, 6 Pac. 630. **Minn.**—*Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. 344. **Mo.**—*Raley v. Guinn*, 76 Mo. 263. **Tenn.**—*Elliott v. Jordan*, 7 Baxt. 376; *Johnson v. Billingsley*, 3 Humph. 151.

52. **U. S.**—*Franklin v. German Sav. Bank*, 142 U. S. 93, 12 Sup. Ct. 147, 35 L. ed. 948; *Kaill v. Board of Directors*, 194 Fed. 73, 114 C. C. A. 151; *Helena v. United States*, 104 Fed. 113, 43 C. C. A. 429; *Board of Comrs. v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *Adams-Booth Co. v. Reid*, 112 Fed. 106; *United States v. Board of Auditors*, 28 Fed. 407. **Ark.**—*Green v. Holzer*, 118 Ark. 533, 177 S. W. 903; *Pattison v. Smith*, 94 Ark. 588, 127 S. W. 983; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *Jefferson Land Co. v. Grace*,

upon the judgment, as, for example, the defense of the statute of limitations.<sup>53</sup>

**B. FORMER JUDGMENT AS MERGER OR BAR.—1. Statements of General Rules.—a. As to Merger.—(1.) In General.—**Whenever a claim or demand is made the basis of a suit which is prosecuted to a final judgment on the merits, it becomes thereby merged in such judgment, and not only loses the vitality and identity which made it available as a cause of action or defense,<sup>54</sup> but any preference, privilege

57 Ark. 423, 21 S. W. 877; *Burcham v. Terry*, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; *Doyle v. Martin*, 55 Ark. 37, 17 S. W. 346; *Williamson v. Mimms*, 49 Ark. 336, 5 S. W. 320. **Cal.** *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984. **Colo.**—*Board v. Burpee*, 24 Colo. 57, 48 Pac. 539; *Brown v. Whetstone*, 25 Colo. App. 371, 138 Pac. 61. **Ill.**—*Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188; *Buckmaster v. Jackson ex dem. Carlin*, 4 Ill. 104. **Ia.**—*Kerr v. Kennedy*, 119 Iowa 239, 93 N. W. 353; *Sioux City & St. P. R. Co. v. Osceola Co.*, 45 Iowa 168. **Mo.** *Jones v. Edeman*, 223 Mo. 312, 122 S. W. 1047; *Einstein v. Strother* (Mo. App.), 182 S. W. 122; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111. **Pa.**—*Daubeman v. Hain*, 196 Pa. 435, 46 Atl. 442. **S. D.** *Howard v. City of Huron*, 5 S. D. 539, 59 N. W. 833. **Tex.**—*Farmer v. Saunders* (Tex. Civ. App.), 128 S. W. 941; *Edwards v. Gates* (Tex. Civ. App.), 120 S. W. 585. **Wash.**—*State v. Gloyd*, 14 Wash. 5, 44 Pac. 103. **Wyo.**—*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 45 Pac. 494.

See also the title "Res Judicata."

Judgment as merger of defensive matters, see *infra*, XVII, B.

[a] **Lien Expired.**—A judgment foreclosing a lien for street assessment is not impeachable collaterally on the ground that the lien had ceased to exist before the foreclosure complaint was filed. *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984.

**53. U. S.**—*Burnet v. Desmornes*, 226 U. S. 145, 33 Sup. Ct. 63, 57 L. ed. 159. **Cal.**—*Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984. **Kan.**—*Head v. Daniels*, 38 Kan. 1, 15 Pac. 911. **Mo.** *Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078. **Neb.**—*Bressee v. Seberger*, 88 Neb. 632, 130 N. W. 264. **N. J.**—*Palmer v. Board of Chosen Freeholders*, 77 N. J. L. 143, 71 Atl. 285.

See generally the title "Limitation of Actions."

[a] **An action to claim filiation** may by the statutes of Porto Rico, be filed at any time within two years after the child becomes of age. A decree of legitimation rendered in an action filed after that period is not open to collateral attack on that ground. *Burnet v. Desmornes*, 226 U. S. 145, 33 Sup. Ct. 63, 57 L. ed. 159.

[b] **An administrator's sale** (1) to pay outlawed debts has been upheld collaterally. *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407; *Stanley v. Noble*, 59 Iowa 666, 13 N. W. 839. (2) Such sales have on the other hand been held void. **Mass.**—*Thompson v. Brown*, 16 Mass. 172; *Wellman v. Lawrence*, 15 Mass. 326; *Heath v. Wells*, 5 Pick. 140, 16 Am. Dec. 383. **Mich.**—*Hoffman v. Beard*, 32 Mich. 218. **N. H.**—*Godkin v. Sanford*, 3 N. H. 491.

[c] **A judgment against decedent's estate** on an outlawed debt is conclusive collaterally. *Weber v. Noth*, 51 Iowa 375, 1 N. W. 652.

**54. U. S.**—*United States v. Price*, 9 How. 83, 13 L. ed. 56; *United States v. Leffler*, 11 Pet. 86, 9 L. ed. 642; *City of Harper, Kan. v. Daniels*, 211 Fed. 57, 129 C. C. A. 242; *Manhattan Trust Co. v. Trust Co. of North America*, 107 Fed. 328, 46 C. C. A. 322; *Independent Electric Co. v. Jeffrey Mfg. Co.*, 76 Fed. 981; *Schuler v. Israel*, 27 Fed. 851; *Ries v. Rowland*, 11 Fed. 657, 4 McCrary 85; *Connecticut Mut. L. Ins. Co. v. Jones*, 8 Fed. 303, 1 McCrary 388. **Ala.**—*Brown v. Long*, 192 Ala. 72, 68 So. 324; *Davis v. Bedsole*, 69 Ala. 362; *Mobile Bank v. Mobile, etc. R. Co.*, 69 Ala. 305; *Mosca Town Co. v. Wellington*, 39 Colo. 326, 89 Pac. 783, 121 Am. St. Rep. 175. **Conn.** *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Marlborough v. Sisson*, 31 Conn. 332; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec.

or other peculiar quality of the claim will usually be extinguished by

- EST. *Humphrey v. Barnes*, 17 Conn. 420; *Boardman v. De Forest*, 5 Conn. 1. D. C.—*National Metropolitan Bank v. Hitz*, 1 Mackey 111; *Bunch v. United States, Inc. of Kappeler*, 40 App. Cas. 100. Fla.—*Moore v. Folkel*, 7 Fla. 44; *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293. Ga.—*Glausier, Watson & Co. v. Whaley*, 11 Ga. App. 404, 75 S. E. 441. Ill.—*Peoria Sav., etc. Co. v. Elder*, 165 Ill. 55, 45 N. E. 1083; *Runnamaker v. Goodhue*, 54 Ill. 393; *Wayman v. Cochran*, 35 Ill. 152; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58. Ind.—*Hord v. Bradbury*, 156 Ind. 20, 59 N. E. 27; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Indiana, B. & W. R. Co. v. Koons*, 105 Ind. 507, 5 N. E. 549; *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Ward v. Haggard*, 75 Ind. 381; *Marshall v. Stewart*, 65 Ind. 245; *Pressler v. Turner*, 57 Ind. 56; *Ault v. Zehering*, 38 Ind. 429; *Crosby v. Jeroloman*, 37 Ind. 264; *Cissna v. Haines*, 18 Ind. 496; *Dunn v. Dilks*, 31 Ind. App. 673, 68 N. E. 1935. Ia.—*Harford v. Street*, 46 Iowa 594; *North v. Mudge*, 13 Iowa 496, 81 Am. Dec. 441. Kan.—*Rossiter v. Merriman*, 80 Kan. 739, 104 Pac. 858, 24 L. R. A. (N. S.) 1095; *Redden v. First Nat. Bank*, 66 Kan. 747, 71 Pac. 578; *Price v. First Nat. Bank*, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419; *Thisler v. Miller*, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302; *Bolen Coal Co. v. Whittaker Brick Co.*, 52 Kan. 747, 35 Pac. 810; *Ashton v. Clayton*, 27 Kan. 626. Ky.—*Smith v. Belmont & N. Iron Co.*, 11 Bush 390; *Scott v. Sanders' Heirs*, 6 J. J. Marsh. 506. La.—*West Feliciana R. Co. v. Thornton*, 12 La. Ann. 736, 68 Am. Dec. 778; *Abat v. Buisson*, 9 La. 417; *Makee v. Cairnes*, 2 Mart. (N. S.) 599. Me.—*Brown v. West*, 73 Me. 23; *Sweet v. Brackley*, 53 Me. 346; *Uran v. Houdlette*, 36 Me. 15; *Pike v. McDonald*, 32 Me. 418, 54 Am. Dec. 597; *White v. Philbrick*, 5 Greenl. 147, 17 Am. Dec. 214. Md.—*Johnson v. Hines*, 61 Md. 122, 136; *Walsh v. Chesapeake, etc. Canal Co.*, 59 Md. 423; *Strocks v. Dyer*, 39 Md. 424; *Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708; *United States Bank v. Merchants' Bank*, 7 Gill 415; *Moale v. Hollins*, 11 Gill & J. 11, 33 Am. Dec. 684; *Harris v. Alcock*, 10 Gill & J. 226, 32 Am. Dec. 158. Mass.—*Wyman v. Fabens*, 111 Mass. 77; *Bangs v. Watson*, 9 Gray 241; *Thatcher v. Gannon*, 12 Mass. 268. Mich.—*Town v. Smith*, 14 Mich. 348. Miss.—*Agnew v. McElroy*, 19 Smed. & M. 552, 48 Am. Dec. 772; *Standifer v. Bush*, 8 Smed. & M. 383. Mo.—*Cooksey v. Kansas City, etc. R. Co.*, 74 Mo. 477; *Moran v. Plankinton*, 64 Mo. 337; *Wyeoff v. Epworth Hotel Construction, etc. Co.*, 146 Mo. App. 554, 125 S. W. 550. N. H.—*Andrews v. Varrell*, 46 N. H. 17. N. J.—*Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381; *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756; *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243. N. Y.—*Gutta-Pereha, etc. Mfg. Co. v. Houston*, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412; *Davies v. New York*, 93 N. Y. 250, 4 Civ. Proc. 290; *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655; *Caylus v. New York, etc. R. Co.*, 76 N. Y. 609; *Goodrich v. Dunbar*, 17 Barb. 644; *Besley v. Palmer*, 1 Hill 482; *Ives v. Goddard*, 1 Hilt. 434; *Miller v. Covert*, 1 Wend. 487; *Knight v. Rothschild*, 132 App. Div. 274, 117 N. Y. Supp. 26. N. C.—*Snow Steam Pump Co. v. Dunn*, 119 N. C. 77, 25 S. E. 741; *Grant v. Burgwyn*, 88 N. C. 95; *Gibson v. Smith*, 63 N. C. 103; *Platt v. Potts*, 33 N. C. 266, 53 Am. Dec. 412. Ohio.—*Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991. Ore.—*Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915C, 522. Pa.—*Murray v. Weigle*, 118 Pa. 159, 11 Atl. 781; *Marsh v. Pier*, 4 Rawle 273, 26 Am. Dec. 131; *Dixon v. Miller*, 20 Pa. Co. Ct. 335. Tenn.—*Carey v. Campbell*, 3 Sneed 62. Tex.—*Gibson v. Hale*, 57 Tex. 405; *Darragh v. Kaufman*, 2 Posey Unrep. Cas. 97. Wash.—*Spokane Merchants' Assn. v. First Nat. Bank*, 86 Wash. 367, 150 Pac. 434. Wis.—*Jameson v. Barber*, 56 Wis. 630, 14 N. W. 859. Eng.—*Lockyer v. Ferryman*, 2 App. Cas. 519; *King v. Hoare*, 13 Mees. & W. 494; *Nelson v. Couch*, 15 C. B. N. S. 99, 108, 10 Jur. (N. S.) 366, 33 L. J. C. P. 46, 8 L. T. Rep. (N. S.) 577, 11 Wkly. Rep. 964, 109 E. C. L. 99, 143 Eng. Reprint 721; *Buckland v. Johnson*, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145, 139 Eng. Reprint 375; *Stafford v. Clark*, 2 Bing. 377, 9 E. C. L. 623, 1 Car. & P. 24, 12 E. C. L. 27, 3 L. J.



the merger, rather than transmitted to the judgment.<sup>55</sup> It has been held, however, that the rule is not inflexible, and that it will not be applied by a court of equity, if to do so would produce inequity.<sup>56</sup>

(II.) Is Judgment New Liability. — Generally and for most purposes the merger of the original claim or cause of action in a judgment creates a new and distinct liability.<sup>57</sup> Under some circumstances, however, the court may look to the nature of the obligation upon which the judgment is based for the purpose of determining the character

C. P. (O. S.) 48, 9 Moore C. P. 724, 130 Eng. Reprint 352; Tarleton v. Allhusen, 2 Ad. & El. 32, 4 L. J. K. B. 17, 29 E. C. L. 37, 111 Eng. Reprint 13; Bagot v. Williams, 3 B. & C. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115, 107 Eng. Reprint 721; Gregory v. Malesworth, 3 Atk. 626, 26 Eng. Reprint 1160; Can.—Davidson v. Belleville, etc. R. Co., 5 Ont. App. 315; McLennan v. McMonies, 23 U. C. Q. B. 114; Sloan v. Creasor, 22 U. C. Q. B. 127; McKay v. Fee, 20 U. C. Q. B. 268; McArthur v. Cool, 19 U. C. Q. B. 476; Proudfoot v. Lawrence, 8 U. C. Q. B. 269.

[a] Notes given for the purchase price of land are merged in a judgment thereon, notwithstanding the fact that a sale of the land under such judgment fails to produce a sufficient amount to pay the whole debt. Daniels v. Runyons, 164 Ky. 309, 175 S. W. 338.

55. U. S.—New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. ed. 96. Minn.—Temple v. Scott, 3 Minn. 419. Ohio.—Spencer v. Brockway, 1 Ohio 259, 13 Am. Dec. 615. Wash. Crowder v. Morphy, 61 Wash. 626, 112 Pac. 742.

As to merger of security, see *infra*, XVII, B, 2, g, (II), (F).

[a] A bond upon which judgment has been rendered becomes merged in the judgment and any remedy available is on the judgment and not on the bond. Bunch v. United States, use of Keppler, 40 App. Cas. (D. C.) 156.

[b] A chattel mortgage is merged in a judgment foreclosing the same. Spokane Merchants' Assn. v. First Nat. Bank, 86 Wash. 367, 150 Pac. 434.

[c] A claim for necessities is merged in and extinguished by a judgment in a suit on such claim, and an action on such judgment is not a suit for necessities furnished, within the purview of the statute. Brown v. West, 73 Me. 23.

[d] Merged Notes as Evidence.—The

merger by a foreclosure decree in chancery, of the original notes secured by a trust deed, so they could not form the basis of another action, did not destroy their character as evidence in ejectment founded on the trust deed. Brown v. Schintz, 203 Ill. 136, 67 N. E. 767.

56. Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924.

[a] A judgment lien on the homestead of a debtor is not merged by a decree for its enforcement so as to destroy the lien of the judgment. Batten v. Lowther, 74 W. Va. 167, 81 S. E. 821.

57. Ala.—Aultman v. Gamble, 88 Ala. 424, 7 So. 248; Lee's Admr. v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505. Kan.—Rossiter v. Merriman, 80 Kan. 739, 104 Pac. 858, 24 L. R. A. (N. S.) 1095. Mass.—Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009. N. Y.—Newcomb v. Clark, 1 Denio 226; Knight v. Rothschild, 132 App. Div. 274, 117 N. Y. Supp. 26; Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660. But see Porter v. Kingsbury, 77 N. Y. 164. N. C.—State use Gregory v. Hooks, 33 N. C. 371. Pa.—Blystone v. Blystone, 51 Pa. 373; Work v. Prall, 26 Pa. Super. 104.

[a] Judgment recovered by an administrator, on a debt due his intestate, is due to the administrator, and he may sue on it in the courts of another state, without even alleging his representative character, while an administrator cannot sue on a claim due his intestate outside of the state in which his letters of administration issued. U. S.—Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315; Trecothick v. Austin, 4 Mason 16, 24 Fed. Cas. No. 14,164. Mass.—Talmage v. Chapel, 16 Mass. 71. Mo.—Hall v. Harrison, 21 Mo. 227, 64 Am. Dec. 225. Tenn.—Young v. O'Neal, 3 Sneed 55. Vt.—Allen v. Lyman, 27 Vt. 20.

[b] Note Extinguished by Judg-

of the liability of the judgment,<sup>58</sup> as where it is claimed that the liability has been terminated by a subsequent discharge in bankruptcy, in which event the court will look to the nature of the original obligation to determine whether the discharge operates against it.<sup>59</sup>

b. *As to Judgment as Bar.*—(I.) *In General.*—A former recovery operates as an estoppel to a subsequent action, unless reversed, vacated or annulled, where the judgment or decree is final and was rendered by a court of competent jurisdiction on the merits of the controversy between the same parties or their privies, in a suit or proceeding involving the same issues as are raised in the subsequent suit.<sup>60</sup>

ment.—When a note, bearing ten per cent interest, is put into judgment, it is thereby extinguished, and the debt will thereafter draw but six per cent interest. *Mitchell v. Mayo*, 16 Ill. 83.

58. *Judgment on Penal Obligation.* Right to look to original liability to determine whether judgment shall be refused extraterritorial recognition because penal, see *infra*, XVIII, B, 2, b, (II).

59. *U. S.*—*Id. v. Shephardson*, 220 Fed. 186; *In re Cole*, 106 Fed. 837. Cal.—*Woehrl v. Canclini*, 158 Cal. 107, 109 Pac. 888. Ill.—*Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55. Ind.—*Madison Tp. v. Dunkle*, 114 Ind. 262, 16 N. E. 593; *Donald v. Kell*, 111 Ind. 1, 11 N. E. 782; *Borror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123. Mass.—*Lee v. Tarplin*, 194 Mass. 47, 79 N. E. 786. Mo.—*Lippincott v. Herman*, 179 Mo. 350, 78 S. W. 1132; *Goodman v. Herman*, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885. N. J.—*Barnes Cycle Co. v. Haines*, 69 N. J. Eq. 651, 61 Atl. 515. Okla.—*Chambers v. Kirk*, 41 Okla. 696, 139 Pac. 986.

60. *U. S.*—*Hunt v. Blackburn*, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. ed. 488; *Young v. Black*, 7 Cranch 565, 3 L. ed. 440; *Linton v. Omaha Wholesale Produce Co.*, 218 Fed. 331, 133 C. C. A. 336; *Messinger v. Anderson*, 171 Fed. 785, 96 C. C. A. 445; *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed. 64, 67 C. C. A. 190; *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; *Casey v. Pennsylvania Asphalt Pav. Co.*, 109 Fed. 744 (*affirmed* in 114 Fed. 189, 52 C. C. A. 145); *Linton v. National L. Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54; *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.*, 95 Fed. 457, 37 C. C. A. 146; *Ball v. Trenholm*, 45 Fed. 588; *Ramsey v. Herndon*, 1 McLean 450, 20

Fed. Cas. No. 11,546; *Hugh v. Blake*, 1 Mason 515, 12 Fed. Cas. No. 6,845; *Campbell v. Strong*, Hempst. 265, 4 Fed. Cas. No. 2,367a. Ala.—*Hall & Farley v. Alabama Term. & Imp. Co.*, 176 Ala. 398, 56 So. 235; *Penny v. Brithish, etc. Mtg. Co.*, 132 Ala. 357, 31 So. 96; *Strang v. Moog*, 72 Ala. 460; *Tankersly v. Pettis*, 71 Ala. 179; *Mobile Bank v. Mobile, etc. R. Co.*, 69 Ala. 305; *Gilbreath v. Jones*, 66 Ala. 129; *Cannon v. Brame*, 45 Ala. 262; *Mervine v. Parker*, 18 Ala. 241. Ariz.—*Reilly v. Perkins*, 6 Ariz. 188, 56 Pac. 734. Ark.—*McWhorter v. Andrews*, 53 Ark. 307, 13 S. W. 1099; *Peay v. Duncan*, 20 Ark. 85; *Trammell v. Thurmond*, 17 Ark. 203. Cal.—*Krzepicki v. Krzepicki*, 167 Cal. 449, 140 Pac. 13; *South San Bernardino Land, etc. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245, 59 Pac. 699; *Keech v. Beatty*, 127 Cal. 177, 59 Pac. 837; *Chase v. Swain*, 9 Cal. 130. Colo.—*Mosca Town Co. v. Wellington*, 39 Colo. 326, 89 Pac. 783, 121 Am. St. Rep. 175; *Denver v. Lobenstein*, 3 Colo. 216; *Smith v. Schlink*, 15 Colo. App. 325, 62 Pac. 1044. Conn.—*Bell v. Raymond*, 18 Conn. 91; *Coit v. Tracy*, 8 Conn. 268, 20 Am. Dec. 110; *Dennison v. Hyde*, 6 Conn. 508. Del.—*Solomon v. Loper*, 4 Harr. 187. D. C.—*Slack v. Perrine*, 9 App. Cas. 128; *Gray v. District of Columbia*, 1 App. Cas. 20; *Birdsall v. Welch*, 6 D. C. 316. Fla.—*Moore v. Felkel*, 7 Fla. 44; *Thornton v. Eppes*, 6 Fla. 546. Ga.—*Johnson v. Hayes*, 139 Ga. 218, 77 S. E. 73; *Shackelford v. Covington*, 130 Ga. 858, 61 S. E. 984; *Cheney v. Selman*, 71 Ga. 384; *Grubb v. Kolb*, 55 Ga. 630; *Bradley v. Johnson*, 49 Ga. 412; *Russell v. Slaton*, 38 Ga. 195; *Crutchfield v. State*, 24 Ga. 335; *Kenan v. Miller*, 2 Ga. 325. Haw.—*Archer v. Naka*, 20 Hawaii 215. Ill.—*Markley v. People*, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; *Wright*

This doctrine of merger or bar is to be distinguished from the doctrine of *res judicata*, although both are based upon the same principle, since the latter is concerned with the conclusiveness of a former adjudication as to some matter of fact whenever the same fact comes in question

- v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761; *Alexander v. Potts*, 151 Ill. App. 587; *Ginsburg v. Morrall*, 105 Ill. App. 213; *Baxter v. Thede*, 103 Ill. App. 57; *Backman v. Schertz*, 73 Ill. App. 479. **Ind.**—*Hord v. Bradbury*, 156 Ind. 20, 59 N. E. 27; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Bougher v. Scobey*, 21 Ind. 365; *Housemire v. Moulton*, 15 Ind. 367. **Ia.** *Hogle v. Smith*, 136 Iowa 32, 113 N. W. 556; *Madison v. Garfield Coal Co.*, 114 Iowa 56, 86 N. W. 41; *Hahn v. Miller*, 68 Iowa 745, 28 N. W. 51; *Goodenow v. Litchfield*, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; *Street v. Beckman*, 43 Iowa 496; *Hart v. Jewett*, 11 Iowa 276. **Kan.**—*Missouri, K. & T. R. Co. v. Allen*, 67 Kan. 838, 73 Pac. 98; *Santa Fe Bank v. Haskell County Bank*, 51 Kan. 50, 32 Pac. 627. **Ky.** *Hall v. Forman*, 82 Ky. 505; *Campbell v. Mayhugh*, 15 B. Mon. 142; *Hayden v. Boothe*, 2 A. K. Marsh. 353; *Wallace v. Usher*, 4 Bibb 508; *Smith v. Belmont*, etc. *Iron Co.*, 11 Bush 390. **La.**—*Slocumb v. De Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740. **Me.**—*Woodbury v. Portland Mar. Soc.*, 94 Me. 122, 46 Atl. 797; *Walker v. Chase*, 53 Me. 258. **Md.** *Tifel v. Jenkins*, 95 Md. 665, 53 Atl. 429; *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; *Barriek v. Horner*, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459; *Streeks v. Dyer*, 39 Md. 424; *Whitehurst v. Rogers*, 38 Md. 503; *Beall v. Pearre*, 12 Md. 550. **Mass.**—*Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 1; *Foster v. Richard Busted*, 100 Mass. 409, 1 Am. Rep. 125; *Smith v. Whiting*, 11 Mass. 445; *Bigelow v. Winsor*, 1 Gray 299. **Mich.**—*Hanchett v. Auditor-Gen.*, 124 Mich. 424, 83 N. W. 103; *Sayers v. Auditor-Gen.*, 124 Mich. 259, 82 N. W. 1045; *Barker v. Cleveland*, 19 Mich. 230; *Wales v. Lyon*, 2 Mich. 276. **Minn.**—*Sheets v. Ramer*, 125 Minn. 98, 145 N. W. 787; *Keene v. Lobdell*, 85 Minn. 110, 88 N. W. 251; *Truesdale v. Farmers' L. & T. Co.*, 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238. **Miss.**—*Adams v. Yazoo, etc. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; *Perry v. Lewis*, 49 Miss. 443; *Wall v. Wall*, 28 Miss. 409; *Agnew v. McElroy*, 10 Smed. & M. 552, 48 Am. Dec. 772. **Mo.**—*Chouteau v. Gibson*, 76 Mo. 38; *McKinney's Admr. v. Davis*, 6 Mo. 501; *McKnight v. Taylor*, 1 Mo. 282; *Wycoff v. Epworth Hotel Construction, etc. Co.*, 146 Mo. App. 554, 125 S. W. 550; *Barber Asphalt Pav. Co. v. Field* (Mo. App.), 97 S. W. 179. **Neb.**—*Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821, 139 N. W. 666; *Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287; *State ex rel. Kennedy v. Broatch*, 68 Neb. 687, 94 N. W. 1016; *Wood v. Carter*, 67 Neb. 133, 93 N. W. 158; *Hamilton Nat. Bank v. American L. & T. Co.*, 66 Neb. 67, 92 N. W. 189; *State v. Savage*, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; *Dillon v. Chicago, etc. R. Co.*, 58 Neb. 472, 78 N. W. 927; *Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406; *Spear v. Tidball*, 40 Neb. 107, 58 N. W. 708; *Miles v. Ballantine*, 4 Neb. (Unof.) 171, 93 N. W. 708. **Nev.** *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124; *Sherman v. Dilley*, 3 Nev. 21. **N. H.**—*Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *Claggett v. Simes*, 25 N. H. 402; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. **N. J.** *Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381. **N. M.**—*Lindauer Merc. Co. v. Boyd*, 11 N. M. 464, 70 Pac. 568; *Territory v. Santa Fe Pac. R. Co.*, 10 N. M. 410, 62 Pac. 985; *United States v. Maxwell Land Grant Co.*, 5 N. M. 297, 21 Pac. 153, 5 L. R. A. 751. **N. Y.**—*Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; *People v. Smith*, 51 Barb. 360; *Kent v. Hudson River R. Co.*, 22 Barb. 278; *Baker v. Rand*, 13 Barb. 152; *Miller v. Covert*, 1 Wend. 487; *Burt v. Sternburgh*, 4 Cow. 559, 15 Am. Dec. 402; *Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256; *Rice v. King*, 7 Johns. 20; *In re Moran*, 59 Misc. 133, 112



in a subsequent proceeding between the same parties or their privies, even though the subject-matter of the suit or the cause of action is

N. Y. S. 207. But see *Kerby v. Daly*, 63 N. Y. 659, holding that where an appellate court affirms a judgment on condition that the plaintiff deduct the amount of one item of his claim, a subsequent action for recovery on the item deducted is not barred by the judgment. **N. C.**—*White v. Tayloe*, 153 N. C. 29, 68 S. E. 907; *Durham Consol. Land, etc. Co. v. Guthrie*, 123 N. C. 185, 31 S. E. 601; *Albertson v. Williams*, 97 N. C. 264, 1 S. E. 841; *Long v. Jarratt*, 94 N. C. 443; *Gay v. Stancell*, 76 N. C. 369; *Falls v. Gamble*, 66 N. C. 455. **Ohio.**—*Bell v. McColloch*, 31 Ohio St. 397; *Grant v. Ramsey*, 7 Ohio St. 157; *Moore v. Robison*, 6 Ohio St. 302; *Maloney v. Maloney*, 12 Ohio Cir. Ct. 700, 4 Ohio Cir. Dec. 255. **Okla.** *Pratt v. Ratliff*, 10 Okla. 168, 61 Pac. 523. **Ore.**—*White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Crabill v. Crabill*, 22 Ore. 588, 30 Pac. 320; *Glenn v. Savage*, 14 Ore. 567, 13 Pac. 442. **Pa.**—*In re Shortlidge's Estate*, 214 Pa. 620, 64 Atl. 318; *Bell v. Allegheny County*, 184 Pa. 296, 39 Atl. 227, 63 Am. St. Rep. 795; *Bolton v. Hey*, 168 Pa. 418, 31 Atl. 1097; *Haneman v. Pile*, 161 Pa. 599, 29 Atl. 113; *Marsteller v. Marsteller*, 132 Pa. 517, 19 Atl. 344, 19 Am. St. Rep. 604; *Gordinier's Appeal*, 89 Pa. 528; *Finley v. Hanbest*, 30 Pa. 190; *Cleveland, etc. R. Co. v. Erie*, 27 Pa. 380, 1 Grant's Cas. 212; *Kelsey v. Murphy*, 26 Pa. 78; *Kennedy v. Lancaster County Bank*, 18 Pa. 347; *Man v. Drexel*, 2 Pa. 202; *Jatho v. Green, etc. Ry. Co.*, 4 Phila. 24; *Bordley's Estate*, 3 Phila. 127. **R. I.**—*Curry v. Swett*, 13 R. I. 476. **S. C.**—*Smith v. Smith*, 55 S. C. 507, 33 S. E. 583; *Jones v. Weathersbee*, 4 Strobb. 50, 51 Am. Dec. 653. **S. D.** *Howard v. Huron*, 6 S. D. 180, 60 N. W. 803. **Tenn.**—*Guthrie v. Connecticut Indemnity Assn.*, 101 Tenn. 643, 49 S. W. 829; *Carey v. Campbell*, 3 Sneed 62; *Ellis v. Staples*, 9 Humph. 238. **Tex.**—*Crane v. Blum*, 56 Tex. 325; *Cook v. Burnley*, 45 Tex. 97; *Watson v. Hopkins*, 27 Tex. 637; *Arees v. Tate*, 1 White & W. Civ. Cas., §1222. **Vt.** *Hodges v. Eddy*, 52 Vt. 434; *Pierson v. Catlin*, 18 Vt. 77; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345. **Va.**—*Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918; *Saunders v. Grigg's Admr.*, 81 Va. 506; *Howison v. Weeden*, 77 Va. 704. **Wash.**—*Thompson v. Washington Nat. Bank*, 68 Wash. 42, 122 Pac. 606. **W. Va.**—*Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948; *Corrothers v. Sargent*, 20 W. Va. 351. **Wis.**—*Swennes v. Sprain*, 120 Wis. 68, 97 N. W. 511; *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846; *Dick v. Webster*, 6 Wis. 481; *Woodward v. Hill*, 6 Wis. 143. **Wyo.**—*Price v. Bonfield*, 2 Wyo. 80. **Eng.**—*Phosphate Sewage Co. v. Molleson*, 4 App. Cas. 801; *Lockyer v. Ferryman*, 2 App. Cas. 519; *Hammond v. Schofield*, 1 Q. B. 450, 60 L. J. Q. B. 539; *In re May*, 28 Ch. Div. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 78, 33 Wkly. Rep. 917; *Newington v. Levy*, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. Rep. N. S. 70, 18 Wkly. Rep. 1198 (*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 24, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473); *Priestman v. Thomas*, 9 P. D. 210, 53 L. J. 109, 51 L. T. Rep. (N. S.) 843, 32 Wkly. Rep. 842; *Kingston's Case*, 20 How. St. Tr. 537; *King v. Hoare*, 13 Mees. & W. 494; *Nelson v. Couch*, 15 C. B. N. S. 99, 108, 10 Jur. N. S. 366, 33 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99, 143 Eng. Reprint 721; *Buckland v. Johnson*, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145, 139 Eng. Reprint 375; *Stafford v. Clark*, 2 Bing. 377, 9 E. C. L. 623, 1 Car. & P. 24, 12 E. C. L. 27, 3 L. J. C. P. (O. S.) 48, 9 Moore C. P. 724, 130 Eng. Reprint 352; *Peterborough v. Germaine*, 6 Bro. P. C. 1, 2 Eng. Reprint 893. **Can.**—*Cochrane v. Hamilton Prov. Loan Society*, 15 Ont. 128; *Davidson v. Belleville, etc. R. Co.*, 5 Ont. App. 315; *Sloan v. Creasor*, 22 U. C. Q. B. 127; *McArthur v. Cool*, 19 U. C. Q. B. 476; *Stinson v. Branigan*, 10 U. C. Q. B. 402.

[a] **Estoppel by Judgment Applies Alike to the State as to Individuals.** *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587.

[b] **A fact or right in issue determined specifically or generally by the decree of the court cannot be again**

not the same.<sup>61</sup> So also it is to be distinguished from "collateral attack," which is concerned solely with the right collaterally to impeach the validity of a judgment.<sup>62</sup>

(II.) As Affected by Time of Filing Suit. — A judgment may be pleaded as a bar to a suit begun prior to its rendition, since such judgment, being the first rendered on the cause of action, effectually merges the same without regard to the time or order of the filing of the suits.<sup>63</sup>

**2. What Matters and Under What Circumstances They Are Concluded or Barred.** — a. *Matters Adjudicated by Former Judgment.* A former judgment on the merits is conclusive, in a second suit between the same parties, as to every matter offered and received to sustain or defeat a demand, even where the second does not pertain to the same subject-matter or seek the same object.<sup>64</sup> So too, where

litigated by the parties to that suit, over the winning party's objections without a modification or vacation of that decree. *Triska v. Miller*,<sup>86</sup> Neb. 503, 125 N. W. 1070.

As to the essentials of and limitations on the doctrine, see the following discussion.

61. See the title "*Res Judicata*," and D. C.—*Strong v. Grant*, 2 Mackey 218. Kan.—*Atchison, T. & S. F. Ry. Co. v. Commissioners of Jefferson County*, 12 Kan. 127. Pa.—*Pennebaker v. Parker*, 33 Pa. Super. 458. Tex.—*Lane v. Kuehn* (Tex. Civ. App.), 141 S. W. 363.

62. See *supra*, XVII, A.

63. U. S.—*Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. ed. 707; *Keeley v. Ophir Hill Con. Min. Co.*, 169 Fed. 601, 95 C. C. A. 99; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288 (reversing 128 Fed. 608); *Penfield v. Potts & Co.*, 126 Fed. 475, 61 C. C. A. 371; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980, 6 C. C. A. 661; *Bryar v. Bryar*, 78 Fed. 657; *Sharon v. Hill*, 26 Fed. 337; *United States v. Dewey*, 6 Biss. 501, 25 Fed. Cas. No. 14,956. Ala.—*Davis v. Bedsole*, 69 Ala. 362. Conn.—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. Ga.—*Merritt v. Bagwell*, 70 Ga. 578. Ind.—*Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441. Ia.—*Estes v. Chicago*, etc. R. Co., 72 Iowa 235, 33 N. W. 647. La.—*Bourgeois v. Jacobs*, 45 La. Ann. 1310, 14 So. 68. Me.—*Oxford v. Paris*, 33 Me. 179. Md.—*United States Bank v. Merchants' Bank*, 7 Gill 415. Mass.—*Marble v. Keyes*, 9 Gray 221. Minn.—*Allis v. Davidson*, 23 Minn. 442. Mo.

*Nave v. Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; *City of Galatin v. Netherton*, 189 Mo. App. 24, 176 S. W. 495. N. H.—*Andrews v. Varrell*, 46 N. H. 17. N. Y.—*Nicholl v. Mason*, 21 Wend. 339; *Mandeville v. Avery*, 63 Hun 624, 17 N. Y. Supp. 429. Ohio.—*North British & M. Ins. Co. v. Cohn*, 11 Ohio Cir. Dec. 826, 17 Ohio Cir. Ct. 185. Ore.—*Barrell v. Title Guarantee, etc. Co.*, 27 Ore. 77, 39 Pac. 992. Pa.—*Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Finley v. Haubest*, 30 Pa. 190; *Duffy v. Lytle*, 5 Watts 120; *Jones v. Ellison*, 10 W. N. C. 205. Tex.—*Kell Milling Co. v. Bank of Miami* (Tex. Civ. App.), 168 S. W. 46. Vt.—*Morgan v. Barker*, 26 Vt. 602; *Small v. Haskins*, 26 Vt. 209; *Stevens v. Briggs*, 14 Vt. 44, 39 Am. Dec. 209. Va.—*Jones v. Myrick*, 8 Gratt. (49 Va.) 179. W. Va.—*Williams v. Carr*, 85 S. E. 69.

[a] A judgment rendered by a state court, in a suit between the same parties, is a bar to a suit in a federal court, though the suit in the state court was instituted subsequent to the one in the federal court. *Case v. Mountain Timber Co.*, 210 Fed. 565. See *infra*, XVIII.

[b] Where exclusive control has been taken of the subject-matter by the court in which suit is first filed, a judgment rendered thereon, by another court in a second suit, is not a bar to the original suit. *Sharp v. Bonham*, 213 Fed. 660.

64. U. S.—*In re Ross*, 204 Fed. 248, 122 C. C. A. 516; *Gilmer v. Billings*, 55 Fed. 775. Ga.—*Fowler v. Davis*, 1 Ga. App. 549, 57 S. E. 939. Ia.—*Determann v. Luehrsmann*, 74 Iowa 275, 37

the right or title, or ground of relief, set up in the two suits is the same, or predicated upon the same claim or source of title constituting the basis of the former adjudication, the former judgment will operate as an estoppel to the second suit, notwithstanding the fact that two separate rights or claims or two distinct parcels or kinds of property are involved in the two actions.<sup>65</sup>

b. *Matters Not in Issue.*—A former judgment does not operate as a bar to a subsequent suit upon any right or claim arising out of the same subject-matter, which is severable from the former cause of action and was not put in issue and adjudicated in the prior action;<sup>66</sup>

N. W. 330. **Kan.**—Woodman v. Davison, 85 Kan. 713, 118 Pac. 1066. **Ky.** Stevenson v. Flournoy, 89 Ky. 561, 13 S. W. 210; Burns v. Stephenson, 3 Ky. L. Rep. 754, 11 Ky. Opin. 589. **Md.** Bruner v. Ramsburg, 43 Md. 560; Chesapeake, etc. Canal Co. v. Gittings, 36 Md. 276. **Mass.**—Morse v. Elms, 131 Mass. 151; Whitman v. Boston, etc. R. Co., 16 Gray 530. **Mich.**—Hunt v. Middleworth, 44 Mich. 448, 7 N. W. 57. **Miss.**—Burkett v. Burkett, 81 Miss. 593, 33 So. 417. **N. Y.**—Sullivan v. Miller, 106 N. Y. 635, 13 N. E. 772; Van Gelder v. Hallenbeck, 46 Hun 432; Bearnes v. Bearnes, 66 How. Pr. 456. **Ore.**—Dalton v. Kelsey, 58 Ore. 244, 114 Pac. 464. **P. I.**—Del Rosario v. Celosia, 26 Phil. Isl. 404. **Tex.**—Flippen v. Dixon, 83 Tex. 421, 18 S. W. 803, 29 Am. St. Rep. 653. **Wash.**—Parker v. Galbraith, 46 Wash. 280, 89 Pac. 712.

See the title "Res Judicata."

**Necessity for identity of subject-matter, see *infra*, XVII, B, 2, e, (I).**

65. **U. S.**—Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355; New Orleans v. Louisiana Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. ed. 202; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. ed. 859; Southern Min. R. Ext. Co. v. St. Paul, 55 Fed. 690, 5 C. C. A. 249; Neal v. Foster, 36 Fed. 29; Puetz v. Bransford, 32 Fed. 318. **Cal.**—Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355; Toomy v. Hale, 100 Cal. 172, 34 Pac. 644. **Conn.**—Sargent v. New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543. **D. C.**—Lyon v. Bursey, 36 App. Cas. 235. **Ill.**—People v. Rickert, 159 Ill. 496, 42 N. E. 884. **Ia.**—Watson v. Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331; Baxter v. Myers, 85 Iowa 328, 52 N. W. 231, 29 Am. St. Rep. 298.

**N. Y.**—Thayer v. Cable, 19 App. Div. 558, 46 N. Y. Supp. 850; Pierce v. Kinney, 75 Misc. 328, 135 N. Y. Supp. 537. **Pa.**—Robb v. Van Horn, 150 Pa. 508, 24 Atl. 756.

66. **U. S.**—Slaughter v. La Compagnie Francaise Dis Cables Telegraphiques, 113 Fed. 21; United States v. Oregon Cent. Military Road Co., 103 Fed. 549; Detroit v. Detroit City R. Co., 56 Fed. 867; Keator v. St. John, 42 Fed. 585; Crawford v. Edgerton, 39 Fed. 523. **Ala.**—Penney v. Corey, 147 Ala. 617, 41 So. 978. **Cal.**—Patterson v. Mills, 138 Cal. 276, 71 Pac. 177; McCormick v. Gross, 135 Cal. 302, 67 Pac. 766; Beronio v. Ventura County Lumb. Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; Journe v. Hewes, 124 Cal. 244, 56 Pac. 1032; National Carriage Mfg. Co. v. Story, etc. Commercial Co., 111 Cal. 531, 44 Pac. 157; Richardson v. Eureka, 110 Cal. 441, 42 Pac. 965. **Conn.**—Lyon v. Robbins, 45 Conn. 513. **Ga.**—McClellan v. McClellan, 142 Ga. 322, 82 S. E. 1069; Virginia-Carolina Chemical Co. v. Roberts, 2 Ga. App. 375, 58 S. E. 502. **Ill.**—Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899; Williams v. Walker, 62 Ill. 517; O'Byrne v. Cregier, 181 Ill. App. 569; Quinn v. McMahan, 40 Ill. App. 593; Dowdall v. Cannedy, 32 Ill. App. 207. **Ind.**—Peterson v. Sohl, 141 Ind. 466, 40 N. E. 910; Quick v. Brenner, 120 Ind. 364, 22 N. E. 326; Perrill v. Nichols, 89 Ind. 444. **Ia.**—Kane v. Tempelin, 158 Iowa 24, 138 N. W. 901; Donahue v. McCosh, 81 Iowa 296, 46 N. W. 1008; Roberts v. Hamilton, 56 Iowa 683, 10 N. W. 236. **Kan.**—Faler v. Culver, 94 Kan. 123, 146 Pac. 333; Chanute Brick & Tile Co. v. Gas Belt Fuel Co., 89 Kan. 177, 130 Pac. 649; First Nat. Bank v. Kingman, 62 Kan. 571, 64 Pac. 65. **La.**—Wieman's Suc-



nor does it bar a subsequent suit upon a cause of action or claim which could not have been adjudicated in the former action.<sup>67</sup>

c. *Matters Within Scope of Former Litigation.*—But as a general rule a judgment on the merits in a former action between the same parties or their privies is a final bar to any other suit for the same cause of action, and is conclusive, not only as to all matters which were tried in the former action, but as to all matters which, with propriety and con-

cession, 106 La. 387, 30 So. 893; *Cantrell v. Roman Catholic Cong.*, 16 La. Ann. 442; *Gracie v. Gayoso*, 7 Mart. (N. S.) 650.  **Md.**—*Cummings v. Bannon*, 8 Atl. 357; *Shafer v. Stonebraker*, 4 Gill & J. 345.  **Mass.**—*Hutchins v. Nickerson*, 212 Mass. 118, 98 N. E. 791; *Nashua & L. R. Corp. v. Boston, etc. R. Corp.*, 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; *Gage v. Holmes*, 12 Gray 428.  **Mich.**—*Wilson v. Hoffman*, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485.  **Miss.**—*Hubbard v. Flynt*, 58 Miss. 266.  **Mo.**—*Tootle v. Buckingham*, 190 Mo. 183, 88 S. W. 619; *Wright v. Broome*, 67 Mo. App. 32; *Lawless v. Lawless*, 47 Mo. App. 523.  **Neb.**—*Hill v. Hill*, 90 Neb. 43, 132 N. W. 738; *Hamilton Nat. Bank v. American L. & T. Co.*, 66 Neb. 67, 92 N. W. 189.  **N. Y.**—*Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355; *Jackson v. Andrews*, 98 N. Y. 672; *Weed v. Burt*, 78 N. Y. 191; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *De Graaf v. Wyckoff*, 41 Hun 646, 4 N. Y. St. 108; *Genet v. President, etc. of Delaware & H. Canal Co.*, 109 App. Div. 733, 96 N. Y. Supp. 406; *Levy v. Hohn- weisner*, 101 App. Div. 82, 91 N. Y. Supp. 552; *New Union Tel. Co. v. Marsh*, 96 App. Div. 122, 89 N. Y. Supp. 79; *Roach v. Curtis*, 50 Misc. 122, 100 N. Y. Supp. 411.  **N. C.**—*Gilken v. Edmonson*, 154 N. C. 127, 69 S. E. 924; *Long v. Warlick*, 148 N. C. 32, 61 S. E. 617; *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Asher v. Reizenstein*, 105 N. C. 213, 10 S. E. 889; *Woody v. Jordan*, 69 N. C. 189.  **Ohio.** *Porter v. Wagner*, 36 Ohio St. 471; *Jones v. Ludlow*, 6 Ohio Cir. Ct. 57, 3 Ohio Cir. Dec. 348.  **Ore.**—*Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. 464.  **Pa.** *Fidelity Ins. Trust, etc. Co. v. Gazzam*, 161 Pa. 536, 29 Atl. 264; *Converse v. Colton*, 49 Pa. 346; *Piro v. Shipley*, 33 Pa. Super. 278.  **S. C.**—*Deloach v. Turner*, 9 Rich. 181; *Davidson v. Graves, Bailey Eq.* 268.  **Tex.**—*East Line, etc. R. Co. v. Scott*, 72 Tex. 70,

10 S. W. 99, 13 Am. St. Rep. 758; *Cage v. King* (Tex. Civ. App.), 159 S. W. 174; *Bandy v. Cates*, 44 Tex. Civ. App. 38, 97 S. W. 710; *Lucas v. Heidenheimer*, 3 Will. Civ. Cas., §260.  **Va.**—*Crutcher v. Crutcher*, 4 Munf. 457.  **Wash.**—*Egbers v. Fischer*, 73 Wash. 308, 131 Pac. 1128; *Allen v. Wall*, 7 Wash. 316, 35 Pac. 65.  **Eng.**—*Serrao v. Noel*, 15 Q. B. D. 549.

[a] A judgment for breach of contract is not a bar to an action to recover money advanced for the purchase of an outfit with which to perform such contract. *Stebbins v. Martin*, 121 Minn. 154, 140 N. W. 1029.

[b] No action (1) can be brought for the residuum of a claim, a part of which has been utilized by way of recoupment in a former suit. *Penny v. Carey*, 147 Ala. 617, 41 So. 978; *McLane v. Miller*, 12 Ala. 643. (2) Nor can a counter-claim for damages interposed in a former action, and a partial recovery had thereon, be again set up against the recovery on a note maturing after the former suit. *Case Mfg. Co. v. Moore*, 144 N. C. 527, 57 S. E. 213.

67.  **U. S.**—*Millie Iron Mining Co. v. McKinney*, 172 Fed. 42, 96 C. C. A. 156; *Smith v. Mosier*, 169 Fed. 430.  **Ala.**—*McLane v. Miller*, 12 Ala. 643.  **Cal.**—*Schudel v. Helbing*, 26 Cal. App. 410, 147 Pac. 89.  **Ga.**—*White v. Crew*, 16 Ga. 416.  **Ill.**—*Quinn v. Ohlerking*, 37 Ill. App. 315.  **Ind.**—*Indianapolis, D. & W. Ry. Co. v. Center Tp.*, 130 Ind. 89, 28 N. E. 439; *Athearn v. Brannan*, 8 Blackf. 440; *Louisville, H. & St. L. Ry. Co. v. Linton*, 43 Ind. App. 709, 88 N. E. 532.  **Mich.**—*Perkins v. Oliver*, 110 Mich. 402, 68 N. W. 245; *Fifield v. Edwards*, 39 Mich. 264.  **Minn.**—*First Nat. Bank v. Rogers*, 22 Minn. 224.  **Mo.** *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696; *Scott v. Black*, 96 Mo. App. 472, 70 S. W. 523.  **N. Y.**—*Shaw v. Broadbent*, 129 N. Y. 114, 29 N. E. 238; *Burdick v. Post*, 12 Barb. 168; *Norris v. Hoffman*, 133 App. Div. 596,

sistency, might have been tried, where the court has jurisdiction, the proceedings are regular, and there is no fraud." A recovery, therefore, on the whole cause of action of only a part of the amount due,

- 118 N. Y. Supp. 156. **Ore.**—Holmes v. Wolfard, 37 Ore. 95, 81 Pac. 819. **S. C.** Sease v. Dobson, 34 S. C. 345, 13 S. E. 530. **Tenn.**—Gudger v. Barnes, 4 Heisk. 570. **Tex.**—Cage v. King (Tex. Civ. App.), 159 S. W. 174. **Vt.**—Ordway v. Tarrow, 79 Vt. 192, 64 Atl. 1116. **Wash.** Egbers v. Fischer, 73 Wash. 308, 131 Pac. 1128.
68. **U. S.**—Trosell v. Del., Lack. & West. R. R., 227 U. S. 431, 23 Sup. Ct. 274, 57 L. ed. 586 (reversing 200 Fed. 44, 118 C. C. A. 272); Townsend v. St. Louis, etc. Coal, etc. Co., 159 U. S. 21, 15 Sup. Ct. 997, 40 L. ed. 61; Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. ed. 1061; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Stockton v. Ford, 18 How. 418, 15 L. ed. 395; Linton v. Omaha Wholesale Produce Market House Co., 218 Fed. 331, 133 C. C. A. 336; Mazzariello v. Doherty, 204 Fed. 245, 122 C. C. A. 513; Marshall v. Bryant Electric Co., 185 Fed. 499, 107 C. C. A. 599; Warburton v. Trust Co. of America, 182 Fed. 769, 105 C. C. A. 201; Oman v. Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190; Kilham v. Wilson, 112 Fed. 565, 50 C. C. A. 454; Dana v. Morgan, 219 Fed. 313; Bryant Electric Co. v. Marshall, 169 Fed. 426; The Ira M. Hedges, 163 Fed. 587. **Cal.** Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597. **Colo.**—Denver City Irr., etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Colorado Fuel, etc. Co. v. Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222. **Del.** Hollis v. Morris, 2 Harr. 128. **D. C.** Horine v. Wende, 29 App. Cas. 415. **Fla.**—Sauls v. Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190. **Ga.** Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732. **Idaho.**—Work v. Kinney, 8 Idaho 771, 71 Pac. 477. **Ill.**—Bailey v. Bailey, 115 Ill. 531, 4 N. E. 394; Peacock v. Iron, etc. Pub. Co., 114 Ill. App. 463; Marshall v. John Grosse Clothing Co., 83 Ill. App. 338; Terre Haute, etc. R. Co. v. Peoria, etc. R. Co., 81 Ill. App. 435. **Ind.**—Ferris v. Udel, 129 Ind. 579, 10 N. E. 180; Howe v. Lewis, 121 Ind. 110, 22 N. E. 978; Kurtz v. Carr, 105 Ind. 574, 5 N. E. 692; Bates v. Spooner, 45 Ind. 489; Vierling v. Leich, 29 Ind. App. 174, 64 N. E. 230. **Ia.**—Schuapack v. Farnock, 115 Iowa 451, 88 N. W. 951; Hanson v. Manley, 72 Iowa 48, 33 N. W. 357; Everhart v. Holloway, 55 Iowa 179, 7 N. W. 506. **Kan.**—Chicago, etc. R. Co. v. Anderson County Comrs., 47 Kan. 766, 29 Pac. 96. **Ky.**—Wood v. Sharp's Admr., 159 Ky. 46, 166 S. W. 787; Havens v. Ahlering, 123 Ky. 713, 97 S. W. 344; McCoy v. Martin, 4 Dana 580; Hackney v. Hoover, 27 Ky. L. Rep. 1003, 87 S. W. 769. **La.**—Armistead v. Spring, 1 Rob. 567; Lacey v. Flash, McGloin 124. **Me.**—Scammon v. New Cong. Meeting-House, 1 Greenl. 262. **Mass.**—Rogers v. Shea, 219 Mass. 416, 106 N. E. 1018; Cotter v. Boston & N. St. Ry. Co., 190 Mass. 302, 76 N. E. 910. **Minn.**—McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131; Liimatainen v. St. Louis River D. & Imp. Co., 119 Minn. 238, 137 N. W. 1099; Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676; Albert v. Long, 43 Minn. 235, 45 N. W. 226. **Miss.** State v. Morrison, 60 Miss. 71; Burford v. Kersey, 48 Miss. 642. **Mo.** Hoyle v. Farquharson, 80 Mo. 377; La Rue v. Kempt, 186 Mo. App. 57, 171 S. W. 588; Ogden v. Chicago, R. I. & P. Ry. Co., 131 Mo. App. 331, 111 S. W. 516; Barber Asphalt Pav. Co. v. Field (Mo. App.), 97 S. W. 179; Pugh v. Williamson, 61 Mo. App. 165; Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669. **N. H.**—Berry v. Whidden, 62 N. H. 473. **N. J.**—Denver City Waterworks Co. v. American Waterworks Co., 81 N. J. Eq. 139, 85 Atl. 826. **N. M.**—Territory v. Santa Fe Pac. R. Co., 10 N. M. 410, 62 Pac. 985. **N. Y.** Pray v. Hegeman, 98 N. Y. 351; Jordan v. Van Epps, 85 N. Y. 427; Smith v. Smith, 79 N. Y. 634; Shuman v. Strauss, 52 N. Y. 404; Embury v. Conner, 3 N. Y. 511, 58 Am. Dec. 225; Shaw v. Broadbent, 54 Hun 635, 7 N. Y. Supp. 293, 4 Silv. 192; Hughes v. United Pipe Lines, 46 Hun 682, 12 N. Y. St. 704; Wilson v. Sanger, 57 App. Div. 323, 68 N. Y. Supp. 124; Weiser v. Kling, 38 App. Div. 266, 57 N. Y. Supp. 48; Brocken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 306; Swan v. Wheeler, 30 Misc.

is a bar to another suit brought on the same cause of action for the unrecovered balance.<sup>69</sup> If a party has more than one title or claim to the property in litigation he must declare upon all of them,<sup>70</sup> as well as present all the grounds, reasons and evidence available in support of any and all claims or defenses presented,<sup>71</sup> where he is called

225, 63 N. Y. Supp. 328; *Davidson v. Weed*, 20 Misc. 147, 45 N. Y. Supp. 718. N. C.—*Davis v. Wall*, 142 N. C. 450, 55 S. E. 350; *Williams v. Batchelor*, 90 N. C. 364; *Murrill v. Murrill*, 84 N. C. 182. Ohio.—*Desnovers v. Denison*, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Dec. 430; *Thoms v. Greenwood*, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320. Ore.—*Paulson v. Oregon Surety & Casualty Co.*, 70 Ore. 175, 138 Pac. 838; *Colgan v. Farmers' & Mechanics' Bank*, 69 Ore. 357, 138 Pac. 1070; *Ross v. Ross*, 21 Ore. 9, 26 Pac. 1007; *Barrett v. Failing*, 8 Ore. 152. Pa.—*Pennock v. Kennedy*, 153 Pa. 579, 26 Atl. 217; *Buck v. Wilson*, 113 Pa. 423, 6 Atl. 97; *Head v. Meloney*, 111 Pa. 99, 2 Atl. 195; *Raisig v. Graf*, 17 Pa. Super. 509. S. C.—*Perkins v. Perkins*, 49 S. C. 563, 27 S. E. 551; *Barnes v. Cunningham*, 9 Rich. Eq. 475; *Eding v. Whaley*, 1 Rich. Eq. 301. S. D. *Culhane v. Etting*, 35 S. D. 544, 153 N. W. 301. Tenn.—*Lindsley v. Thompson*, 1 Tenn. Ch. 272. Tex.—*Cameron v. Hinton*, 92 Tex. 492, 49 S. W. 1047; *Darragh v. Kaufman*, 2 Posey Unrep. Cas. 97. Utah.—*Everill v. Swan*, 20 Utah 56, 57 Pac. 716. Va.—*Tilson v. Davis's Admr.*, 32 Gratt. (73 Va.) 92. W. Va.—*Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561. Wis. *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1; *Driscoll v. Damp*, 16 Wis. 106. Eng.—*Nelson v. Couch*, 15 C. B. N. S. 99, 108, 10 Jur. N. S. 366, 33 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99, 143 Eng. Reprint 721; *Henderson v. Henderson*, 3 Hare 100, 67 Eng. Reprint 313; *Lockyer v. Ferryman*, 2 App. Cas. 519. Can.—*Davidson v. Belleville*, etc. R. Co., 5 Ont. App. 315.

[a] Where the cause of action is the same in both suits, the estoppel by judgment arises as to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy; but if different, the estoppel is only as to matters actually determined in the first suit. *Troxell v. Del., Lack. & West. R.*

*R.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586.

[b] When the causes of action are different, the former decision is conclusive only as to questions, rights, and facts actually decided therein, and nothing more. *Hudson v. Iguano Land & Milling Co.*, 71 W. Va. 402, 76 S. E. 797. See also *Virginia-Carolina Chemical Company v. Kirven*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. ed. 179.

Necessity for identity of causes of action, see *infra*, XVII, B, 2, e, (I).

69. Ga.—*Atlanta Elevator Co. v. Fulton Bag, etc. Mills*, 106 Ga. 427, 32 S. E. 541. Ind.—*Campbell v. Monroe County*, 71 Ind. 185; *Jenkins v. Jenkins*, 63 Ind. 120. Ia.—*Hodge v. Shaw*, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290. Mo.—*Koenig v. Morrison*, 44 Mo. App. 411. N. Y. *Davies v. New York*, 93 N. Y. 250, 4 Civ. Proc. 290. Pa.—*Stradley v. Bath Portland Cement Co.*, 228 Pa. 108, 77 Atl. 242.

*Compare, Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599.

[a] Reason.—One is not entitled to bring a new action for an additional recovery on the same cause of action, because he is not content with the result of the first. *Atlanta Elevator Co. v. Fulton Bag & Cotton Mills*, 106 Ga. 427, 32 S. E. 541; *Campbell v. Monroe County*, 71 Ind. 185.

70. Ia.—*Des Moines, etc. R. Co. v. Bullard*, 89 Iowa 749, 56 N. W. 498. Ky.—*Wood v. Sharp's Admr.*, 159 Ky. 46, 166 S. W. 787. N. Y.—*Wileox v. Gilchrist*, 85 Hun 1, 32 N. Y. Supp. 608. Wash.—*State v. City of Cheney*, 67 Wash. 151, 121 Pac. 48.

71. U. S.—*Landon v. Bulkley*, 95 Fed. 344, 37 C. C. A. 96. Ga.—*Craig v. Crosby*, 81 Ga. 650, 8 S. E. 185. Ill. *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329, 65 N. E. 717. Ky.—*Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705. La. *Porter v. Morere*, 30 La. Ann. 230. N. Y.—*Port Jervis Nat. Bank v. Hansee*, 15 Abb. N. C. 488. Ohio.—*Martin v. Roney*, 41 Ohio St. 141. S. C.—*New-*



upon in legal form to establish a cause of action or defense;<sup>72</sup> and this is true whether he be an original party or an intervener in the case.<sup>73</sup> But it does not follow that a prior judgment is conclusive of matters which were not essentially connected with, implied in, or germane to the issues determined in the former action, and therefore were not in issue or adjudicated, although they might have been brought in, and may affect the final settlement of the rights of the parties.<sup>74</sup> So too, a plaintiff need not join in one suit several separate, distinct and independent causes of action which he may have against the same defendant, although he may do so.<sup>75</sup>

*d. Matters Excluded, Withdrawn, etc.*—A former judgment is not a bar to a subsequent suit based upon any claim or demand legally severable from the cause of action in which such judgment was rendered,<sup>76</sup> or to any counter-claim or defense thereto,<sup>77</sup> which was with-

ed *v. Neal*, 50 S. C. 68, 27 S. E. 560. Wash.—*State v. City of Cheney*, 67 Wash. 151, 121 Pac. 48. Wis.—*Swennes v. Sprain*, 120 Wis. 68, 97 N. W. 511.

[a] A suit to reform a deed executed in part performance of a contract, is barred by a judgment compelling specific performance of such contract, since the two might have been joined in one action. *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566, 568.

72. U. S.—*Warburton v. Trust Co. of America*, 182 Fed. 769, 105 C. C. A. 201. Cal.—*Brown v. Willis*, 67 Cal. 235, 7 Pac. 682. Ill.—*McGillis v. Willis*, 39 Ill. App. 311. Ind.—*Vail v. Rinehart*, 105 Ind. 6, 4 N. E. 218. Kan.—*Kirk v. Goodwin*, 53 Kan. 610, 36 Pac. 1057. Md.—*Royston v. Horner*, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510. Wash.—*State v. City of Cheney*, 67 Wash. 151, 121 Pac. 48; *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208. Wis.—*Pierce v. Kneeland*, 9 Wis. 23.

73. Ind.—*Shaw v. Barnhart*, 17 Ind. 183. Ky.—*Watson v. Carman's Admr.*, 10 Ky. L. Rep. 288, 6 S. W. 450. La.—*Fleitas v. Meraux*, 47 La. Ann. 232, 16 So. 848. Md.—*Packham v. German F. Ins. Co.*, 91 Md. 515, 46 Atl. 1066, 80 Am. St. Rep. 461, 50 L. R. A. 828. Mich.—*Hyde v. Leisenring*, 107 Mich. 490, 65 N. W. 536. Minn.—*Pierro v. St. Paul, etc. R. Co.*, 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673. Miss.—*State v. Morrison*, 60 Miss. 74; *Stewart v. Stebbins*, 30 Miss. 66. Wash.—*State v. City of Cheney*, 67 Wash. 151, 121 Pac. 48.

[a] But see *Bowsman v. Anderson*, 62 Ore. 431, 123 Pac. 1092, holding that

where a defendant in an action at law has an equitable as well as a legal defense, he may set up his legal defense by answer, and file a complaint in equity in the nature of a cross-bill, as he may depend alone on the legal defense, and, if defeated, sue to enforce his equitable rights.

74. Ill.—*O'Byrne v. Cregier*, 181 Ill. App. 569. N. Y.—*Bender v. Paulus*, 197 N. Y. 369, 90 N. E. 994; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *Maloney v. Horan*, 12 Abb. Pr. (N. S.) 289, 10 Am. Rep. 335; *Norris v. Hoffman*, 133 App. Div. 596, 118 N. Y. Supp. 156; *Cuneo v. Freeman*, 137 N. Y. Supp. 885. N. C.—*Williams v. Clouse*, 91 N. C. 322. Ohio.—*Porter v. Wagner*, 36 Ohio St. 471. Tex.—*Wilson v. Casey*, 3 Tex. Civ. App. 141, 22 S. W. 118. Vt.—*Sheffer v. B. B. Perkins & Co.*, 83 Vt. 185, 75 Atl. 6.

75. *Norris v. Hoffman*, 133 App. Div. 596, 118 N. Y. Supp. 156; *Morgan v. Waters*, 122 App. Div. 340, 106 N. Y. Supp. 882; *Eastman v. Porter*, 14 Wis. 39. See *infra*, XVII, B, 2, g, (I).

76. Ark.—*Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977. Cal.—*Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997. Ia.—*Donahue v. McCosh*, 81 Iowa 296, 46 N. W. 1008. Minn.—*Major v. Owen*, 126 Minn. 1, 147 N. W. 662. N. Y.—*Pearce v. Kenney*, 152 App. Div. 638, 137 N. Y. Supp. 475; *Di Blasi v. Maisel*, 144 N. Y. Supp. 452.

77. Ia.—*Finnegan v. Campbell*, 74 Iowa 158, 37 N. W. 127. Mo.—*Cockerill v. Stafford*, 102 Mo. 57, 14 S. W. 813. S. C.—*Duren v. Kee*, 41 S. C. 171, 19 S. E. 492.

drawn by the party before verdict,<sup>78</sup> or excluded from the issues or withheld from the jury by the court,<sup>79</sup> or which for any reason was not litigated and determined in such former action.<sup>80</sup> The same rule applies also where the plaintiff is required to choose between two or more causes of action set out in his complaint,<sup>81</sup> as well as where one

What defenses concluded or barred, see generally *infra*, XVII, B, 2, h, (1).

78. **U. S.**—*McComb v. Frink*, 149 U. S. 629, 13 Sup. Ct. 993, 37 L. ed. 876. **Ark.**—*Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977. **Cal.**—*Hough v. Waters*, 30 Cal. 309. **Mass.**—*Wood v. Corl*, 4 Mete. 203. **Mo.**—*Cockerill v. Stafford*, 102 Mo. 57, 14 S. W. 813; *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 676; *Mineral Belt Bank v. Elking Lead & Zinc Co.*, 173 Mo. App. 634, 158 S. W. 1066. **N. Y.**—*Thompson v. Wood*, 1 Hilt. 93; *Louw v. Davis*, 13 Johns. 227; *National Hudson River Bank v. Reynolds*, 57 Hun 307, 10 N. Y. Supp. 669; *Masten v. Olcott*, 24 Hun 587. **Pa.**—*Levy v. Solomon*, 207 Pa. 478, 56 Atl. 1007; *Steelman v. Sites' Exrs.*, 35 Pa. 216; *Killion v. Wright*, 34 Pa. 91; *Muirhead v. Kirkpatrick*, 2 Pa. 425.

[a] But see *Lyon v. Bursey*, 36 App. Cas. (D. C.) 235, holding that, where plaintiff sued in ejectment to recover the north half of a lot, and amended his declaration so as to limit his claim to an undivided one-half of such north half, and recovered judgment, he was estopped from thereafter maintaining an action for the other half interest.

79. **Cal.**—*Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997. **Ky.**—*Louisville v. Selva*, 66 S. W. 376. **Mass.**—*Pelton v. Baker*, 158 Mass. 349, 33 N. E. 394; *Boston Blower Co. v. Brown*, 149 Mass. 421, 21 N. E. 883. **Mich.**—*Reid v. Parks*, 122 Mich. 363, 81 N. W. 252; *Detroit, etc. R. Co. v. Griggs*, 12 Mich. 45. **N. Y.**—*Strong v. Strong*, 102 N. Y. 69, 5 N. E. 199; *Pearce v. Kenney*, 152 App. Div. 638, 137 N. Y. Supp. 475. **Eng.**—*Blake v. O'Kelly*, Ir. Rep. 9 Eq. 54.

*Compare, McKay v. Fee*, 20 U. C. Q. B. 268.

[a] But see *Murrell v. Citizens' Sav. Bank*, 19 Ky. L. Rep. 693, 41 S. W. 564, holding that matters erroneously ruled out by the court were barred by the judgment rendered in the action, so that a subsequent suit could not be based thereon.

[b] Where plaintiff's claim of equitable title was excluded from the issues in an action at law, it was held that the judgment therein did not bar an assertion of such equitable right in a subsequent suit. *Major v. Owen*, 126 Minn. 1, 147 N. W. 662.

80. **U. S.**—*Bodemuller v. United States*, 39 Fed. 437. **Fla.**—*Lake v. Hancock*, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159. **Ia.**—*Donahue v. McCosh*, 81 Iowa 296, 46 N. W. 1008. **Ky.**—*Campbell v. Mims*, 161 Ky. 530, 170 S. W. 1176. **Mich.**—*Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979. **N. Y.**—*Mitchell v. Read*, 19 Hun 418; *Burwell v. Knight*, 51 Barb. 267; *Jones v. Underwood*, 35 Barb. 211, 13 Abb. Pr. 393. **Tex.**—*Vance v. Southern Kansas Ry. Co. of Texas* (Tex. Civ. App.), 173 S. W. 264; *Crebbin v. Bryce*, 24 Tex. Civ. App. 532, 60 S. W. 587; *Rackley v. Fowlkes* (Tex. Civ. App.), 36 S. W. 75.

[a] But see *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444, holding that when an issue has been submitted at trial, withholding proof thereof will not prevent the judgment rendered at such trial from operating as a bar to a second suit on such issue.

[b] Where a claim was omitted by mistake or ignorance from a former action, it is not barred by such former recovery. **U. S.**—*Phillips v. Bossard*, 35 Fed. 99. **Conn.**—*Kane v. Morehouse*, 46 Conn. 300. **Ind.**—*State v. Bruteh*, 12 Ind. 381; *Byrket v. State*, 3 Ind. 248. **N. J.**—*Whiley v. Broadway*, 3 N. J. L. 996. **Vt.**—*Stevens v. Damon*, 29 Vt. 521.

81. **U. S.**—*Starr v. Stark*, 2 Sawy. 603, 642, 22 Fed. Cas. No. 13,317. **Ky.**—*Ware v. McCormack*, 96 Ky. 139, 28 S. W. 157, 959. **Mich.**—*Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979; *Gott v. Judge Detroit Super. Ct.*, 42 Mich. 625, 4 N. W. 529. **N. Y.**—*Snyder v. Croy*, 2 Johns. 227. **Vt.**—*Holbrook v. J. J. Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339. **Wash.**—*Allen v. Wall*, 7 Wash. 316, 35 Pac. 65.

is excluded or reserved because it is not available under the pleadings.<sup>82</sup> But the rule does not apply to an indivisible item or part of the former cause of action.<sup>83</sup>

c. *Identity of Causes of Action and Subject-Matter.*—(I.) In General. In order that a former judgment constitute a bar to a subsequent action or proceeding, it must not only be rendered in an action between the same parties or their privies,<sup>84</sup> but the causes of action must be identical in both suits.<sup>85</sup> While a former judgment is available

[a] But see *Gorham v. City of New Haven*, 79 Conn. 679, 66 Atl. 505, holding where plaintiff is permitted to amend his complaint after verdict for an amount in excess of the amount claimed under the count remaining after amendment, he will not be permitted to sue on the count thus withdrawn.

82. *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997.

[a] A remittitur of one of two causes of action, as conditionally ordered by an appellate court, does not prevent an action on the other cause of action. *Holbrook v. J. J. Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339.

83. *Ga.*—Neill v. Harris, 133 Ga. 493, 66 S. E. 246. *Mich.*—Dutton v. Shaw, 35 Mich. 431. *Minn.*—Thompson v. Myrick, 24 Minn. 4. *Pa.*—Smedley v. Tucker, 3 Phila. 259.

See *infra*, XVII, B, 2, g.

84. See *infra*, XVII, B, 2, f.

85. See the following: *U. S.*—*Troxell v. Del.*, Laek. & West. R. R., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586; *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. ed. 738; *United States v. California & Oreg. L. Co.*, 192 U. S. 355, 48 L. ed. 476; *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Union Cent. Life Ins. Co. v. Drake*, 214 Fed. 536, 131 C. C. A. 82; *United States v. Sommers*, 171 Fed. 57, 96 C. C. A. 299; *United States v. Naldrett*, 214 Fed. 895; *Ranken v. St. Louis, etc. R. Co.*, 98 Fed. 479; *Steam Gauge, etc. Co. v. Meyrose*, 27 Fed. 213; *Crandall v. Dare*, 11 Fed. 902; *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401; *United States, etc. Felting Co. v. Asbestos Felting Co.*, 4 Fed. 813, 18 Blatchf. 312; *Smith v. Turner*, 1 Hughes 373, 22 Fed. Cas. No. 13,119; *Clark v. Gibboney*, 3 Hughes 391, 5 Fed. Cas. No. 2,821. *Ala.*—*Pruitt v. Holly*, 73 Ala. 369; *Berringer v. Payne*, 68 Ala. 154; *Gilbreath v. Jones*, 66 Ala. 129. *Ark.*—*Neal v. Brandon*, 74 Ark. 320, 85 S. W.

776; *Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339; *McGee v. Overby*, 12 Ark. 164. *Cal.*—*In re Wilson*, 147 Cal. 108, 81 Pac. 313; *People v. Holliday*, 5 Pac. 798; *Chase v. Swain*, 9 Cal. 130. *Conn.*—*Pavelka v. St. Albert Society, etc. Union*, 82 Conn. 146, 72 Atl. 725; *Waterbury Dime Savings Bank v. McAlenney*, 78 Conn. 208, 61 Atl. 476; *Storrs v. Robinson*, 77 Conn. 207, 58 Atl. 746; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1; *Sargent v. New Haven Steamboat Co.*, 65 Conn. 116, 31 Atl. 543; *Supples v. Cannon*, 44 Conn. 424; *Munson v. Munson*, 30 Conn. 425; *Cowles v. Harts*, 3 Conn. 516. *D. C.*—*Horine v. Wende*, 29 App. Cas. 415; *Strong v. Grant*, 2 Mackey 218. *Ga.*—*McDongold v. Maddox*, 32 Ga. 63. *Haw.*—*Campbell Est. v. Campbell-Parker Co.*, 18 Hawaii 342. *Ill.*—*Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Spring Valley Coal Co. v. Patting*, 112 Ill. App. 4; *Marshall v. John Gross Clothing Co.*, 83 Ill. App. 338; *Folz v. Nelke*, 33 Ill. App. 370. *Ind.*—*Hoosier Stone Co. v. Louisville, etc. R. Co.*, 131 Ind. 575, 31 N. E. 365; *Balfie v. Lammers*, 109 Ind. 347, 10 N. E. 92; *Bougher v. Scobey*, 21 Ind. 365; *Athearn v. Brannan*, 8 Blackf. 440; *United Oil & Gas Co. v. Alberson*, 43 Ind. App. 626, 88 N. E. 359; *McClaskey v. McDaniel*, 37 Ind. App. 59, 74 N. E. 1023; *Chicago, etc. R. Co. v. Yawger*, 24 Ind. App. 460, 56 N. E. 50. *Ia.*—*Blair v. Hemphill*, 111 Iowa 226, 82 N. W. 501. *Kan.*—*John V. Farwell Co. v. Lykins*, 59 Kan. 96, 52 Pac. 99; *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707; *Achison, etc. R. Co. v. Jefferson County Comrs.*, 12 Kan. 127. *Ky.*—*Roberts v. Moss*, 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280; *Newport v. Taylor's Heirs*, 11 B. Mon. 361; *Campbell v. Sherley*, 25 Ky. L. Rep. 904, 76 S. W. 540; *Steinharter v. Wolfstein*, 13 Ky. L. Rep. 871; *Hazelrigg v. Boorman*, 8 Ky. L. Rep. 607, 2 S. W. 769. *La.*—*Baer v. Terry*, 108 La. 597, 32 So. 353, 92 Am. St.



as a plea in bar of a subsequent action only when the subject-matter

Rep. 394; *Semple v. Scarborough*, 44 La. Ann. 257, 10 So. 860; *State v. Jumel*, 30 La. Ann. 861; *Leatt v. Williams*, 22 La. Ann. 81; *Slocumb v. De Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740; *Peyton v. Enos*, 16 La. Ann. 135; *Stadeker v. His Creditors*, 12 La. Ann. 817; *Shepherd v. Phillips*, 7 La. Ann. 458; *Osburn v. Planters' Bank*, 2 La. Ann. 494; *State v. Atchafalaya R., etc. Co.*, 7 Rob. 447; *Noble v. Cooper*, 7 Rob. 44; *Ganiott v. Havard*, 6 Mart. N. S. 290; *Goodwin v. Chesneau*, 3 Mart. N. S. 409; *Hawkins v. Gravier*, 9 Mart. (O. S.) 727; *Cloutier v. Lecomte*, 3 Mart. (O. S.) 481. **Me.**—*Howard v. Kimball*, 65 Me. 308. **Md.** *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626. **Mass.**—*Barnes v. Huntley*, 188 Mass. 274, 74 N. E. 318; *Hoseason v. Keegen*, 178 Mass. 247, 59 N. E. 627; *Harlow v. Bartlett*, 170 Mass. 584, 49 N. E. 1014; *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765; *Gilbert v. Thompson*, 9 Cush. 348; *Jones v. Fales*, 4 Mass. 245. **Minn.**—*Ziegler v. Suggit*, 129 Minn. 309, 152 N. W. 754; *Kinzel v. Boston & Duluth Farm Land Co.*, 124 Minn. 416, 145 N. W. 124; *Liimatainen v. St. Louis Dam & Imp. Co.*, 119 Minn. 238, 137 N. W. 1099; *Linne v. Stout*, 44 Minn. 110, 46 N. W. 319. **Miss.** *Perry v. Lewis*, 49 Miss. 443; *Dunlap v. Edwards*, 29 Miss. 41. **Mo.**—*Barber Asphalt Paving Co. v. Field*, 132 Mo. App. 628, 97 S. W. 179; *Ogden v. Chicago, R. I. & P. R. Co.*, 131 Mo. App. 331, 111 S. W. 516; *Alexander County Nat. Bank v. Foster*, 124 Mo. App. 344, 101 S. W. 685; *Browne v. Appleman*, 83 Mo. App. 79; *Winham v. Kline*, 77 Mo. App. 36; *Downing v. Missouri, etc. R. Co.*, 70 Mo. App. 657; *Tutt v. Price*, 7 Mo. App. 194. **Neb.**—*Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384. **N. J.** *Traflet v. Empire L. Ins. Co.*, 64 N. J. L. 387, 46 Atl. 204; *Richman v. Baldwin*, 21 N. J. L. 395; *Smock v. Throckmorton*, 8 N. J. L. 216; *Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381. **N. M.**—*Lockhart v. Leeds*, 12 N. M. 156, 76 Pac. 312. **N. Y.**—*Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59; *Lorillard v. Clyde*, 99 N. Y. 196, 1 N. E. 614; *Parr v. Greenbush*, 42 Hun 232; *Ehle v. Bingham*, 7 Barb. 494; *Hicks v. Pearsall*, 164 App. Div. 721, 150 N. Y. Supp. 207; *O'Brien v. Seg-*

*bolt*, 163 App. Div. 162, 148 N. Y. Supp. 489; *Quinn v. Supreme Council, etc. Legion*, 156 App. Div. 43, 141 N. Y. Supp. 112; *Consolidated Nat. Bank v. First Nat. Bank*, 129 App. Div. 538, 114 N. Y. Supp. 308; *MacArdell v. Olcott*, 104 App. Div. 263, 93 N. Y. Supp. 799; *Engel v. Union Square Bank*, 94 App. Div. 244, 87 N. Y. Supp. 1070; *Boyd v. Boyd*, 26 Misc. 679, 56 N. Y. Supp. 760; *Jenner v. Shope*, 137 N. Y. Supp. 901. **N. C.**—*Scott v. Mutual Reserve Fund Life Assn.*, 137 N. C. 515, 50 S. E. 221; *Barringer v. Virginia Trust Co.*, 132 N. C. 409, 43 S. E. 910; *Turner v. Rosenthal*, 116 N. C. 437, 21 S. E. 198; *Williams v. Clouse*, 91 N. C. 322; *Temple v. Williams*, 91 N. C. 82; *Tuttle v. Harrill*, 85 N. C. 456; *Shuster v. Perkins*, 47 N. C. 217; *Pass v. Lee*, 32 N. C. 410. **Ohio.** *Linke v. Walcutt*, 26 Ohio Cir. Ct. 10 (*affirmed*, 69 Ohio St. 531, 70 N. E. 1125); *Dayton, etc. R. Co. v. Dayton, etc. Traction Co.*, 26 Ohio Cir. Ct. 1. **Ore.**—*Burns v. Kennedy*, 49 Ore. 588, 90 Pac. 1102; *Ruckman v. Union R. Co.*, 45 Ore. 578, 78 Pac. 748, 69 L. R. A. 480. **Pa.**—*Baker v. Bailey*, 204 Pa. 524, 54 Atl. 326; *Besecker v. Florey*, 176 Pa. 23, 34 Atl. 926; *Kaster v. Welsh*, 157 Pa. 590, 27 Atl. 668; *Susquehanna Mut. F. Ins. Co.'s Appeal*, 105 Pa. 615; *Cist v. Zeigler*, 16 Serg. & R. 282, 16 Am. Dec. 573; *Rudolph v. Sturgis*, 17 Montg. Co. Rep. 13. **R. I.**—*Norman v. Sylvia*, 26 R. I. 438, 59 Atl. 112. **S. C.**—*Parrott v. Barrett*, 70 S. C. 195, 49 S. E. 563. **Tex.**—*Foster v. Wells*, 4 Tex. 101; *Galveston Chamber of Com. v. Railroad Commission* (Tex. Civ. App.), 137 S. W. 737. **Utah.**—*Hall v. McNally*, 23 Utah 606, 65 Pac. 724. **Vt.** *Ordway v. Farrow*, 79 Vt. 192, 64 Atl. 1116; *Wing v. Hall*, 47 Vt. 182; *Gates v. Goreham*, 5 Vt. 317, 26 Am. Dec. 303. **Va.**—*Brammer's Admr. v. Norfolk & W. Ry. Co.*, 107 Va. 206, 57 S. E. 593; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361; *McComb v. Lobdell*, 32 Gratt. (73 Va.) 185; *Cleaton v. Chambliss*, 6 Rand. (27 Va.) 86. **W. Va.** *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827; *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Pickens v. Love*, 44 W. Va. 725, 29 S. E. 1018. **Wyo.**—*Bon-nifield v. Price*, 1 Wyo. 223. **Eng.**—*Mid-land R. Co. v. Martin*, 2 Q. B. 172, 17 Cox C. C. 687, 58 J. P. 39, 62 L. J.

of the two suits is the same,<sup>86</sup> it is obvious that there must also be

Q. B. 517, 69 L. T. Rep. N. S. 353, 5 Wkly. Rep. 189; *Beck v. Pierce*, 23 Q. B. D. 316, 54 J. P. 198, 58 L. J. Q. B. 516, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29; *Williams v. Davies*, 11 Q. B. D. 74, 47 J. P. 581, 52 L. J. N. C. 87; *Pleareth v. Marriott*, 22 Ch. D. 182, 52 L. J. Ch. 221, 48 L. T. Rep. N. S. 170, 31 Wkly. Rep. 68; *The Thyatira*, 8 P. D. 155, 5 Asp. 147, 52 L. J. P. 85, 49 L. T. Rep. (N. S.) 406, 32 Wkly. Rep. 276; *Moore v. Battie*, Ambl. 371, 27 Eng. Reprint 247, 1 Edm. 273, 28 Eng. Reprint 689; *Leicester v. Perry*, 1 Bro. Ch. 305, 28 Eng. Reprint 1148; *Mallock v. Gaiton*, Dick. 65, 21 Eng. Reprint 192; *Carter v. James*, 2 D. & L. 236, 8 Jur. 912, 13 L. J. Exch. 373, 13 Mees. & W. 137; *Dublin v. Trimleston*, 12 Ir. Eq. 251; *Bristowe v. Fairclough*, 9 L. J. C. P. 215, 1 Man. & G. 143, 1 Scott N. R. 161, 39 E. C. L. 687, 133 Eng. Reprint 281; *Ebbetts v. Conquest*, 52 L. T. Rep. N. S. 560; *Savile v. Jackson*, McClell 377, 11 Price 243, 13 Price 715; *Atty.-Gen. v. Rochester*, 6 Sim. 273, 58 Eng. Reprint 596; *Holland v. Clark*, 1 Y. & Coll. C. C. 151, 62 Eng. Reprint 831. **Can.** *Delarme v. Cusson*, 28 Can. Sup. Ct. 66; *Hester v. Ray*, 26 Can. Sup. Ct. 79; *Russell v. Rowe*, 7 U. C. Q. B. 484; *Reg. v. Eardley*, 49 J. P. 551.

See also the cases cited *supra*, XVII, B, 1, b, (I); and *infra*, note 87.

[a] Where separate actions are brought for the publication of the same libel in two newspapers, which are owned by the same person, the issues involved in the two actions are the same, and a judgment in one is a bar to the other. *Cook v. Connors*, 157 App. Div. 832, 143 N. Y. Supp. 230.

Compare *infra*, XVII, B, 2, g, (III), (B), and note 3 [a].

[b] A judgment on an appeal bond, in an action of forcible entry and detainer, does not merge a suit for double damages for holding over under a lease of the premises, nor bar a recovery therein. *Alexander v. Loeb*, 230 Ill. 454, 82 N. E. 833.

As to identity of causes of action in connection with the right to amend, see the title "New Cause of Action or Defense."

86. For statement of rule, see the following cases: **U. S.**—*Southern Pac. R. Co. v. United States*, 183 U. S. 519,

22 Sup. Ct. 154, 46 L. ed. 307; *Aspen v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Wilson v. Smith*, 117 Fed. 707; *Fessenden v. Barrett*, 50 Fed. 690; *Clark v. Gibboney*, 3 Hughes 391, 5 Fed. Cas. No. 2,821. **Ala.**—*Gilbreath v. Jones*, 66 Ala. 129. **Cal.**—*Brill v. Shively*, 93 Cal. 674, 29 Pac. 324. **Conn.**—*Supples v. Cannon*, 44 Conn. 424. **Del.**—*Poor v. Darrah*, 5 Honst. 364. **D. C.**—*Strong v. Grant*, 2 Mackey 218. **Fla.**—*Lake v. Hancock*, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159. **Ga.**—*Ross v. Battle*, 117 Ga. 877, 45 S. E. 252. **Ill.**—*Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786; *Cooper v. Corbin*, 105 Ill. 224; *American Percheron Horse Breeders' Assn. v. American Percheron Horse Breeders'*, etc. Assn., 114 Ill. App. 136. **Ia.**—*Madison v. Garfield Coal Co.*, 114 Iowa 56, 86 N. W. 41. **Ky.**—*Maize v. Bowman*, 93 Ky. 205, 19 S. W. 589, 17 L. R. A. 81. **La.**—*State v. Moore*, 110 La. 564, 44 So. 293; *Carnde v. Scarborough*, 44 La. Ann. 257, 10 So. 860; *Lewis v. New Orleans Sav. Inst.*, 33 La. Ann. 1463; *White v. Gaines*, 29 La. Ann. 769; *Edwards v. Ballard*, 14 La. Ann. 362. **Mich.**—*Metropolitan Lumb. Co. v. McColeman*, 149 Mich. 333, 103 N. W. 809. **Miss.**—*Greene v. Merchants'*, etc. Bank, 73 Miss. 542, 19 So. 350; *Manly v. Kidd*, 33 Miss. 141. **Mo.**—*Cook v. Basom*, 164 Mo. 594, 65 S. W. 227; *Clemens v. Murphy*, 40 Mo. 121; *Parks v. Richardson*, 35 Mo. App. 192. **Neb.**—*State v. Broatch*, 68 Neb. 687, 94 N. W. 1016; *Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384. **N. J.**—*Matthews v. Roberts*, 2 N. J. Eq. 338. **N. Y.**—*Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1; *Clift v. Mercer*, 79 App. Div. 369, 79 N. Y. Supp. 622; *Reed v. Provident Sav. L. Assur. Soc.*, 79 App. Div. 163, 79 N. Y. Supp. 665; *Stearns v. St. Louis*, etc. R. Co., 42 Hun 659, 4 N. Y. St. 715. **Ohio.**—*Gibson v. McNeely*, 11 Ohio St. 131. **Pa.** *Siebert v. Steinmeyer*, 204 Pa. 419, 54 Atl. 336; *Milligan v. Browarsky*, 147 Pa. 155, 23 Atl. 398; *Finley v. Hanbest*, 30 Pa. 190; *City v. Frick*, 6 Phila. 578. **P. I.**—*Balathat v. Tanjuteo*, 2 Phil. Isl. 182. **S. C.**—*Green v. Iredell*, 31 S. C. 588, 10 S. E. 545. **Tenn.**—*Gowan v. Graves*, 10 Heisk. 579. **Tex.**—*Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94; *Bodeman v. Reinhard* (Tex. Civ. App.), 54 S. W. 1051. **Va.**—*Shuf-*

identity of causes of action,<sup>87</sup> since two or more distinct causes of action may arise from the same transaction or state of facts, and a judgment in one will not operate as a bar to an action upon the other.<sup>88</sup>

**Certainty in Identity.**—For a judgment in a former suit to operate as an estoppel there must be no uncertainty as to the precise question raised and determined in such suit; it must appear by the record or by extrinsic evidence that the precise question therein determined is a controlling issue in the subsequent suit, leaving nothing to inference or conjecture in establishing the identity of causes in the two actions.<sup>89</sup> Where the two suits are not clearly upon the same cause of action, substantially if not identically, the judgment rendered in the former action does not operate as a bar to the maintenance of the second

*fleabarger v. Blanchard*, 101 Va. 690, 44 S. E. 951. **Can.**—*Deacon v. Great West. R. Co.*, 6 U. C. C. P. 241.

87. **Colo.**—*Moorhead v. Erie Min. & Mill. Co.*, 43 Colo. 408, 96 Pac. 253. **D. C.**—*Strong v. Grant*, 2 Mackey 213. **Ill.**—*Markley v. People*, 171 Ill. 230, 49 N. E. 502, 63 Am. St. Rep. 234; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Steele v. People*, 88 Ill. App. 186. **Ind.**—*Hord v. Bradbury*, 156 Ind. 20, 59 N. E. 27. **Kan.**—*Atchison, etc. R. Co. v. Jefferson County Comrs.*, 12 Kan. 127. **Ky.**—*Nugent v. Mallory*, 145 Ky. 824, 141 S. W. 850. **La.**—*Slocumb v. De Lizardi*, 21 La. Ann. 355, 99 Am. Dec. 740. **Mass.**—*Gilbert v. Thompson*, 9 Cush. 348. **Mo.**—*Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248, 104 S. W. 5; *Alexander County Nat. Bank v. Foster*, 124 Mo. App. 344, 101 S. W. 685. **N. Y.**—*Stowell v. Chamberlain*, 60 N. Y. 272. **N. C.**—*Case Mfg. Co. v. Moore*, 144 N. C. 516, 527, 57 S. E. 213; *Shuster v. Perkins*, 47 N. C. 217. **Ore.**—*Meyer v. Livesley*, 56 Ore. 383, 107 Pac. 476, 108 Pac. 121. **Pa.**—*Pennebaker v. Parker*, 33 Pa. Super. 458. **Tex.**—*Foster v. Wells*, 4 Tex. 101; *Smith v. Banks* (Tex. Civ. App.), 152 S. W. 449; *Lane v. Kuehn* (Tex. Civ. App.), 141 S. W. 363. **Wash.**—*Kath v. Brown*, 69 Wash. 306, 124 Pac. 900. **Wis.**—*Swennes v. Sprain*, 120 Wis. 68, 97 N. W. 511. *Compare*, *Giblin v. North Wisconsin Lumb. Co.*, 131 Wis. 261, 111 N. W. 499.

See also the cases cited *supra*, note 85.

88. **Conn.**—*Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147. **Ga.**—*Central Georgia Power Co.*

*v. Butts County*, 139 Ga. 490, 77 S. E. 380. **Ind.**—*Bilsland v. McManomy*, 82 Ind. 139. **Ia.**—*Heins v. Wicke*, 102 Iowa 396, 71 N. W. 345. **Mass.**—*Electrelle Co. v. Maguire*, 215 Mass. 550, 102 N. E. 904. **Minn.**—*Lindgren v. Lindgren*, 73 Minn. 90, 75 N. W. 1034. **W. Va.**—*Bent v. Barnes*, 72 W. Va. 161, 78 S. E. 374. **Can.**—*Muir v. Carter*, 16 Can. Sup. Ct. 473; *Stuart v. Mott*, 23 Can. Sup. Ct. 153.

[a] **Subject-Matter the Same But Causes of Action Different.**—A judgment dismissing a petition in an action to enforce specific performance of a compromise agreement to convey certain minerals on the ground that there was no such agreement, does not bar a subsequent action to cancel the deed under which defendant claimed, since, though the subject-matter of the two actions is the same, the causes of action are different. *Kentonia Corporation v. Boring Land & Min. Co.*, 159 Ky. 61, 166 S. W. 780.

89. **U. S.**—*De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. ed. 956; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214. **Ala.**—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. **Cal.**—*Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 30 Pac. 1108; *Flandreau v. Downey*, 23 Cal. 354. **Fla.**—*Virginia-Carolina Chemical Co. v. Fisher*, 58 Fla. 377, 50 So. 504. **Ill.**—*Robinson & Co. v. Marr*, 181 Ill. App. 605. **Ia.**—*Griffith v. Fields*, 105 Iowa 362, 75 N. W. 325. **Mass.**—*Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454. **N. Y.**—*Mutual Life Ins. Co. v. United States H. Co.*, 82 Misc. 632, 144 N. Y. Supp. 476. **N. D.**—*Coyle v. Due*, 28 N. D. 400, 149 N. W.



suit,<sup>90</sup> although it may operate as *res judicata* as to any matter sub-

122. **Tex.**—*Texas & P. R. Co. v. Scoggin & Brown*, 42 Tex. Civ. App. 335, 95 S. W. 651.

90. See the following: **U. S.**—*Friend v. Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. ed. 718; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. ed. 402; *Yates v. Utica Bank*, 206 U. S. 181, 27 Sup. Ct. 646, 51 L. ed. 1015; *Fuller v. Venable*, 118 Fed. 543, 55 C. C. A. 398; *Claffin v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241; *American China Development Co. v. Boyd*, 148 Fed. 258. **Ala.**—*Deens v. Dunklin*, 33 Ala. 47; *Stallsworth v. Stallsworth*, 5 Ala. 143. **Ark.**—*Pillow v. King*, 55 Ark. 633, 18 S. W. 764. **Cal.**—*Daniels v. Henderson*, 49 Cal. 242; *Gamble v. Voll*, 15 Cal. 597; *McLaughlin v. McLaughlin*, 17 Cal. App. 639, 121 Pac. 704. **Conn.**—*Chapman v. Brainard*, 2 Root 375. **Ill.**—*Chicago Title & Trust Co. v. National Storage Co.*, 260 Ill. 485, 103 N. E. 227; *Markley v. People*, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Davis v. Kennedy*, 105 Ill. 300; *Robinson & Co. v. Marr*, 181 Ill. App. 605; *Siegel v. Fish*, 129 Ill. App. 319; *American Percheron Horse Breeders' Assn. v. American Percheron Horse Breeders, etc. Assn.*, 114 Ill. App. 136; *Smith v. Rountree*, 85 Ill. App. 161 (*affirmed* in 185 Ill. 219, 56 N. E. 1130). **Ind.**—*Johnson v. Graves*, 129 Ind. 124, 28 N. E. 315; *Moore v. State*, 114 Ind. 414, 16 N. E. 836; *Bilsland v. McManomy*, 82 Ind. 139; *Jones v. Sweet*, 77 Ind. 187. **Ia.**—*Lee v. Independent School Dist.*, 149 Iowa 345, 128 N. W. 533; *Heins v. Wicke*, 102 Iowa 396, 71 N. W. 345; *Merrill v. Tobin*, 82 Iowa 529, 48 N. W. 1044. **Kan.**—*Meyn v. Kansas City*, 91 Kan. 29, 136 Pac. 898; *Washington Nat. Bank v. Woodrum*, 60 Kan. 34, 55 Pac. 330. **Ky.**—*Pulliam v. Sells*, 124 Ky. 310, 99 S. W. 289; *Sebastian v. Booneville Academy Co.*, 22 Ky. L. Rep. 186, 56 S. W. 810; *Schuster v. White's Admr.*, 19 Ky. L. Rep. 1861, 44 S. W. 979; *Webb's Heirs v. Webb*, 6 Mon. 163. **La.**—*McCaffrey v. Benson*, 40 La. Ann. 10, 3 So. 393; *Thomas v. Sewell*, 30 La. Ann. 359; *Brou v. Beecel*, 22 La. Ann. 610; *Thompson v. Nicholson*, 12 Rob. 326; *Mallard v. Borges*, 5 Rob. 15; *Maurin v. Toustin*,

6 Mart. 496. **Mass.**—*Newhall v. Enterprise Mining Co.*, 205 Mass. 585, 91 N. E. 905; *Eastman v. Symonds*, 108 Mass. 567; *McDowell v. Langdon*, 3 Gray 513; *Harding v. Hale*, 2 Gray 399; *Latham v. Good*, 8 Cush. 302. **Mich.**—*Feldkamp v. Ernst*, 177 Mich. 550, 143 N. W. 887; *Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451. **Minn.**—*Chapman v. Propp*, 125 Minn. 447, 147 N. W. 442; *Mead v. Mead*, 115 Minn. 524, 132 N. W. 1132; *Lindgren v. Lindgren*, 73 Minn. 90, 75 N. W. 1034. **Miss.**—*Hardy v. O'Pry*, 102 Miss. 197, 59 So. 73. **Mo.**—*O'Malley v. Musick*, 191 Mo. App. 405, 177 S. W. 749. **Neb.**—*Linton v. Catthers*, 70 Neb. 661, 97 N. W. 860. **N. J.**—*Hoffmeier v. Trost*, 83 N. J. L. 358, 85 Atl. 221; *Pierce v. Old Dominion Copper Min., etc. Co.*, 67 N. J. Eq. 399, 58 Atl. 319. **N. Y.**—*Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283; *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; *Wilcox v. Lee*, 1 Rob. 355, 1 Abb. Pr. (N. S.) 250, 26 How. Pr. 418; *Raven v. Smith*, 87 Hun 90, 33 N. Y. Supp. 972; *Vinal v. Continental Constr., etc. Co.*, 53 Hun 247, 6 N. Y. Supp. 595; *Stearns v. St. Louis, etc. R. Co.*, 41 Hun 641, 2 N. Y. St. 391; *Watson v. Ross*, 168 App. Div. 788, 154 N. Y. Supp. 551; *People v. Philip Bernstein Benefit Soc.*, 161 App. Div. 823, 146 N. Y. Supp. 886; *MacArdell v. Olecott*, 104 App. Div. 263, 93 N. Y. Supp. 799; *Brantingham v. Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157; *McCarthy v. Hiller*, 26 App. Div. 588, 50 N. Y. Supp. 626; *Scott v. Haines*, 18 N. Y. Supp. 163. **N. C.**—*Ray v. Scott*, 59 N. C. 283. **N. D.**—*Coyle v. Due*, 28 N. D. 400, 149 N. W. 122. **Ohio.**—*Hellebush v. Erdhouse*, 11 Ohio Cir. Ct. 298, 5 Ohio Cir. Dec. 397; *Anonymous*, 7 Ohio Dec. (Reprint) 158, 1 Cine. L. Bul. 186. **Ore.**—*Knott v. Stephens*, 5 Ore. 235. **Pa.**—*Amrhein v. Quaker City Dye Works*, 192 Pa. 253, 43 Atl. 1008; *Van Dyke v. Van Dyke*, 135 Pa. 459, 19 Atl. 1061; *Jennings v. Hare*, 104 Pa. 489; *Woods v. White*, 97 Pa. 222. **S. C.**—*Wagener v. Kirven*, 52 S. C. 25, 29 S. E. 390; *Pickens v. Bryant*, 45 S. C. 17, 22 S. E. 750; *People's Bldg., etc. Assn. v. Mayfield*, 42 S. C. 424, 20 S. E. 290; *Ex parte Dunn*, 8 S. C. 207. **S. D.**—*Pitts v. Oliver*, 13 S. D. 561, 83 N. W. 591, 79 Am. St. Rep. 907. **Tenn.**—*Coulter v. Davis*, 13 Lea 451. **Tex.**—*Dority*

sequently arising on a different cause of action, where the particular point was actually litigated and determined in the prior action between the same parties or their privies;<sup>91</sup> and this is true whether the subject-matter of the two causes of action is the same or not.<sup>92</sup>

*v. Dority*, 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941; *Blum v. Gaines*, 57 Tex. 135; *Lane v. Kuehn* (Tex. Civ. App.), 141 S. W. 363. **Vt.**—*Sawyer v. McIntyre*, 18 Vt. 27. **Va.**—*Quarles v. Kerr*, 14 Gratt. (55 Va.) 48. See *Staunton Mut. Tel. Co. v. Buchanan*, 108 Va. 810, 62 S. E. 928, as to the Virginia rule governing suits against joint wrongdoers. **W. Va.**—*Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181. **Wis.**—*Huntzicker v. Crocker*, 135 Wis. 38, 115 N. W. 349; *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1; *Case v. Hoffman*, 190 Wis. 314, 75 N. W. 945, 44 L. R. A. 728; *Rosenow v. Gardner*, 99 Wis. 358, 74 N. W. 982; *Boutin v. Lindsley*, 84 Wis. 644, 54 N. W. 1017. **Eng.**—*Whittaker v. Kershaw*, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23; *Peareth v. Marriott*, 22 Ch. D. 182, 52 L. J. Ch. 221, 48 L. T. Rep. (N. S.) 170, 31 Wkly. Rep. 68; *Bradshaw v. Lancashire, etc. R. Co.*, L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. Rep. N. S. 847, 23 Wkly. Rep. 310; *Daly v. Dublin, etc. R. Co.*, L. R. 30 Ir. 514; *Carnegie v. Carnegie*, L. R. 17 Ir. 430; *Hunter v. Stewart*, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 45 Eng. Reprint 1148. **Can.**—*Deacon v. Great Western R. Co.*, 6 U. C. C. P. 241.

See generally the cases cited *supra*, note 89.

[a] If the causes of action are different a plea of estoppel will not avail. *McClellan v. McClellan*, 142 Ga. 322, 82 S. E. 1069.

[b] Two suits by the same plaintiff against the same defendant for cutting timber on the same tract of land, are not upon the same cause of action, where one is for trees cut prior to a certain date, and the other for trees cut subsequent to such date. *Avery v. White*, 83 Conn. 311, 76 Atl. 360.

[c] When the second suit is upon a different cause of action but between the same parties, the former judgment operates as an estoppel to the latter suit only as to points and questions

actually litigated and determined in the former. *Union Cent. Life Ins. Co. v. Drake*, 214 Fed. 536, 131 C. C. A. 82. See the title "Res Judicata."

[d] A judgment in a suit by the wife for damages for personal injuries, her administrator being substituted after her death, does not operate as an estoppel to an action by the husband against the same defendant for the loss of her society and services. *Indianapolis & M. Rapid Transit Co. v. Reeder*, 42 Ind. App. 520, 85 N. E. 1042.

[e] A judgment in an action on an express contract, is not a bar to a subsequent action on another express contract, alleged by defendant in the prior suit to be the one under which the services were performed. *Stitt v. Rat Portage L. Co.*, 101 Minn. 93, 111 N. W. 948.

91. See the following: **U. S.**—*Southern Pac. Co. v. United States*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. ed. 355; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. ed. 195; *Grider v. Groff*, 202 Fed. 685, 121 C. C. A. 95; *Linton v. National L. Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54. **Ill.**—*Chicago Title & Trust Co. v. National Storage Co.*, 260 Ill. 485, 103 N. E. 227; *People v. Chicago, B. & Q. R. Co.*, 247 Ill. 340, 93 N. E. 422; *People v. Hill*, 182 Ill. 425, 55 N. E. 542; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608. **Miss.**—*Hardy v. O'Pry*, 102 Miss. 197, 59 So. 73. **N. J.**—*Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 155, 90 Atl. 1056.

See generally the title "Res Judicata."

92. **U. S.**—*G. & C. Merriam Co. v. Saalfeld*, 190 Fed. 927, 111 C. C. A. 517; *Messinger v. Anderson*, 171 Fed. 785, 96 C. C. A. 445; *Manhattan Trust Co. v. Trust Co. of North America*, 107 Fed. 328, 46 C. C. A. 322. **Ia.**—*Goode- now v. Litchfield*, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86. **La.**—*Vascocu's Heirs v. Pavie*, 14 La. 135. **Mass.**—*Johnson v. Morse*, 11 Allen 540. **Ohio.**—*Curtis v. Cisna*, 1 Ohio 429. **Okla.**—*Nichols, etc. Co. v. Trower*, 14 Okla. 461, 78 Pac. 575. **Pa.**—*Mack v. Logue*, 23 Pa. Super.

(II.) **How Identity Determined.**—(A.) **SAME EVIDENCE TO SUPPORT.** The true test of the identity of causes of action is the identity of the facts essential to their maintenance, and this identity is best determined by ascertaining whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first. Where this is found to be the case, the prior judgment is a bar to the second suit.<sup>94</sup> On the other hand, if the evidence submitted in the second action is sufficient to authorize a recovery therein, but could not have produced a result in the first action different from that obtained, the plaintiff's failure in the first suit will not operate to bar his recovery in the second action.<sup>95</sup>

(B.) **DIFFERENCE IN RELIEF SOUGHT.**—While the estoppel resulting from a former adjudication to a subsequent suit generally depends upon the character and extent of the relief sought and granted therein, a mere difference in the relief sought does not prevent an estoppel

160. **Tenn.**—Taylor v. Sledge, 110 Tenn. 263, 75 S. W. 1074. **W. Va.**—Hudson v. Iguano Land & Mining Co., 71 W. Va. 402, 76 S. E. 797.

For effect of such judgments as evidence, see 7 ENCY. or EV. 781, and the title "Res Judicata."

93. As to test where right to amend is in question see the title "New Cause of Action or Defense."

94. **U. S.**—Union Cent. Life Ins. Co. v. Drake, 214 Fed. 536, 131 C. C. A. 82; Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Stone v. United States, 64 Fed. 667, 12 C. C. A. 451; Jones v. Hillis, 100 Fed. 355; Snyder's Admrs. v. McComb's Exrs., 39 Fed. 292; Clark v. Blair, 14 Fed. 812, 4 McCrary 311; Emma Silver Min. Co. v. New York Emma Silver Min. Co., 7 Fed. 401; Lawrence v. Vernon, 3 Sumn. 20, 15 Fed. Cas. No. 8,146. **Ala.**—Gordon v. State, 71 Ala. 315; Cannon v. Brame, 45 Ala. 262. **Cal.**—Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731; Taylor v. Castle, 42 Cal. 367. **Conn.**—Percy v. Foote, 36 Conn. 102. **Ga.**—Crockett v. Ronton, Dudley 254. **Ill.**—People v. Rickert, 159 Ill. 496, 42 N. E. 884. **Ky.**—Kentonia Corp. v. Boreing Land, etc. Co., 159 Ky. 61, 166 S. W. 780. **Mass.**—Smith v. Whiting, 11 Mass. 445. **Miss.**—Hardy v. O'Pry, 102 Miss. 197, 59 So. 73. **Neb.**—Gayer v. Parker, 24 Neb. 643, 39 N. W. 845, 8 Am. St. Rep. 227. **N. J.**—Hoffmeier v. Trost, 83 N. J. L. 358, 85 Atl. 221; Schilstra v. Van Den Berghe, 82 N. J. Eq. 155, 612, 90 Atl. 1056. **N. M.**—Albuquerque First Nat. Bank v. Lewinson, 76 Pac. 288.

**N. Y.**—Warren v. Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Dawley v. Brown, 79 N. Y. 390; Stowell v. Chamberlain, 60 N. Y. 272; Marsh v. Masterson, 18 Jones & S. 187; Miller v. Manice, 6 Hill 114; Johnson v. Smith, 8 Johns. 383; Rice v. King, 7 Johns. 20; International Paper Co. v. Purdy, 136 App. Div. 189, 120 N. Y. Supp. 342. **N. D.**—Coyle v. Due, 28 N. D. 400, 149 N. W. 122. **Okla.**—Pratt v. Ratliff, 10 Okla. 168, 61 Pac. 523. **Pa.**—Nernst Lamp Co. v. Hill, 243 Pa. 448, 90 Atl. 137; In re Campbell, 197 Pa. 581, 47 Atl. 860; Heikes v. Com., 26 Pa. 513; Marsh v. Pier, 4 Rawle 273, 26 Am. Dec. 131. **Tenn.**—Motley v. Harris, 1 Lea 577. **Vt.**—Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Gates v. Goreham, 5 Vt. 317, 26 Am. Dec. 303. **Wash.**—Mallory v. City of Olympia, 83 Wash. 499, 145 Pac. 627; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935. **Eng.**—Hunter v. Stewart, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 45 Eng. Reprint 1148; Martin v. Kennedy, 2 Bos. & P. 69, 126 Eng. Reprint 1161. See also 7 ENCY. or EV. 836.

95. **U. S.**—Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. **Ill.**—Ouinette v. City of Chicago, 242 Ill. 501, 90 N. E. 300. **Ind.**—Stringer v. Adams, 98 Ind. 539, 545; Indianapolis & C. R. R. Co. v. Clark, 21 Ind. 150; Hargus v. Goodman, 12 Ind. 629; Kirkpatrick v. Stingley, 2 Ind. 269. **N. J.**—Hoffmeier v. Trost, 83 N. J. L. 358, 85 Atl. 221. **Tex.**—Lane



where the two actions are substantially the same.<sup>96</sup> But where the relief sought or appropriate in one action is inappropriate in the other, there is generally such a lack of identity of causes of action in the two suits as to prevent an estoppel, although the two actions may be predicated upon the same transaction or state of facts;<sup>97</sup> and even where the same relief is sought, the causes of action upon which the two suits are brought may be different, so that no estoppel results.<sup>98</sup>

(C.) DIFFERENCE IN FORM OR THEORY OF ACTION.—(1.) *Generally.* A judgment on the merits in a former action will bar a subsequent suit on the same cause of action between the same parties, though the forms of the two actions be not the same.<sup>99</sup> But this rule does not apply where

*v. Kuehn* (Tex. Civ. App.), 141 S. W. 363.

*Compare, Townsley v. Niagara Life Ins. Co.*, 160 App. Div. 177, 145 N. Y. Supp. 209.

96. **U. S.**—*Oglesby v. Attrill*, 20 Fed. 570. **Ariz.**—*Dowdy v. Calvi*, 14 Ariz. 148, 125 Pac. 873. **Ga.**—*Fain v. Hughes*, 108 Ga. 537, 33 S. E. 1012. **Ia.**—*Bettys v. Chicago, etc. R. Co.*, 43 Iowa 602. **La.**—*Brady v. Ascension Parish*, 26 La. Ann. 320. **Mich.**—*Barker v. Cleveland*, 19 Mich. 230. **Mo.**—*Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481. **N. Y.**—*Marsh v. Masterson*, 101 N. Y. 401, 5 N. E. 59; *Taylor v. Taylor*, 63 Hun 303, 17 N. Y. Supp. 161; *Bouchand v. Dias*, 3 Denio 238; *International Paper Co. v. Purdy*, 136 App. Div. 189, 120 N. Y. Supp. 342; *Schmidt v. Weyell*, 60 Misc. 370, 113 N. Y. Supp. 630. **Pa.**—*Lieberman v. Hoffman*, 2 Penny. 211.

[a] “A judgment or decree bars all grounds for the relief sought,” and bars a subsequent suit to reach the same result by different means. *Calaf v. Calaf*, 232 U. S. 371, 34 Sup. Ct. 411, 58 L. ed. 642.

97. **Cal.**—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Nickerson v. California Stage Co.*, 10 Cal. 520. **Ky.**—*Bement v. Ohio Valley Banking, etc. Co.*, 99 Ky. 109, 35 S. W. 139, 59 Am. St. Rep. 445. **Md.**—*Morton v. Harrison*, 111 Md. 536, 75 Atl. 337; *Murdock's Case*, 2 Bland 461, 20 Am. Dec. 381. **Mass.**—*Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000. **Mo.**—*Scheurich v. Southwest Missouri Light Co.*, 109 Mo. App. 406, 84 S. W. 1003. **N. Y.**—*Hochstein v. James W. Hill Co.*, 153 N. Y. Supp. 899. **Pa.**—*Citizens Electric Co. v. Lycoming-Edison Co.*, 248 Pa. 603, 94 Atl. 241. **Tex.**—*Groves v. Whittenberg* (Tex. Civ. App.), 165 S. W. 889; *Middleton v. Nibling* (Tex. Civ. App.),

142 S. W. 968. **Eng.**—*Guidici v. Kinton*, 6 Beav. 517, 49 Eng. Reprint 926.

98. **U. S.**—*Gilmer v. Morris*, 35 Fed. 682. **La.**—*Laroussini v. Werlein*, 50 La. Ann. 637, 23 So. 467. **N. Y.**—*Watson v. Ross*, 168 App. Div. 788, 154 N. Y. Supp. 551; *In re Weaver*, 156 App. Div. 927, 141 N. Y. Supp. 1054. **Eng.**—*Rattenburg v. Fenton*, Coop. Brough. 60, 47 Eng. Reprint 22; *Hunter v. Stewart*, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 45 Eng. Reprint 1148.

99. **U. S.**—*Marine Ins. Co. v. Young*, 1 Cranch 331, 2 L. ed. 126; *Intermela v. Perkins*, 205 Fed. 603, 123 C. C. A. 619; *Elk Garden Co. v. T. W. Thayer Co.*, 206 Fed. 212; *McDonald v. Seligman*, 81 Fed. 753. **Ala.**—*Cannon v. Brame*, 45 Ala. 262. **Cal.**—*Taylor v. Castle*, 42 Cal. 367. **Colo.**—*Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20. **Conn.**—*Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94. **D. C.**—*Birdsall v. Welch*, 6 D. C. 316. **Ga.**—*Smith v. Smith*, 125 Ga. 83, 54 S. E. 73; *Ferguson v. Carter*, 8 Ga. 524. **Ill.**—*Elmwood Cemetery Co. v. People*, 204 Ill. 468, 68 N. E. 500; *Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238; *Atty.-Gen. v. Chicago, etc. R. Co.*, 112 Ill. 520; *Cole v. Favoorite*, 69 Ill. 457; *Kapischke v. Koch*, 79 Ill. App. 238. **Ind.**—*Faught v. Faught*, 98 Ind. 470; *Bottorff v. Wise*, 53 Ind. 32. **Kan.**—*Council Grove State Bank v. Rude*, 23 Kan. 143. **Ky.**—*Kentucky State Co. v. Page*, 125 S. W. 170; *Owens v. Rawleigh*, 6 Bush 656; *Hanley v. Foley*, 18 B. Mon. 519. **La.**—*Sewell v. Scott*, 35 La. Ann. 553. **Me.**—*Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565; *Bunker v. Tufts*, 57 Me. 417; *Brown v. Moran*, 42 Me. 44; *White v. Philbrick*, 5 Greenl. 147, 17 Am. Dec. 214. **Md.**—*Harryman v. Roberts*, 52 Md. 64. **Mass.**—*Clare v. New York, etc.*

the difference in the form or theory of the action, in effect makes it a different cause of action, as where one action is in rem and the other in personam,<sup>1</sup> or the two actions, though based upon the same transaction or state of facts, proceed upon different theories as to the legal effect of such facts or as to the rights of the parties in the premises;<sup>2</sup> or where one action is in the nature of a criminal prosecution and the other a civil action for damages.<sup>3</sup> Nor does the rule apply, of course, where the former judgment was not on the merits,<sup>4</sup> or where two or more distinct causes of action arise from the same transaction or state of facts.<sup>5</sup>

R. Co., 172 Mass. 211, 51 N. E. 1083; *Harlow v. Bartlett*, 170 Mass. 581, 49 N. E. 1014; *Blackington v. Blackington*, 113 Mass. 231; *Merriam v. Woodcock*, 104 Mass. 326. Mich.—*Daniel v. Citizens' Mut. Fire Ins. Co.*, 149 Mich. 626, 113 N. W. 17; *Barker v. Cleveland*, 19 Mich. 230. Minn.—*Robitshek v. Swedish-American Nat. Bank*, 72 Minn. 319, 75 N. W. 331; *Hatch v. Goodington*, 32 Minn. 92, 19 N. W. 393; *Hardin v. Palmerlee*, 28 Minn. 450, 10 N. W. 773. Miss.—*Perry v. Lewis*, 49 Miss. 443. Mo.—*Union R. & Trans. Co. v. Traube*, 59 Mo. 355. Neb.—*Spear v. Tidball*, 40 Neb. 107, 58 N. W. 708. N. Y.—*Brown v. New York*, 66 N. Y. 385; *Collins v. Bennett*, 46 N. Y. 490; *Maeder v. Wexler*, 98 App. Div. 68, 90 N. Y. Supp. 598; *Boyd v. Boyd*, 53 App. Div. 152, 65 N. Y. Supp. 859. Ohio. *Bell v. McColloch*, 31 Ohio St. 397; *Covington, etc. Bridge Co. v. Sargent*, 27 Ohio St. 233. Okla.—*Pratt v. Ratliff*, 10 Okla. 168, 61 Pac. 523. Pa. *Larkins v. Lindsay*, 205 Pa. 534, 55 Atl. 184; *Ahl v. Goodhart*, 161 Pa. 455, 29 Atl. 82; *Brenner v. Moyer*, 98 Pa. 274. S. C.—*Stroble v. Large*, 3 McCord 112. Tex.—*Birdseye v. Schaeffer* (Tex. Civ. App.), 57 S. W. 987; *Stuart v. Tenison Bros. Saddlery Co.*, 21 Tex. Civ. App. 530, 53 S. W. 83. Vt.—*Lindsey v. Danville*, 46 Vt. 144; *Spencer v. Dearth*, 43 Vt. 98; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345. Va.—*Shumate v. Fauquier*, 84 Va. 574, 5 S. E. 570; *Hite v. Long*, 6 Rand. (27 Va.) 457, 18 Am. Dec. 719. Wash.—*Boylan v. Bock*, 60 Wash. 423, 111 Pac. 454; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935. Wis.—*Shepardson v. Cary*, 29 Wis. 34. Eng.—*Routledge v. Hislop*, 2 Ed. & El. 549, 6 Jur. N. S. 398, 29 L. J. M. C. 90, 2 L. T. Rep. N. S. 53, 8 Wkly. Rep. 363, 105 E. C. L. 549, 121 Eng. Reprint 206; *Outram v. Morewood*, 3 East 346, 7 Rev. Rep. 473, 102 Eng.

Reprint 630; *Hancock v. Welsh*, 1 Stark. 347, 2 E. C. L. 136.

1. *The Odorilla v. Baizley*, 128 Pa. 283, 18 Atl. 511; *Middleton v. Nibbling* (Tex. Civ. App.), 142 S. W. 968.

[a] Judgment in rem against a steamboat under a statute permitting resort thereto merely as a cumulative remedy, cannot be pleaded as a former recovery in bar of an action against the owners of the boat on the same contract. *Toby v. Brown*, 11 Ark. 308.

[b] Where there was no appearance or personal service in an attachment suit on a note, the judgment therein, which has not been satisfied, does not bar a subsequent suit in personam on the same note. *Smith v. Curtiss*, 38 Mich. 393.

Effect of proceeding in rem in sister state as bar to proceeding in personam, see *infra*, XVIII, B, 3, d, (I).

2. Cal.—*South San Bernardino Land, etc. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245, 59 Pac. 699. N. Y.—*Derleth v. Degraaf*, 19 Jones & S. 369; *Seeley v. Osborne*, 161 App. Div. 844, 147 N. Y. Supp. 116; *Hahl v. Sugo*, 27 Misc. 1, 57 N. Y. Supp. 920. Tex. *Groves v. Whittenberg* (Tex. Civ. App.), 165 S. W. 889. W. Va.—*Brown v. Squires*, 42 W. Va. 367, 26 S. E. 177. See *infra*, XVII, B, 2, e, (II), (C), (2).

3. *Gould v. Landon*, 43 Pa. 365.

4. U. S.—*Water, L. & G. Co. v. Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219. Conn. *Botsford v. Wallace*, 72 Conn. 195, 44 Atl. 10. Ind.—*Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611. Miss.—*Agnew v. McElroy*, 10 Smed. & M. 552, 48 Am. Dec. 772. Tenn.—*McQuade v. Williams*, 101 Tenn. 334, 47 S. W. 427. Eng.—*Hadley v. Greene*, 2 Comp. & J. 374, 1 L. J. Exch. 137, 2 Tyrw. 390.

See *infra*, XVII, B, 3, d.

5. *Elliott v. Porter*, 5 Dana (Ky.)

**Actions Ex Contractu and Ex Delicto.**—A judgment in an action of tort to recover damages for an injury, will usually operate as a bar to a subsequent suit on contract for the recovery of damages for the same injury, or vice versa.<sup>6</sup>

(2.) *Grounds of Recovery.*—A judgment operates as an estoppel only as to the facts constituting the ground of recovery at the time of its rendition, and the legal rights and relations of the parties thereby determined, and cannot operate as a bar to a subsequent suit, where conditions have changed and new facts and elements are brought in.<sup>7</sup> But if there is no change in the legal rights and relations of the parties, and no new element is introduced by a change of facts, such change

299, 30 Am. Dec. 689; *Put v. Rawstern*, 3 Mod. Rep. 1, 87 Eng. Reprint 1. See *infra*, XVII, B, 2, g.

6. **Ark.**—*Stanley v. Bracht*, 42 Ark. 210; *Walker v. Fuller*, 29 Ark. 448. **Ga.**—*Duncan v. Stokes*, 47 Ga. 593. **Ill.** *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Terre Haute, etc. R. Co. v. People*, 41 Ill. App. 513. **Ind.**—*Guthrie v. Goodrich*, 160 Ind. 92, 66 N. E. 446; *Cutler v. Cox*, 2 Blackf. 178, 18 Am. Dec. 152. But see *Smith v. Scantling*, 4 Blackf. 443, holding that a recovery in assumpsit is not a bar to an action of trover. **Ia.**—*Newby v. Caldwell*, 54 Iowa 102, 6 N. W. 154. **Ky.**—*Hall v. Forman*, 82 Ky. 505. **Me.**—*Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565. **Md.**—*Walsh v. Chesapeake, etc. Canal Co.*, 59 Md. 423. **Mass.**—*Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895; *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301, 3 L. R. A. 507; *Smith v. Way*, 9 Allen 472; *Norton v. Doherty*, 3 Gray 372, 63 Am. Dec. 758; *Bigelow v. Winsor*, 1 Gray 299; *Salem India-Rubber Co. v. Adams*, 23 Pick. 256; *Agnew v. McElroy*, 10 Smed. & M. 552, 48 Am. Dec. 772. **N. H.**—*Andrews v. Varrell*, 46 N. H. 17. **N. M.**—*Lowenthal v. Baca*, 10 N. M. 347, 62 Pac. 982. **N. Y.**—*Jones v. Scriven*, 8 Johns. 453; *Lee v. Corn*, 2 Misc. 463, 21 N. Y. Supp. 1073, 51 N. Y. St. 157; *Roome v. Collins*, 2 N. Y. City Ct. Rep. 54. *Compare*, *Bower v. Mandeville*, 95 N. Y. 237. **Ohio.**—*Timmons v. Dunn*, 4 Ohio St. 680. **Pa.**—*Floyd v. Browne*, 1 Rawle 121, 18 Am. Dec. 602. **S. C.** *Cook v. Cook*, 2 Brev. 349. **Vt.**—*Hill v. Barre Nat. Bank*, 56 Vt. 582. **Wash.** *Achey v. Creech*, 21 Wash. 319, 53 Pac. 208. **Eng.**—*Buckland v. Johnson*, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565,

80 E. C. L. 145, 139 Eng. Reprint 375. **Can.**—*Sloan v. Creasor*, 22 U. C. Q. B. 127.

[a] Where the first action was dismissed by the plaintiff, and no adjudication on the merits was had, however, the rule was held not to apply. *Johnson v. East Tennessee, etc. R. Co.*, 90 Ga. 810, 17 S. E. 121.

[b] Where the second action is based upon a different theory as to the legal effect of the state of facts or as to the rights of the parties in the given premises, this rule does not apply. **Minn.**—*Woodman v. Blue Grass Land Co.*, 98 Minn. 87, 107 N. W. 1052. **Neb.**—*Gayer v. Parker*, 24 Neb. 643, 39 N. W. 845, 8 Am. St. Rep. 227. **Pa.** *Schrivver v. Eckenrode*, 87 Pa. 213.

7. **U. S.**—*Memphis City Bank v. Tennessee*, 161 U. S. 186, 16 Sup. Ct. 468, 40 L. ed. 664; *Dennison Mfg. Co. v. Scharf Tag, etc. Co.*, 121 Fed. 313, 57 C. C. A. 9; *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 173; *Reinecke Coal Min. Co. v. Wood*, 112 Fed. 477. **Ark.**—*Weis v. Meyer*, 55 Ark. 18, 17 S. W. 339. **Cal.**—*Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673; *Naftzger v. Gregg*, 31 Pac. 612. **Conn.** *Peck v. Easton*, 74 Conn. 456, 51 Atl. 134. **Ill.**—*Ligare v. Chicago, M. & N. R. Co.*, 166 Ill. 249, 46 N. E. 803; *Gage v. Ewing*, 114 Ill. 15, 28 N. E. 379; *Hyde v. Waite*, 2 Ill. App. 443. **Ind.** *Terre Haute & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401; *Brenner v. Heiler*, 46 Ind. App. 335, 91 N. E. 744. **Ia.**—*Kemp v. Des Moines*, 125 Iowa 640, 101 N. W. 474; *Linton v. Crosby*, 61 Iowa 293, 16 N. W. 113; *Dwyer v. Goran*, 29 Iowa 126. **Kan.**—*State ex rel. Coleman v. Leavenworth*, 75 Kan. 787, 90 Pac. 237. **Ky.**—*Pulliam v. Sells*, 124 Ky. 310, 99 S. W. 289; *Louisville, etc. R. Co. v. Schmidt*, 112 Ky. 717, 66



will not affect the estoppel. Nor can the estoppel of the former judgment be avoided by alleging in a second action additional reasons or new grounds in support of the case, which should have been litigated

- S. W. 629. **La.**—*Martin v. Walker*, 43 La. Ann. 1019, 10 So. 365; *Cantrelle v. St. James Roman Catholic Congr.*, 16 La. Ann. 442. **Minn.**—*Wayzata v. Great Northern Ry. Co.*, 67 Minn. 385, 69 N. W. 1073; *Irish American Bank v. Ludlum*, 56 Minn. 317, 57 N. W. 997. **Mont.**—*Meyendorf v. Frohner*, 3 Mont. 282. **N. J.**—*Ashurst v. Lippincott*, 56 N. J. Eq. 840, 42 Atl. 1017. **N. Y.**—*Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 635, 55 N. E. 305; *Carter v. Beekwith*, 128 N. Y. 312, 28 N. E. 582; *Hasbrouck v. Lounsbury*, 26 N. Y. 538. **N. C.**—*Bradburn v. Roberts*, 118 N. C. 214, 61 S. E. 617; *Cabe v. Vanhook*, 127 N. C. 424, 37 S. E. 464. **Ohio.** *State v. Eagle Ins. Co.*, 50 Ohio St. 252, 23 N. E. 1056; *Shepherd v. Willis*, 19 Ohio 142; *Wright v. Cincinnati*, 8 Ohio Dec. 588, 6 Ohio N. P. 450. **Pa.**—*Armhein v. Quaker City Dye Works*, 192 Pa. 253, 43 Atl. 1008; *Elliott v. Smith*, 23 Pa. 131. **R. I.**—*Crafts v. Crafts*, 23 R. I. 5, 52 Atl. 890; *Sayles v. Tibbitts*, 5 R. I. 79. **S. C.**—*Anderson v. Cave*, 49 S. C. 505, 27 S. E. 478. **Tenn.** *McKissick v. McKissick*, 6 Humph. 75. **Tex.**—*Walsh v. Ford*, 27 Tex. Civ. App. 573, 66 S. W. 854. **Utah.**—*Richiey v. Bues*, 31 Utah 262, 87 Pac. 903. **Wash.** *Thompson v. Washington Nat. Bank*, 68 Wash. 42, 122 Pac. 606; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487. **Eng.**—*Heath v. Weaverham Tp.*, 2 Q. B. 108, 58 J. P. 557, 63 L. J. M. C. 187, 70 L. T. N. S. 729, 10 Reports 274, 42 Wkly. Rep. 478; *In re Anglo-French Co-operative Soc.*, 14 Ch. Div. 533, 49 L. J. Ch. 388, 28 Wkly. Rep. 580; *Hall v. Leroy*, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. N. S. 727, 23 Wkly. Rep. 393; *Cotter v. Barrymore*, 4 Bro. P. C. 203, 2 Eng. Reprint 138; *Harris v. Mulkern*, 1 Ex. D. 31, 45 L. J. Exch. 244, 34 L. T. N. S. 99, 24 Wkly. Rep. 208; *Hall v. Levy*, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. N. S. 727, 23 Wkly. Rep. 393. **Can.**—*In re Manitoba Commission Co.*, 23 Manitoba 477.
8. See the following: **U. S.**—*National Foundry, etc. Works v. Oconto City Water Supply Co.*, 183 U. S. 216, 22 Sup. Ct. 111, 46 L. ed. 157; *Case v. Beauregard*, 101 U. S. 688, 25 L. ed. 1004; *Riedinger v. Diamond Match Co.*, 123 Fed. 244, 60 C. C. A. 1; *Lake Erie, etc. R. Co. v. Smith*, 61 Fed. 885. **Cal.** *Quirk v. Rooney*, 130 Cal. 505, 62 Pac. 825; *Phelan v. Quinn*, 130 Cal. 374, 62 Pac. 623; *Montgomery v. Harrington*, 58 Cal. 270. **Idaho.**—*King v. Sioux Falls Co-operative Sav., etc. Assn.*, 6 Idaho 760, 59 Pac. 557. **Ill.**—*Anderson v. West Chicago St. R. Co.*, 200 Ill. 329, 65 N. E. 717; *Monarch Cycle Mfg. Co. v. Mueller*, 83 Ill. App. 359; *Knowlton v. Warner*, 25 Ill. App. 221. **Ind.** *Rarey v. Lee*, 7 Ind. App. 518, 34 N. E. 749. **Kan.**—*Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636. **Ky.** *Holtheide v. Smith's Guardian*, 27 Ky. L. Rep. 60, 84 S. W. 321. **La.**—*Hargrave v. Mouton*, 109 La. 533, 33 So. 590; *Aiken v. Robinson*, 108 La. 267, 32 So. 415; *Canal, etc. R. Co. v. Crescent City R. Co.*, 47 La. Ann. 314, 16 So. 844; *Broussard v. Broussard*, 43 La. Ann. 921, 9 So. 910. **Mass.**—*Hoseason v. Keegan*, 178 Mass. 247, 59 N. E. 627. **Md.**—*Feldmeyer v. Werntz*, 119 Md. 285, 86 Atl. 986. **Minn.**—*Thomas v. Joslin*, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624. **Mo.**—*Givins v. Thompson*, 110 Mo. 432, 19 S. W. 833. **N. Y.**—*Kennedy v. City of New York*, 127 App. Div. 89, 111 N. Y. Supp. 61; *Maeder v. Wexler*, 98 App. Div. 68, 90 N. Y. Supp. 598; *Keller v. Feldman*, 81 Hun 593, 31 N. Y. Supp. 41. **N. C.** *McElwee v. Blackwell*, 101 N. C. 192, 7 S. E. 893; *Edwards v. Baker*, 99 N. C. 258, 6 S. E. 255. **Ohio.**—*Shaw v. Cincinnati*, 1 Ohio Dec. 91, 1 Ohio N. P. 88. **Pa.**—*Carpenter v. City of Lancaster*, 212 Pa. 581, 61 Atl. 1113; *Vankirk v. Patterson*, 204 Pa. 317, 54 Atl. 175; *Bell v. Allegheny*, 184 Pa. 296, 39 Atl. 227, 63 Am. St. Rep. 795; *Fidelity Ins., etc. Co. v. Fridenberg*, 175 Pa. 500, 34 Atl. 848, 52 Am. St. Rep. 851; *Nelson v. Nelson*, 117 Pa. 278, 11 Atl. 61. **P. R.**—*Gonzales v. Mendez*, 15 Porto Rico 682. **Tex.**—*Thomas v. Junction City Irr. Co.*, 80 Tex. 550, 16 S. W. 324; *Stuart v. Tenison Bros. Saddlery Co.*, 21 Tex. Civ. App. 530, 53 S. W. 83; *Santleben v. Alamo Cement Co.* (Tex. Civ. App.), 25 S. W. 143. **Va.** *Diehl v. Marchant*, 87 Va. 417, 12 S. E. 803. **Wash.**—*Thompson v. Washington Nat. Bank*, 68 Wash. 42, 122 Pac. 606;

in the former action.<sup>9</sup> Additional facts, which support the original cause of action, and which might have been presented therein, are not sufficient to sustain a new action,<sup>10</sup> although some authorities have held that the former judgment operates as an estoppel only as to the facts actually litigated.<sup>11</sup>

But the defeat or failure of an action at law predicated upon one theory of the plaintiff's legal rights with respect to the transaction or state of facts involved, because of his failure to substantiate such theory, does not work an estoppel against a second suit founded upon a more correct theory, even where there has been no material change in the facts of his case.<sup>12</sup> Likewise in equity, where the equities of the

*Cuschner v. Longbehn*, 44 Wash. 546, 87 Pac. 817. **Wis.**—*Greenleaf v. Ludington*, 15 Wis. 558, 82 Am. Dec. 698. **Eng.**—*Phosphate Sewage Co. v. Molleson*, 4 App. Cas. 801; *In re May*, 28 Ch. Div. 518, 54 L. J. Ch. 338, 52 L. T. N. S. 79, 33 Wkly. Rep. 917.

[a] Where the difference between the two actions narrows down to a mere difference of theory or legal effect, the substantial facts remaining the same, the former judgment is a bar. *Grant v. Greene Consol. Copper Co.*, 169 App. Div. 206, 154 N. Y. Supp. 596.

9. **U. S.**—*United States v. California*, etc. Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. ed. 476; *Columb v. Webster Mfg. Co.*, 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195; *Ross v. Portland*, 105 Fed. 682; *Patterson v. Wold*, 33 Fed. 791. **Ala.**—*Balkum v. Satcher*, 51 Ala. 81. **Colo.**—*Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551. **Ga.**—*Greene v. Central of Georgia R. Co.*, 112 Ga. 859, 38 S. E. 360. **Ill.**—*Tinker v. Babcock*, 204 Ill. 571, 68 N. E. 445; *Ruegger v. Indianapolis*, etc. R. Co., 103 Ill. 449; *Rogers v. Higgins*, 57 Ill. 244. **Ind.**—*Nickless v. Pearson*, 126 Ind. 477, 26 N. E. 478. **Kan.**—*Price v. Atchison First Nat. Bank*, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419. **La.**—*Buck v. Massie*, 109 La. 776, 33 So. 767; *Flourance v. Wilcox*, 14 La. 58. **Mass.**—*Barnes v. Huntley*, 188 Mass. 274, 74 N. E. 318. **Minn.**—*McKnight v. Minneapolis St. R. Co.*, 127 Minn. 207, 149 N. W. 131. **Ohio.**—*Martin v. Roney*, 41 Ohio St. 141. **Pa.**—*Bell v. Allegheny County*, 184 Pa. 296; 37 Atl. 227, 63 Am. St. Rep. 795. **S. C.**—*Newell v. Neal*, 50 S. C. 68, 27 S. E. 560. **Tex.**—*Girardin v. Dean*, 49 Tex. 243; *Smith v. Banks* (Tex. Civ. App.), 152 S. W. 449. **Eng.**—*Phosphate Sew-*

*age Co. v. Molleson*, 4 App. Cas. 801; *McDougall v. Knight*, 25 Q. B. D. 1, 54 J. P. 788, 59 L. J. Q. B. 517, 63 L. T. N. S. 43, 38 Wkly. Rep. 553; *In re May*, 28 Ch. Div. 518, 54 L. J. Ch. 338, 52 L. T. N. S. 79, 33 Wkly. Rep. 917.

10. *McCain v. Louisville*, etc. R. Co., 15 Ky. L. Rep. 80, 22 S. W. 325; *Hardy v. O'Pry*, 102 Miss. 197, 59 So. 73.

As to judgment as estoppel as to matters within scope of former litigation, see *supra*, XVII, B, 2, c.

11. *Bode v. New England Inv. Co.*, 6 Dak. 499, 42 N. W. 658, 45 N. W. 197; *Moore v. Snowball*, 98 Tex. 16, 81 S. W. 5.

12. **U. S.**—*Dexter, Horton & Co. v. Sayward*, 84 Fed. 296. **Conn.**—*Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147. **Ga.**—*Henson v. Taylor*, 108 Ga. 567, 33 S. E. 911. **Ill.**—*People ex rel. Slusser v. Gary*, 196 Ill. 310, 63 N. E. 749; *Pinneo v. Goodspeed*, 120 Ill. 524, 12 N. E. 196; *Taylor v. Indiana Paper Co.*, 64 Ill. App. 339; *Dowdall v. Cannedy*, 32 Ill. App. 207. **Ind.**—*Chicago & E. I. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924. **Mass.**—*Jones v. Fales*, 4 Mass. 245. **Mich.**—*Brand v. Connery*, 132 Mich. 88, 92 N. W. 784. **Minn.**—*Richardson v. Richards*, 36 Minn. 111, 30 N. W. 457. **N. M.**—*Lockhart v. Leeds*, 12 N. M. 156, 76 Pac. 312. **N. Y.**—*Kreitz v. Frost*, 5 Abb. Pr. N. S. 277; *People v. Dalton*, 52 App. Div. 371, 65 N. Y. Supp. 342; *Stokes v. Stokes*, 49 App. Div. 302, 63 N. Y. Supp. 887; *Buttling v. Hatton*, 33 App. Div. 551, 53 N. Y. Supp. 1009; *Goldstein v. Asen*, 46 Misc. 251, 91 N. Y. Supp. 783; *Osterman v. Goldstein*, 32 Misc. 676, 66 N. Y. Supp. 506. **Ohio.**—*Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *Manns v. Cin-*

second bill are materially different from the first, although the origin of both may be the same, the decree in the first suit is not a bar to a second.<sup>13</sup> Thus a second suit may be maintained for relief on the same cause or transaction, where it is based upon a different right, title or liability from that claimed in the first, and which could not properly have been adjudicated in the first;<sup>14</sup> or where the first was an action on an account stated, and the second is based on the matter in reference to which it was claimed there was an account stated.<sup>15</sup>

The same is true where the first action was upon an express contract and the second upon quantum meruit;<sup>16</sup> where the first was on a written instrument, and the second for recovery on the ground of mistake

cinnati, 10 Ohio Cir. Ct. 549, 6 Ohio Cir. Dec. 824. **Ore.**—Nickum v. Burekhardt, 30 Ore. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822. **R. I.** Knowles v. Knowles, 33 R. I. 491, 82 Atl. 257. **Tex.**—See McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959, holding that a party is not entitled to have a second trial of an issue determined in a previous suit merely because he has a different purpose in view, and seeks different relief. **Wash.** Commercial Bank v. Faklas, 21 Wash. 36, 56 Pac. 927. **Wis.**—Fordyce v. State, 115 Wis. 608, 92 N. W. 430; Andrew v. Schmitt, 64 Wis. 664, 26 N. W. 190.

See also *supra*, XVII, B, 2, e, (II), (C), (1).

13. *Morris' Admsrs. v. Stuart*, 1 G. Gr. (Iowa) 375; *Hunter v. Stewart*, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 45 Eng. Reprint 1148.

14. See the following: **U. S.**—Kroeger v. Calivada Colonization Co., 119 Fed. 641, 56 C. C. A. 257; *Shinkle v. Vickery*, 117 Fed. 916. **Cal.**—Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186. **Ga.** Huff v. Huff, 99 Ga. 371, 27 S. E. 699. **Ia.**—Boyle v. Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; *Keater v. Hock*, 16 Iowa 23. **Ky.**—Dean v. Snyder, 10 Ky. L. Rep. 281. **La.**—Laroussini v. Werlein, 50 La. Ann. 637, 23 So. 467. **Mass.**—Harlow v. Bartlett, 170 Mass. 584, 49 N. E. 1014; *Bridge v. Austin*, 4 Mass. 115. **Minn.**—Watson v. St. Paul City Ry. Co., 76 Minn. 358, 79 N. W. 308. **Mo.**—Hill v. Combs, 92 Mo. App. 242; *Massey v. McCoy*, 79 Mo. App. 169. **N. J.**—Schneider v. Schmitt, 81 N. J. Eq. 18, 92 Atl. 789. **N. Y.**—Belden v. State, 103 N. Y. 1, 8 N. E. 363. **Ore.**—Spande v. Western

Life Indemnity Co., 68 Ore. 171, 136 Pac. 1189; *Feldman v. McGuire*, 34 Ore. 309, 55 Pac. 872. **S. C.**—Whaley v. Stevens, 24 S. C. 479. **Tex.**—American Freehold Land Mortg. Co. v. Maedonell, 93 Tex. 398, 55 S. W. 737; *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49; *Carnes v. Carnes*, 26 Tex. Civ. App. 610, 64 S. W. 877; *Parker v. Stephens* (Tex. Civ. App.), 48 S. W. 878.

[a] The difference in the two titles set up must be real and substantial, and not one of nominal or technical variance. *Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. ed. 817.

As to matters which could not have been adjudicated, see generally *supra*, XVII, B, 2, b.

15. *Tuck v. Rottowsky*, 47 Misc. 386, 93 N. Y. Supp. 1112.

16. **U. S.**—Gibboney v. Camden County, 122 Fed. 46, 58 C. C. A. 228; *Davenport v. Allen*, 120 Fed. 172. **Mass.** Salem India Rubber Co. v. Adams, 23 Pick. 256. **Mich.**—Laird v. Laird's Est., 127 Mich. 24, 86 N. W. 436. **Minn.**—Rossman v. Tillyen, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247. **Miss.**—Hardy v. O'Pry, 102 Miss. 197, 59 So. 73. **Mo.**—Arthur Fritsch Foundry, etc. Co. v. Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136. **N. J.** Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647. **N. Y.**—Marsh v. Masterson, 101 N. Y. 401, 5 N. E. 59; *Maeder v. Wexler*, 43 Misc. 16, 87 N. Y. Supp. 400. **Ohio.**—*In re Ward*, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44. **Tex.** Henrietta Nat. Bank v. Barrett (Tex. Civ. App.), 25 S. W. 456. **Wash.**—Malory v. City of Olympia, 83 Wash. 499, 145 Pac. 627; *Buddress v. Schafer*, 12 Wash. 310, 41 Pac. 43. **Wis.**—Mani-



or fraud, or to have a resulting trust declared.<sup>17</sup> where the first was for the enforcement of a special lien against property, and the second based upon the personal liability of the defendant;<sup>18</sup> or where the first action was for the recovery of the purchase price or consideration of property, resulting in a failure on the part of plaintiff to prove a sale, and the second an action for the use or detention of the property.<sup>19</sup>

*f. Identity of Parties.*—(I.) *In General.*<sup>7</sup> —Not only must the causes of action be identical,<sup>8</sup> but a former recovery will not operate to bar a subsequent suit, unless it appears that the parties to the two actions are identical, either in person or in privity.<sup>9</sup> If the parties

towoc Steam Boiler Works *v.* Manitowoc Glue Co., 120 Wis. 1, 97 N. W. 515.

*Compare infra*, XVII, B, 2, g, (II), (E).

17. **U. S.**—Elgin Nat. Watch Co. *v.* Meyer, 29 Fed. 225. **Cal.**—O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236. **Mo.**—Davidson *v.* Mayhew, 169 Mo. 258, 68 S. W. 1031. **N. Y.**—Gutchess *v.* Whiting, 46 Barb. 139. **R. I.**—Horton *v.* Bassett, 17 R. I. 129, 20 Atl. 234. **Va.**—Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978. **Wis.**—Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

[a] But see Emery *v.* Goodwin, 13 Me. 14, 29 Am. Dec. 475, holding that judgment in an action of debt on a guardian's bond, alleging fraudulent management of the plaintiff's estate, is a bar to a suit in equity by the plaintiff seeking to charge the guardian as trustee of the property alleged to have been misappropriated.

18. **Ill.**—Geary *v.* Bangs, 138 Ill. 77, 27 N. E. 462. **N. M.**—Texas, etc. R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac. 532. **S. C.**—Sease *v.* Dobson, 34 S. C. 345, 13 S. E. 530. **Tex.**—Douglass *v.* Blount (Tex. Civ. App.), 62 S. W. 429. **W. Va.**—Brown *v.* Squire's Admr., 42 W. Va. 367, 26 S. E. 177.

19. Des Boulets *v.* Gravier, 7 Mart. N. S. (La.) 27; Rider *v.* Union India Rubber Co., 28 N. Y. 379.

7. What amounts to an identity of parties in connection with amendments as to parties, see the titles "New Cause of Action or Defense;" "Parties;" also 6 STANDARD PROC. 435, and supplement thereto.

8. See *supra*, XVII, B, 2, e, (I).

9. See the following: **U. S.**—Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209; Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585; *In re* Mayer, 195 Fed. 571; Jenkins *v.* Atlantic Coast

Line R. Co., 179 Fed. 535; Johnson & Johnson *v.* Herold, 161 Fed. 593; Calculagraph Co. *v.* Automatic Time Stamp Co., 154 Fed. 166; Waite *v.* Triplecock, 5 Dill. 547, 28 Fed. Cas. No. 17,046; Smith *v.* Turner, 1 Hughes 373, 22 Fed. Cas. No. 13,119; Burnham *v.* Webster, 1 Woodb. & M. 172, 4 Fed. Cas. No. 2,179; Adams Express Co. *v.* Davison, 1 Fed. Cas. No. 73. **Ala.**—Gilbreath *v.* Jones, 66 Ala. 129; Lawrence *v.* Ware, 37 Ala. 553; Hutchinson *v.* Dearing, 20 Ala. 798. **Ark.**—Trammell *v.* Thurmond, 17 Ark. 203. **Cal.**—Chase *v.* Swain, 9 Cal. 130. **Conn.**—Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594; Cowles *v.* Harts, 3 Conn. 516. **D. C.**—Strong *v.* Grant, 2 Mackey 218. **Ga.**—Alexander *v.* State, 56 Ga. 478. **Ill.**—Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Robinson *v.* Marr, 181 Ill. App. 605; American Percheron Horse Breeders Assn. *v.* American Percheron Horse Breeders, etc. Assn., 114 Ill. App. 136; Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490. **Ind.**—Harvey *v.* State, 94 Ind. 159; Willson *v.* Binford, 81 Ind. 588; Kramer *v.* Matthews, 68 Ind. 172. **Ia.**—Davenport *v.* Chicago, etc. R. Co., 38 Iowa 633. **Kan.**—Atchison, etc. R. Co. *v.* Jefferson County Comrs., 12 Kan. 127. **Ky.**—Liverpool & London & Globe Ins. Co. *v.* Wright, 166 Ky. 159, 179 S. W. 49; Banta *v.* Clay, 5 Litt. 129. **La.**—Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; State *v.* Jumel, 30 La. Ann. 861; Degelos *v.* Woolfolk, 21 La. Ann. 706; Slocumb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Wells *v.* Coyle, 20 La. Ann. 396; Spears *v.* Shropshire, 10 La. Ann. 218. **Md.**—Lumpkin *v.* Lumpkin, 108 Md. 470, 70 Atl. 238; Brooks *v.* Brooke, 12 Gill & J. 306, 38 Am. Dec. 310. **Mass.**—Kerr

are not the same, a second action is not ordinarily barred even where the two actions are based upon the same transaction or state of facts.<sup>10</sup> Where, however, the parties, though nominally or technically different,

*v. Crane*, 212 Mass. 224, 98 N. E. 783; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Gilbert v. Thompson*, 9 Cush. 348. **Mich.**—*Kovacs v. Mayoras*, 175 Mich. 582, 141 N. W. 662; *Lemiette v. Starr*, 66 Mich. 539, 33 N. W. 832; *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806. **Mo.**—*State v. Kaye*, 83 Mo. App. 678; *McGill v. Wallace*, 22 Mo. App. 675. **Neb.**—*Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384. **N. J.**—*Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449. **N. Y.**—*Tompkins v. Hyatt*, 28 N. Y. 347; *Kelsey v. Bradbury*, 21 Barb. 531; *Hutchins v. Fitch*, 4 Johns. 222; *Neafie v. Neafie*, 7 Johns. Ch. 1, 11 Am. Dec. 380; *Griswold v. Jackson*, 2 Edw. Ch. 461; *Rodman v. Devlin*, 23 Hun 590; *Hall v. Richardson*, 22 Hun 444; *Woodworth v. Seymour*, 22 Hun 245; *Bunker v. Laugs*, 76 Hun 543, 28 N. Y. Supp. 210, 58 N. Y. St. 243; *Savage v. Buffalo*, 49 App. Div. 577, 63 N. Y. Supp. 477; *Scott v. Hartog*, 75 Misc. 126, 132 N. Y. Supp. 846; *Matter of Lansing*, 31 Misc. 148, 64 N. Y. Supp. 1125; *Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43. **N. C.**—*Williams v. Clouse*, 91 N. C. 322; *Temple v. Williams*, 91 N. C. 82; *Shuster v. Perkins*, 47 N. C. 217. **N. D.**—*Randall v. Johnstone*, 25 N. D. 284, 141 N. W. 352. **Ohio.**—*Crumb v. Treiber*, 4 Ohio Dec. (Reprint) 492, 4 Wkly. L. Bul. 616. **Pa.**—*Rhoads v. Armstrong*, 41 Pa. 92; *Hoeker v. Jamison*, 2 Watts & S. 438. **Tenn.**—*Harris & Cole Bros. v. Columbia Water, etc. Co.*, 114 Tenn. 328, 85 S. W. 897; *Burton v. Dees*, 4 Yerg. 4. **Tex.**—*Foster v. Wells*, 4 Tex. 101. **Vt.**—*Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680. **Va.**—*Cleaton v. Chambliss*, 6 Rand. 86. **Wis.** *Ruth v. Oberbrunner*, 40 Wis. 238. **Eng.** *Anderson v. Collinson*, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623. **Can.** *Muir v. Carter*, 16 Can. Sup. Ct. 473; *In re Manitoba Commission Co.*, 23 Manitoba 477.

See also the cases cited *supra*, XVII, B, 1, b, (I); and *infra*, note 10.

[a] Exception to the rule is found in an action of tort, such as trespass, where the defendant's responsibility is necessarily dependent upon the culpa-

bility of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable; the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. *Portland Gold Mining Co. v. Stratton's Independence*, 158 Fed. 63, 85 C. C. A. 393. And where a husband authorizes his wife to sue for expenses incurred as a necessary result of personal injuries, and permits her to recover therefor without interposing a claim in his own behalf, he is estopped thereby to sue upon the same cause of action in his own name. *Neumeister v. Dubuque*, 47 Iowa 465.

[b] Either the bailor or bailee may maintain an action against a trespasser for the conversion of property, but a recovery by one bars an action by the other. *First Commercial Bank of Pontiac v. Valentine*, 209 N. Y. 145, 102 N. E. 544, Ann. Cas. 1913D, 1104; *Godfrey v. Pullman Co.*, 87 S. C. 361, 69 S. E. 666.

[c] "Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action. But, in order that privity shall exist, the succession must have occurred after the institution of the suit." *Smith v. Kessler*, 22 Idaho 589, 127 Pac. 172.

10. See the following: **U. S.**—*Troxell v. Del. Lack. & West. R. R.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586; *New Orleans v. Whitney*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. ed. 1102; *Gaines v. Hennen*, 24 How. 553, 16 L. ed. 770; *In re Sears*, 128 Fed. 275, 62 C. C. A. 623; *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387; *United States v. Hoyt*, 1 Blatchf. 326, 26 Fed. Cas. No. 15,409. **Ark.**—*Doss v. Long Prairie Levee Dist.*, 96 Ark. 451, 132 S. W. 443; *McGee v. Overby*, 12 Ark. 164. **Cal.**—*Elliott v. Hudson*, 18 Cal. App. 642, 124 Pac. 103, 108; *Whittle v. Whittle*, 5 Cal. App. 696, 91 Pac. 170. **Del.**—*Bowring v. Wilmington Malleable Iron Co.*, 6 Penn. 332, 67 Atl. 160.

are substantially the same,<sup>11</sup> or are their successors in title, interest or office,<sup>12</sup> the rule is otherwise, as it is where the identical point in issue in the latter suit was litigated and adjudicated in the former action.<sup>13</sup>

Where the parties do not appear in the same capacity in the two actions, the judgment in the first does not operate as a bar to the second suit.<sup>14</sup>

Ga.—*Adel v. Woodall*, 122 Ga. 535, 50 S. E. 481; *Greer v. Willis*, 67 Ga. 43. Haw.—*Tibbetts v. Damon*, 17 Hawaii 263. Ill.—*Bannon v. Thayer*, 124 Ill. 451, 17 N. E. 54; *Cooper v. Corbin*, 105 Ill. 224; *Gittelsohn v. Reichman*, 184 Ill. App. 86; *Arthur v. Doyle*, 152 Ill. App. 261; *American Percheron Horse Breeders' Assn. v. American Percheron Horse Breeders'*, etc. Assn., 114 Ill. App. 136. Ind.—*Harvey v. State*, 94 Ind. 159. Ia.—*Malette v. Arnold*, 83 Iowa 55, 48 N. W. 1060. Ky.—*Hyslop v. Johnson, Briggs & Pitts*, 30 Ky. L. Rep. 379, 98 S. W. 993; *Conwell v. Sandidge*, 8 Dana 273. La.—*Amet v. Boyer*, 43 La. Ann. 562, 9 So. 622. Md. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626. Mass.—*Winthrop v. Athol*, 216 Mass. 79, 102 N. E. 900; *McClellan v. Fisher*, 16 Gray 185; *Buttrick v. Holden*, 8 Cush. 233; *Hawes v. Waltham*, 18 Pick. 451. Mich.—*Kingsbury v. Kettle*, 90 Mich. 476, 51 N. W. 541. Mo.—*Ford v. Hennessy*, 70 Mo. 580. Neb.—*Morse v. Traynor*, 26 Neb. 594, 42 N. W. 719. N. Y.—*Verplanck v. Van Buren*, 76 N. Y. 247; *Douglass v. Ireland*, 73 N. Y. 100; *Zink v. Buffalo*, 6 Hun 611; *McDonald v. Rainor*, 8 Johns. 442; *Dahlstrom v. Gemunder*, 133 App. Div. 69, 117 N. Y. Supp. 576. Pa.—*Eshelman v. Shuman*, 13 Pa. 561; *Burnside v. Miskelly*, 5 Watts 506. Tex.—*Torrey v. Schneider*, 74 Tex. 116, 11 S. W. 1068; *Lane v. Kuehn* (Tex. Civ. App.), 141 S. W. 363. Wis.—*Lampson v. Bowen*, 41 Wis. 484. Eng.—*Reeve v. Dalby*, 4 L. J. Ch. O. S. 117, 2 Sim. & St. 464, 57 Eng. Reprint 423. Can.—*Muir v. Carter*, 16 Can. Sup. Ct. 473.

And generally the cases cited *supra*, note 9.

11. Ill.—*People ex rel. Lewis v. Whittaker*, 254 Ill. 537, 98 N. E. 967; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Arthur v. Doyle*, 152 Ill. App. 261. Ind.—*Bass Foundry, etc. Works v. Parke County*, 141 Ind. 68, 32 N. E. 1125. Kan.—*Gapen v. Stephenson*, 17 Kan. 613. Ky.—*Phillips v. Queen*, 8 Ky. L. Rep. 772,

3 S. W. 146; *Webster v. Webster*, 7 Ky. L. Rep. 302, 13 Ky. Op. 545; *Lowry v. McMurtry* (Ky. Dec.), 251. Mich.—*Curtis v. Fowler*, 99 Mich. 240, 58 N. W. 68; *Hoppin v. Avery*, 87 Mich. 551, 49 N. W. 887. Miss.—*Manly v. Kidd*, 33 Miss. 141. N. Y.—*Verplanck v. Van Buren*, 76 N. Y. 247. Pa.—*Follansbee v. Walker*, 74 Pa. 306. Tex.—*McClesky v. State*, 4 Tex. Civ. App. 322, 23 S. W. 518. Eng.—*Priestley v. Fernie*, 3 H. & C. 977, 11 Jur. N. S. 813, 13 Wkly. Rep. 1089.

12. U. S.—*St. Joseph, etc. R. Co. v. Steele*, 63 Fed. 867, 11 C. C. A. 470. Idaho.—*Smith v. Kessler*, 22 Idaho 589, 127 Pac. 172. Ky.—*Smith v. Belmont Iron Co.*, 11 Bush 390. Wash.—*Wheeler v. City of Aberdeen*, 45 Wash. 63, 87 Pac. 1061.

13. U. S.—*Bailey v. Sundberg*, 43 Fed. 81. Del.—*Bowring v. Wilmington Malleable Iron Co.*, 6 Penne. 332, 67 Atl. 160. Idaho.—*Smith v. Kessler*, 22 Idaho 589, 127 Pac. 172. Ill.—*People ex rel. Lewis v. Whittaker*, 254 Ill. 537, 98 N. E. 967. Ia.—*Goodenow v. Litchfield*, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86. Ky.—*Lindsay v. Sayre*, 8 Ky. L. Rep. 603, 2 S. W. 678. Mich.—*Bates v. Alpena Cir. Judge*, 82 Mich. 91, 45 N. W. 1125, 21 Am. St. Rep. 554. N. Y.—*Beloit Bank v. Beale*, 34 N. Y. 473. Tex.—*Goshorn v. Daniel* (Tex. Civ. App.), 169 S. W. 1071. Wash.—*Wheeler v. City of Aberdeen*, 45 Wash. 63, 87 Pac. 1061.

14. U. S.—*Troxell v. Del. Lack. & West. R. R.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. ed. 586, reversing *Delaware, L. & W. R. Co. v. Troxell*, 200 Fed. 44, 118 C. C. A. 272. Compare, *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355. Cal.—*Elliott v. Hudson*, 18 Cal. App. 642, 124 Pac. 103. Del.—*Bowring v. Wilmington Malleable Iron Co.*, 6 Penne. 332, 67 Atl. 160. Mass.—*Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. Eng.—*Leggott v. Great Northern R. Co.*, 1 Q. B. D. 599, 45 L. J.



(II.) Where All Parties Are Not Identical.—Where a former action was by several parties plaintiff or against several parties defendant, and the merits were litigated and adjudicated as to all, and a party plaintiff thereafter proceeds against a party defendant for identically the same cause of action, the latter action is between the "same parties" as the former, and the judgment rendered in the former action merged the cause of action and is a bar to the latter, although there were parties to the former action who are not joined in the latter, or vice versa.<sup>15</sup>

A judgment obtained by one or more of several joint owners or creditors, having claims against a common debtor, is not a bar to a subsequent action by the other claimants, or separate suits by each of them, for

Q. B. 557, 35 L. T. Rep. N. S. 334, 24 Wkly. Rep. 784; *Hacking v. Lee*, 9 Wkly. Rep. 70.

[a] Where the second bill is brought in a different right, no estoppel arises. *Huggins v. York-Buildings Co.*, 2 Atk. 44. Barn. 83, 26 Eng. Rep. 423.

[b] As to change in capacity by amendment and whether it changes the cause of action, see the titles "New Cause of Action or Defense;" "Parties;" also 6 *STANDARD PRACTICE* 436; and *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355.

15. U. S.—*Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186; *Southern Cotton Oil Co. v. Shelton*, 220 Fed. 247, 136 C. C. A. 509. Cal.—*Aldrich v. Stephens*, 49 Cal. 676; *Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349. Ill.—*Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Drake v. Perry*, 58 Ill. 122. Ia.—*School Tp. of Bloomfield v. Independent School Dist. of Castalia*, 134 Iowa 349, 112 N. W. 5; *Larum v. Wilmer*, 35 Iowa 244; *Davis v. Milburn*, 4 Iowa 246. Kan.—*Peterson v. Warner*, 6 Kan. App. 298, 50 Pac. 1091. Ky.—*Brizendine v. Frankfort Bridge Co.*, 2 B. Mon. 32, 36 Am. Dec. 587; *Curtis v. Bardstown*, 6 J. J. Marsh. 536. Mass.—*Bigelow v. Winsor*, 1 Gray 299; *French v. Neal*, 24 Pick. 55. Miss.—*Manly v. Kidd*, 33 Miss. 141. Ore.—*Neppach v. Jones*, 28 Ore. 286, 39 Pac. 999, 42 Pac. 519. Pa.—*Fell v. Bennett*, 110 Pa. 181, 5 Atl. 17; *Butcher v. South*, 10 Phila. 104. But see *Philadelphia v. Stewart*, 23 Pa. Co. Ct. 552, holding that a judgment against the principal on a bond is not a bar to an action against him and his surety on the same demand. S. C.—*Sovereign Camp of*

*Woodmen of the World v. Means*, 87 S. C. 127, 69 S. E. 85. Tex.—*Girardin v. Dean*, 49 Tex. 243. Vt.—*Pierson v. Catlin*, 18 Vt. 77. Wash.—*Loeper v. Loeper*, 81 Wash. 454, 142 Pac. 1138.

[a] If principal parties are different, the former judgment is not a bar to the subsequent suit. *White v. Gaines*, 28 La. App. 709.

[b] Co-defendants in a former action are not estopped by the judgment rendered therein from litigating their rights afterwards. *Gardner v. Raisbeck*, 28 N. J. Eq. 71.

[c] If the second action is substantially different from the first, the judgment rendered in the first is no bar, although some of the parties to the latter were joined in the former. *Bilsland v. McManomy*, 82 Ind. 139.

16. Mich.—*Wheeler v. Clinton Canal Bank, Harr.* 449. N. H.—*Clark v. Dinsmore*, 5 N. H. 136. S. C.—*Mobile Ins. Co. v. Columbia, etc. R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725.

[a] A judgment against one joint owner, suing alone for the total damage to property injured, is a bar to a subsequent joint action by him and the other joint owner for the damage sustained by both; but it will not bar an action by the joint owner who was not a party to the first suit for the damage sustained by him alone. *Brizendine v. Frankfort Bridge Co.*, 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587.

[b] A judgment confessed in favor of one creditor, is no bar to a suit or suits by other creditors, although it was intended to secure the claims of all the creditors. *Harris v. Alecock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

[c] The assignee of part of an unliquidated demand sounding in tort,

the recovery of their claims, although it is *res judicata* as to the claims of those who brought the former suit.<sup>17</sup>

g. *Divisible and Indivisible Causes of Action*.—(I.) *In General*. It is a well settled principle of legal procedure that a claim, arising either upon contract, or from a wrong, which is in its nature entire, cannot be divided and made the subject of several actions.<sup>18</sup> If suit is brought for a part only of the items constituting an entire claim or cause of action, recovery for that part will bar recovery in a subsequent suit, for any other items or the residue of the same demand,<sup>19</sup>

cannot sue the tortfeasor in equity, except under extraordinary circumstances. *Gaugler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79.

[d] But see *Hopkinson v. Shelton*, 37 Ala. 306, holding that a judgment for nominal damages, recovered by two of three joint owners, against a sheriff and his sureties on his official bond, for his wrongful acts in selling the entire interest in the property under an execution against one of the joint owners, and for making the sale at an unauthorized place, is a bar to an action by the third joint owner for the conversion arising from the wrongful sale of the entire interest.

17. *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158. See generally the title "*Res Judicata*."

18. See generally the title "*Successive Suits*."

19. See the following: **U. S.**—*United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703, 13 Ct. Cl. 561; *Watkins v. American Nat. Bank*, 134 Fed. 36, 67 C. C. A. 110; *Brown v. First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 293; *Bueki, etc. Lumb. Co. v. Atlantic Lumb. Co.*, 109 Fed. 411, 48 C. C. A. 455; *Claffin & Kimball v. Mather Electric Co.*, 87 Fed. 795. See *Breakwater Co. v. Donovan*, 218 Fed. 340, 134 C. C. A. 148. **Ala.**—*Davis v. Bledsole*, 69 Ala. 362; *South, etc. Alabama R. Co. v. Henlein & Barr*, 56 Ala. 368; *O'Neal v. Brown*, 21 Ala. 482; *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 288. **Cal.**—*Van Horne v. Treadwell*, 164 Cal. 620, 130 Pac. 5; *Abbott v. The 76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425; *Herriter v. Porter*, 23 Cal. 385; *Nightingale v. Scannell*, 6 Cal. 506, 65 Am. Dec. 525; *Suisun Lumb. Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349. **Conn.**—*Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Marl-*

*borough v. Sisson*, 31 Conn. 332; *Pinney v. Barnes*, 17 Conn. 420; *Avery v. Fitch*, 4 Conn. 362. **Ga.**—*Central Bank & Trust Corporation v. State*, 139 Ga. 54, 76 S. E. 587; *Atlanta Elevator Co. v. Fulton Bag, etc. Mills*, 106 Ga. 427, 32 S. E. 541; *Broxton v. Nelson*, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97. **Ill.**—*Abbott v. Brown*, 131 Ill. 108, 22 N. E. 813; *Rosemueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Mallock v. Krome*, 78 Ill. 110; *Thompson v. Sutton*, 51 Ill. 213; *Lucas v. Le Compte*, 42 Ill. 303; *Ross v. Weber*, 26 Ill. 221. **Ia.**—*School Tp. of Franklin v. Wiggins*, 142 Iowa 377, 120 N. W. 1032; *Newby v. Caldwell*, 54 Iowa 102, 6 N. W. 154; *Amsden v. Dubuque, etc. R. Co.*, 32 Iowa 288; *Davis v. Milburn*, 4 Iowa 246. **Kan.**—*Wells v. Hickox*, 1 Kan. App. 485, 40 Pac. 821. **Ky.**—*Com. v. Churchill*, 131 Ky. 251, 115 S. W. 189; *Gatewood v. Long*, 106 Ky. 721, 51 S. W. 569; *Pilcher v. Ligon*, 91 Ky. 228, 15 S. W. 513; *Com. ex rel. Alexander v. Bacon*, 31 Ky. L. Rep. 472, 102 S. W. 839; *Cornett v. Moore*, 30 Ky. L. Rep. 280, 97 S. W. 380; *Cole's Admx. v. Illinois Cent. R. Co.*, 27 Ky. L. Rep. 1087, 87 S. W. 1082; *Small v. Reeves*, 25 Ky. L. Rep. 729, 76 S. W. 395; *Louisville Bridge Co. v. Louisville, etc. R. Co.*, 25 Ky. L. Rep. 405, 75 S. W. 285. **La.**—*Bowman v. McElroy*, 15 La. Ann. 663. **Me.**—*Pomeroy v. Prescott*, 106 Me. 401, 76 Atl. 898, 138 Am. St. Rep. 347; *Willoughby v. Atkinson Furnishing Co.*, 96 Me. 372, 52 Atl. 756; *Sibley v. Rider*, 54 Me. 463. **Md.**—*Strike's Case*, 1 Bland 57. **Mass.**—*Knowlton v. New York, etc. R. Co.*, 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; *Goodrich v. Yale*, 97 Mass. 15. **Mich.**—*Andreas v. School Dist. No. 4*, 138 Mich. 54, 100 N. W. 1021; *Dutton v. Shaw*, 35 Mich. 431. **Minn.**—*McKnight v. Minneapolis St. Ry. Co.*, 127 Minn. 207, 149 N. W. 131; *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W.

although the items are in their nature distinct and arise or become due at different times.<sup>22</sup> But the rule does not apply unless the two claims upon which separate suits are brought are parts of one and the

787, 50 L. R. A. 725. Mo.—*Summet v. City Realty & Brokerage Co.*, 208 Mo. 501, 106 S. W. 614; *Bircher v. Boemler*, 204 Mo. 554, 100 S. W. 40; *Van Court v. Moore*, 26 Mo. 92; *Stewart v. Dent*, 31 Mo. 111; *O'Malley v. Mosiek*, 181 Mo. App. 405, 177 S. W. 749; *Friedman, Keller & Co. v. Olson*, 187 Mo. App. 469, 173 S. W. 28; *Edmonston v. Jones*, 96 Mo. App. 83, 69 S. W. 740. Neb.—*Bank v. Deyersick*, 9 Neb. 109, 2 N. W. 305. N. J.—*Attilio v. McCormick*, 57 N. J. L. 430, 31 Atl. 460; *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243. N. Y.—*Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226; *Price v. Holman*, 135 N. Y. 124, 32 N. E. 124; *Montrose v. Wanamaker*, 134 N. Y. 590, 31 N. E. 252; *Willard v. Sperry*, 16 Johns. 121; *Staples v. Goodrich*, 21 Barb. 317; *Clark v. Jones*, 1 Denio 516, 43 Am. Dec. 706; *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *Stevens v. Lockwood*, 13 Wend. 644, 28 Am. Dec. 492; *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60; *Miller v. Covert*, 1 Wend. 487; *Willard v. Sperry*, 16 Johns. 121; *Farrington v. Payne*, 15 Johns. 432; *Smith v. Jones*, 15 Johns. 229; *Law v. McDonald*, 62 How. Pr. 340; *Royal Live Fish Co. v. Central Fish Co.*, 159 App. Div. 151, 144 N. Y. Supp. 21; *Goldberg v. Eastern Brewing Co.*, 136 App. Div. 692, 121 N. Y. Supp. 465; *McCredy v. Thrush*, 37 App. Div. 465, 56 N. Y. Supp. 68; *De Graff & Palmer v. Mayper*, 65 Misc. 185, 119 N. Y. Supp. 657. N. C.—*Sloan v. Hart*, 150 N. C. 269, 63 S. E. 1037; *Evans v. Cumberland Mills*, 118 N. C. 533, 24 S. E. 215. Ohio.—*North British, etc. Ins. Co. v. Cohn*, 17 Ohio Cir. Ct. 185, 11 O. C. D. 826. Pa.—*Fell v. Bennett*, 110 Pa. 181, 5 Atl. 17; *Alcott v. Hugus*, 105 Pa. 350; *Sykes v. Gerber*, 98 Pa. 179; *Ingraham v. Hall*, 11 Serg. & R. 78; *Raisig v. Graf*, 17 Pa. Super. 509; *Eisenhower v. Centralia School Dist.*, 13 Pa. Super. 51; *Buffington's Admr. v. Burhman*, 3 Clark 73, 4 Pa. L. J. 418. S. C.—*State v. Camiller*, 98 S. C. 204, 46 S. E. 1006; *Curtin v. South Bound R. Co.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829; *Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91; *Steen*

*v. Mark*, 32 S. C. 286, 11 S. E. 93; *Crips v. Talvande*, 4 McCord 20; *Bates v. Quattlebom*, 2 Nott & McC. 495. Tenn.—*Saddler v. Apple*, 9 Humph. 342; *Carraway v. Burton*, 4 Humph. 108; *Vance v. Lancaster*, 3 Hayw. 130. Tex.—*Craig v. Broocks*, 60 Tex. Civ. App. 83, 127 S. W. 572. Vt.—*Hayward v. Clark*, 50 Vt. 612; *Warren v. Newfane*, 25 Vt. 250. Va.—*Hite v. Long*, 6 Rand. (27 Va.) 457, 18 Am. Dec. 719. Wash.—*Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566. Wis.—*Borngesser v. Harrison*, 12 Wis. 544, 78 Am. Dec. 757; *McCormick v. Robinson*, 2 Pin. 276, 1 Chand. 254. Eng.—*Russell & Son v. Waterford, etc. R. Co.*, 16 Ir. 314; *Bagot v. Williams*, 3 Barn. & Cress. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115, 107 Eng. Reprint 721; *Barwell v. Kensey*, 3 Lev. 179, 83 Eng. Reprint 639; *Fetter v. Beale*, 1 Salk. 11, 91 Eng. Reprint 11. Can.—*Davidson v. Belleville, etc. R. Co.*, 5 Ont. App. 315; *McKay v. Fee*, 20 U. C. Q. B. 268; *Stinson v. Branigan*, 10 U. C. Q. B. 402.

See also *infra*, XVII, B, 2, g, (II), (A); XVII, B, 2, g, (III), (A).

[a] Even where a part of the claim has been assigned to another person. *Ingraham v. Hall*, 11 Serg. & R. (Pa.) 78.

[b] An injury occasioned by an attachment is an entirety, and the damages resulting therefrom cannot be apportioned among several wrongdoers, nor divided into separate demands. *Jones v. Allen*, 38 Colo. 512, 88 Pac. 387.

[c] A judgment for an undivided three-fourths of a tract of land is a bar to a second action for the remaining one-fourth, where both suits are based upon the same title. *Craig v. Broocks*, 60 Tex. Civ. App. 83, 127 S. W. 572.

[d] Rule applies to infringement of patent, and a patentee may not so subdivide his patent as to bring separate suits upon its several claims for the same alleged infringement against the same person. *Bryant Electric Co. v. Marshall*, 169 Fed. 426.

20. *Friedman, Keller & Co. v. Olson*, 187 Mo. App. 469, 173 S. W. 28.



same cause of action;<sup>21</sup> nor where the claim in suit could not properly have been joined in the previous action,<sup>22</sup> or where the party affected by the splitting of the cause of action consents to it,<sup>23</sup> or where the parties have by their agreement or conduct separated what might otherwise have been a single claim, so that at the time the right of action accrues as to one part there is no right of action as to the other;<sup>24</sup> or where no injury can accrue to the debtor and the application of the rule would defeat the right to claim mechanics' liens for different parts of the debt on different premises.<sup>25</sup>

Where distinct and disconnected causes of action arise between the same parties, each of which is entitled to independent relief, the plaintiff is not required to join them in a single action, even where they might be litigated in the same suit, and a recovery upon one is not a bar to a recovery upon the other;<sup>26</sup> and this is true although the

21. *Clafin v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241.

22. *Taub v. McClelland-Colt Com. Co.*, 10 Colo. App. 190, 51 Pac. 168; *Huffman v. Knight*, 36 Ore. 581, 60 Pac. 207.

23. **U. S.**—*Clafin & Kimball v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241. **Mo.**—*Edmonston v. Jones*, 96 Mo. App. 83, 69 S. W. 741. **Ore.** *Little v. Portland*, 26 Ore. 235, 37 Pac. 911.

24. **U. S.**—*Clafin v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241. **Minn.**—*Wheelock v. Svensgaard*, 63 Minn. 486, 65 N. W. 937. **N. Y.** *Dreyer v. McCormack Real Estate Co.*, 164 App. Div. 41, 149 N. Y. Supp. 322. See *Royal Live Fish Co. v. Central Fish Co.*, 159 App. Div. 151, 144 N. Y. Supp. 21.

25. *Christopher & Simpson, etc. Co. v. Kelly*, 91 Mo. App. 93.

26. **U. S.**—*Stark v. Starr*, 94 U. S. 477, 24 L. ed. 276; *Welch v. Farmers' Loan & Trust Co.*, 165 Fed. 561, 91 C. C. A. 399; *Johnson & Johnson v. Herold*, 161 Fed. 593 (where no motion was made to consolidate); *Olsen v. Whitney*, 109 Fed. 80. **Ala.**—*Boyle v. Wallace*, 81 Ala. 352, 8 So. 194; *New Orleans, etc. R. Co. v. Castello*, 50 Ala. 12; *Robbins v. Harrison*, 31 Ala. 160. **Cal.**—*Journe v. Hewes*, 124 Cal. 244, 56 Pac. 1032; *Hughes v. Mendocino County*, 65 Cal. xix, 4 Pac. 236. **Ill.** *O'Byrne v. Cregier*, 181 Ill. App. 569; *Sherer v. Langford*, 67 Ill. App. 342. **Ind.**—*Indianapolis, D. & W. Ry. Co. v. Center Tp.*, 130 Ind. 89, 28 N. E. 439. **Ky.**—*Schuster v. White's Admr.*, 106 Ky. 317, 50 S. W. 242. **Minn.**—*Wright*

*v. Tileston*, 60 Minn. 34, 61 N. W. 823; *Reynolds v. Franklin*, 47 Minn. 145, 49 N. W. 648; *Corby v. Taylor*, 35 Mo. 447; *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389; *Taylor v. Hines*, 31 Mo. App. 622. **N. M.**—*Neher v. Armijo*, 11 N. M. 67, 66 Pac. 517. **N. Y.**—*Secor v. Sturgis*, 16 N. Y. 548; *Mills v. Garrison*, 3 Abb. Dec. 297, 3 Keyes 40; *Bache v. Purcell*, 51 How. Pr. 270; *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *Phillips v. Berick*, 16 Johns. 136, 8 Am. Dec. 299; *Govin v. De Miranda*, 79 Hun 329, 29 N. Y. Supp. 347; *Gedney v. Gedney*, 19 App. Div. 407, 46 N. Y. Supp. 590; *Gentles v. Finek*, 23 Misc. 153, 50 N. Y. Supp. 726; *Scott v. Haines*, 18 N. Y. Supp. 163. **N. C.** *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108; *Snow Steam Pump Works v. Dunn*, 119 N. C. 77, 25 S. E. 741; *Gregory v. Hobbs*, 93 N. C. 1. **Pa.** *Terreri v. Jutte*, 159 Pa. 244, 28 Atl. 225; *Milligan v. Browarsky*, 147 Pa. 155, 23 Atl. 398; *Daniels v. Heidenreich*, 8 Kulp 413. **Tex.**—*Harris v. Houston (Tex. Civ. App.)*, 60 S. W. 440; *Houston & T. C. R. Co. v. Perkins*, 2 Wils. Civ. Cas., §520. **Vt.** *Mussey v. Bates*, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516. **W. Va.**—*Flat Top Grocery v. McClaugherty*, 46 W. Va. 419, 33 S. E. 252. **Wis.**—*Eastman v. Porter*, 14 Wis. 39.

[a] See *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. ed. 450, holding that in a court of admiralty, the right of division of damages to vessels when both are in fault and the contingent claim to partial indemnity for payment

causes of action arise from the same contract or series of transactions.<sup>27</sup> Two separate and independent actions may be maintained upon the same act or transaction, where one proceeds upon the theory of a tort,

of damage to cargo are separable, and the decree of division in the original suit, the pleadings in which do not set up such claim for indemnity, is not a bar to a subsequent suit brought to enforce it.

[b] A recovery in replevin is no bar to an action for damages for the wrongful seizure and detention of the articles in question. *Bowen v. Harris*, 146 N. C. 355, 59 S. E. 1044.

[c] A judgment in ejectment is not a bar to a subsequent action for the growing crops, where such right was not litigated in the ejectment suit. *Collier v. Cunningham*, 2 Ind. App. 254, 28 N. E. 341.

[d] A judgment for an attorney's fee, is not a bar to another action for legal services rendered the same party under a separate contract. *Wheless v. Serrano*, 121 Mo. App. 17, 98 S. W. 108.

[e] Recovery by a tenant in common, against the estate of his deceased co-tenant, of his share of rents collected by deceased, is not a bar to a subsequent action for rents of other property held by them in common. *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.

[f] Where a stockholder is sued on a debt of the corporation, a previous suit against him on another debt of the corporation is not a bar if the debts were such that separate actions might have been maintained thereon against the corporation itself. *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967.

[g] Judgment for commissions earned prior to the incorporation of a company is not a bar to an action for commissions earned after the incorporation, where claim for the latter was withdrawn during the former trial. *Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126, 23 Atl. 198.

27. **U. S.**—*Baltimore & O. R. Co. v. Parrette*, 55 Fed. 50; *Muscatine v. Mississippi*, etc. R. Co., 1 Dill. 536, 17 Fed. Cas. No. 9,971. **Cal.**—*Curtin v. Salmon River Hydraulic Gold Min.*, etc. Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Owens v. McNally*,

124 Cal. 29, 56 Pac. 615; *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351. **Ill.** *Chicago Opera House Co. v. Paquin*, 70 Ill. App. 596. **Ky.**—*Roberts v. Moss*, 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280. **Mass.**—*Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Newhall v. Enterprise Mining Co.*, 205 Mass. 585, 91 N. E. 905; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *Harding v. Hale*, 2 Gray 399. **Minn.** *State v. Torinus*, 28 Minn. 175, 9 N. W. 725. **Mo.**—*Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248, 104 S. W. 5; *Belshe v. Batdorf*, 98 Mo. App. 627, 73 S. W. 888. **Neb.**—*Latta v. Visel*, 37 Neb. 612, 56 N. W. 311. **N. M.**—*Texas, S. F. & N. R. Co. v. Saxton*, 7 N. M. 302, 34 Pac. 532. **N. Y.**—*Millard v. Missouri*, etc. R. Co., 86 N. Y. 441; *Derleth v. Degraaf*, 19 Jones & S. 369; *Clinton v. New York Cent. & H. R. R. Co.*, 147 App. Div. 468, 131 N. Y. Supp. 881; *Tuek v. Rottkowsky*, 47 Misc. 386, 93 N. Y. Supp. 1112; *Mincer v. Green*, 47 Misc. 374, 94 N. Y. Supp. 15. **N. C.** *Bowen v. Harris*, 146 N. C. 385, 59 S. E. 1044; *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108; *Pendleton v. Dalton*, 92 N. C. 185. **Pa.**—*Morrison v. Beeky*, 6 Watts 349. **Tex.**—*Champion v. Johnson County* (Tex. Civ. App.), 109 S. W. 1146; *West v. Cole* (Tex. Civ. App.), 50 S. W. 151. **W. Va.** *Barnes v. City of Grafton*, 61 W. Va. 408, 56 S. E. 608. **Wis.**—*Kronshage v. Chicago*, etc. R. Co., 45 Wis. 500. **Can.** *Stuart v. Mott*, 23 Can. Sup. Ct. 153, 384.

*Compare, Peacock v. Coltrane* (Tex. Civ. App.), 116 S. W. 389.

[a] A judgment for defendant in an action against a city for lighting, on the ground that plaintiff had not substantially performed his contract, is not a bar to a second action to recover the reasonable value of the same service. *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219.

[b] "The doctrine of estoppel is restricted to facts directly in issue." *Excelsior Coal Co. v. Gildersleeve*, 160 Fed. 47, 87 C. C. A. 202.

[c] Items not due when the first suit was brought, were not required to

and the other upon contract, so that resort to one is not a disaffirmance of the other, and a recovery upon one does not constitute a bar to the other, unless satisfaction is obtained thereon.<sup>23</sup>

**Effect of Satisfaction of Judgment Upon One Cause of Action.** — While a plaintiff may have several concurrent or successive rights of action based upon the same transaction or injury, and may recover a separate

be included therein, and a second suit for their recovery is not barred by the judgment rendered in the former action. *Barnes v. City of Grafton*, 61 W. Va. 408, 56 S. E. 608.

[d] **An adverse judgment in a suit on a note given for patent medicine, void under the statute for failure to show that fact on its face, is no bar to an action on the contract of sale.** *Warmack v. Askew*, 97 Ark. 19, 132 S. W. 1013.

[e] **A judgment for defendant in an action on an express contract is not a bar to a suit to recover on a quantum meruit.** *Champion v. Johnson County* (Tex. Civ. App.), 109 S. W. 1146.

28. **U. S.** — *Farnum v. Kennebec Water Dist.*, 170 Fed. 173, 95 C. C. A. 355; *Crockett v. Miller*, 112 Fed. 729, 50 C. C. A. 447; *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474. **Ala.** — *Shaw v. Beers*, 25 Ala. 449. **Colo.** — *Mackenzie v. Porter*, 40 Colo. 340, 91 Pac. 916. **Ga.** — *Linder v. Rowland*, 122 Ga. 425, 50 S. E. 124; *Henson v. Taylor*, 108 Ga. 567, 33 S. E. 911. **Ill.** — *Brumbach v. Flower*, 20 Ill. App. 219. **Ind.** — *Union Cent. L. Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89. **Ky.** — *Dodd v. Pittsburg, C. & St. L. R. Co.*, 127 Ky. 762, 106 S. W. 787. **La.** — *Preston v. Slocomb*, 10 Rob. 361. **Mass.** — *Greenfield v. Wilson*, 13 Gray 384; *Norton v. Huxley*, 13 Gray 285. **Mich.** — *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290; *Black v. Miller*, 75 Mich. 323, 42 N. W. 837. **Mo.** — *Linnville v. Rhoades*, 73 Mo. App. 217; *Gens & Tiede v. Hargadine*, 56 Mo. App. 245. **N. H.** — *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508. **N. Y.** — *Morgan v. Powers*, 66 Barb. 35; *Gutchess v. Whiting*, 46 Barb. 139; *Butler v. Rice*, 17 Hun 406; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Wanzer v. De Baun*, 1 E. D. Smith 261; *Albany Hdw. & Iron Co. v. Day*, 11 App. Div. 230, 42 N. Y. Supp. 971; *Kahn v. Witkoski*, 115 N. Y. Supp. 138. **N. C.** — *Woody v. Jordan*, 69 N. C. 189. **Pa.** — *Fidelity Ins., etc. Co. v. Gazzam*, 161 Pa. 536,

29 Atl. 264; *Schrivver v. Eckenrode*, 87 Pa. 213; *Finley v. Hanbest*, 30 Pa. 190. **R. I.** — *Whittier v. Collins*, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879. **S. C.** — *Vincent v. Southern Ry.*, 88 S. C. 413, 70 S. E. 1056. **Tenn.** — *Turner v. Brock*, 6 Heisk. 50. **Tex.** — *Pishaway v. Runnels*, 71 Tex. 352, 9 S. W. 260. **Vt.** — *Oben v. Adams*, 94 Atl. 506; *Pierce v. Mitchell*, 87 Vt. 538, 90 Atl. 577; *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *Priest v. Foster*, 69 Vt. 417, 38 Atl. 78; *Merchants' National Bank v. Taylor*, 66 Vt. 574, 29 Atl. 1012. **Wis.** — *Mallory v. Mariner*, 15 Wis. 177. **Can.** — *Hamilton Provident and Loan Society v. Gilbert*, 6 Ont. 434.

[a] But see *Burt v. North Philadelphia Trust Co.*, 45 Pa. Super. 320, holding that where a depositor sues a bank in assumpsit for his money on deposit, and recovers a final judgment for the same with interest as damages for its detention, he cannot thereafter maintain an action of trespass to recover damages for injuries to his credit caused by the refusal of the bank to pay on his orders and demand the same money.

[b] The prohibition against two judgments may be met by a tender at the second trial of a discharge of the first judgment. *Kahn v. Witkoski*, 115 N. Y. Supp. 138.

[c] **A judgment recovered for the conversion of goods is no bar to an action for the price of the goods.** *Southern Ry. Co. v. Raney*, 117 Ala. 270, 23 So. 29. See *Lenoir's Admr. v. Wilson*, 36 Ala. 600.

[d] **A recovery in an action for seduction under promise of marriage, is not a bar to an action for breach of such promise of marriage.** *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364.

[e] **A recovery for the value of goods fraudulently conveyed by one defendant to another will not bar an action in tort for conspiracy between such defendants to prevent the plaintiff from obtaining satisfaction of a**



judgment on each, one full satisfaction will bar his further actions, remedies and rights of process.<sup>29</sup>

(II.) Arising *Ex Contractu*.—(A.) *IN GENERAL*.—Where a contract or obligation sued upon is entire and indivisible, a judgment rendered in an action based thereon will merge all claims arising under the contract and bar further litigation based thereon.<sup>30</sup> Where a contract or

judgment against one of them. *Tams v. Lewis*, 42 Pa. 402.

29. **U. S.**—*Muscatine v. Mississippi & M. R. Co.*, 1 Dill. 536, 17 Fed. Cas. No. 9,971; *Mayer v. Foulkrod*, 4 Wash. C. C. 503, 16 Fed. Cas. No. 9,342. **Ill.**—*Kapisehki v. Koch*, 180 Ill. 44, 54 N. E. 179; *Nolte v. Lowe*, 18 Ill. 437. **N. Y.**—*Peters v. Sanford*, 1 Denio 224. **N. C.**—*Painter v. Norfolk & W. R. Co.*, 144 N. C. 436, 57 S. E. 151; *Mast v. Sapp*, 140 N. C. 533, 53 S. E. 350, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864. **Tenn.**—*Dies v. Wilson County Bank*, 129 Tenn. 89, 165 S. W. 248, Ann. Cas. 1915A, 1090. **Wash. Ter.**—*Dawson v. Baum*, 3 Wash. Ter. 464, 19 Pac. 46. **W. Va.**—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Peerce v. Athey*, 4 W. Va. 22. **Eng.**—*Bird v. Randall*, 3 Burr. 1345, 1 W. Bl. 373, 97 Eng. Reprint 866.

*Compare*, *Post v. Hartford St. R. Co.*, 72 Conn. 362, 44 Atl. 547.

[a] In Virginia a judgment against one wrongdoer bars a subsequent action against the other joint wrongdoers, whether it is deemed a satisfaction of the claim or a final election to proceed against that defendant alone. *Staunton Mut. Tel. Co. v. Buchanan*, 108 Va. 810, 62 S. E. 928.

[b] Where plaintiff has recovered several judgments for successive conversions by different individuals, he may make his election on which judgment he will take out execution, and when he has done this, he is estopped from proceeding on the other judgments. *Matthews v. Menedger*, 2 McLean 145, 16 Fed. Cas. No. 9,289.

Effect of satisfaction of judgment, see generally the title "Judgments, Satisfaction of."

30. See the following: **U. S.**—*De Weese v. Smith*, 97 Fed. 309; *Horton v. New York Cent., etc. R. Co.*, 63 Fed. 897; *Culbertson v. Ellis*, 6 McLean 248, 6 Fed. Cas. No. 3,461; *Chinn v. Hamilton, Hampton*, 1881, 6 Fed. Cas. No. 2,685. **Cal.**—*Van Horne v. Treadwell*, 164 Cal. 620, 130 Pac. 5; *Abbott v. The*

*76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425. **Conn.**—*Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79. **Ga.**—*Stephens v. Crawford*, 3 Ga. 499. **Ill.**—*Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Nolte v. Lowe*, 18 Ill. 437; *Dalton v. Bentley*, 15 Ill. 420. **Ind.**—*Indianapolis, B. & W. Ry. Co. v. Koons*, 105 Ind. 507, 5 N. E. 549; *Carlier v. Cox*, 2 Blackf. 178, 18 Am. Dec. 152. **Me.**—*Willoughby v. Atkinson Furnishing Co.*, 96 Me. 372, 52 Atl. 756. **Mass.**—*White v. Dingley*, 4 Mass. 433. **Minn.**—*Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151. **Miss.**—*Hanes v. Planters' Cotton-Press, etc. Assn.*, 55 Miss. 654. **Mo.**—*Kerr v. Simmons*, 82 Mo. 269. **N. J.**—*Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 213. **N. Y.**—*O'Beirne v. Lloyd*, 43 N. Y. 248; *Miller v. Covert*, 1 Wend. 487; *Stuyvesant v. New York*, 11 Paige 414; *Coggins v. Bulwinkle*, 1 E. D. Smith 434; *Samuel v. Fidelity, etc. Co.*, 76 Hun 308, 27 N. Y. Supp. 741; *Royal Live Fish Co. v. Central Fish Co.*, 152 App. Div. 151, 144 N. Y. Supp. 21; *Pakas v. Hollingshead*, 99 App. Div. 472, 86 N. Y. Supp. 560, 91 N. Y. Supp. 1105, 42 Misc. 287; *Maeder v. Wexler*, 98 App. Div. 68, 90 N. Y. Supp. 508; *Higdon v. Woolverton*, 65 Misc. 178, 119 N. Y. Supp. 630; *New York v. Constantine*, 18 N. Y. Supp. 788, 46 N. Y. St. 247. **Ohio.**—*Stein v. The Prairie Rose*, 17 Ohio St. 471, 93 Am. Dec. 631; *Erwin v. Lynn*, 16 Ohio St. 539. **Pa.**—*Thompson v. Graham*, 246 Pa. 202, 92 Atl. 118; *Hill v. Joy*, 149 Pa. 243, 24 Atl. 293; *Carvill v. Garrigues*, 5 Pa. 152; *Speier v. Locust Laundry*, 56 Pa. Super. 323. **Tex.**—*Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100; *Texas & P. R. Co. v. Scuggin & Brown*, 42 Tex. Civ. App. 335, 95 S. W. 651; *Mallory v. Dawson Cotton Oil Co.*, 32 Tex. Civ. App. 294, 74 S. W. 953. **Vt.**—*Morey v. King*, 51 Vt. 383. **Va.**—*Sands v. Roller*, 118 Va. 191, 86 S. E. 857; *Hancock v. White Hall Tobacco Warehouse Co.*, 102 Va. 239, 46 S. E. 288. **Wash.**—*Collins v. Gleason*, 47 Wash.

obligation is divisible in its nature, however,<sup>31</sup> as where the contract contains provisions for its performance by instalments at different

62, 91 Pac. 566. **W. Va.**—Peerce v. Athey, 4 W. Va. 22. **Can.**—McKay v. Fee, 20 U. C. Q. B. 268; Stinson v. Bramigan, 10 U. C. Q. B. 402.

See also *supra*, XVII, B, 2, g, (I).

[a] On the rendition of one judgment the contract becomes *functus officio*, and cannot be revived as the basis of another judgment. *Sands v. Roller*, 118 Va. 191, 86 S. E. 857.

[b] A judgment for a balance due for work under two indivisible verbal contracts, one supplemental to the other, was a bar to a subsequent action for breach of such contracts, even where defendant's appeal was withdrawn before adjudication, upon adjustment of the controversy by agreement. *Thompson v. Graham*, 246 Pa. 202, 92 Atl. 118.

[c] A suit to recover rent should be for the full payment period, and a judgment for an amount less than a quarter, when payable quarterly, is a bar to an action for the remainder of the quarter. *Warren v. Comings*, 6 Cush. (Mass.) 103. To same effect, see *Burkhardt v. Greene*, 26 Ohio Cir. Ct. 315, affirmed in 68 Ohio St. 711, 70 N. E. 1116, without opinion.

[d] An action by a landlord against his tenant for supplies and advances must include a claim for damages for the tenant's failure to perform a covenant in the lease to properly cultivate the land, and a judgment obtained in such action will bar an action for the breach of the covenant. *Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100.

[e] Successive breaches of a bond, (1) will constitute separate causes of action only where the judgment recovered in the first action was prior to the subsequent breaches and did not include the penalty of the bond. *Ahl v. Ahl*, 60 Md. 207; *Orendorff v. Utz*, 48 Md. 298. (2) But where sureties on a second bond were erroneously sued and forced to pay for defalcations which occurred under the first bond, it did not bar an action against the first bondsmen who were liable for the losses occasioned by the speculations of their principal. *White v. Smith*, 47 N. C. 4.

[f] A recovery (1) for the prin-

cipal of a debt will bar a subsequent action for interest on the same debt. *Harty v. Harty*, 2 La. 518; *Saul v. His Creditors*, 7 Mart. N. S. (La.) 425; *Nugent v. Delhounne*, 2 Mart. (La.) 307; *Faurie v. Pitot*, 2 Mart. (La.) 83; *Gordon v. Omaha*, 71 Neb. 570, 99 N. W. 242. (2) But where no interest was asked or recovered in the action for recovery of the principal debt, the judgment therein was not a bar to an action for interest under a separate contract. *Florence v. Jennings*, 22 C. B. (N. S.) 454, 3 Jur. (N. S.) 772, 26 L. J. C. P. 274, 89 E. C. L. 454.

[g] A recovery for the principal of two notes, and six per cent interest thereon, against the maker and endorser thereof, will bar a subsequent suit on a written undertaking of the maker to pay thirty per cent interest in consideration of a certain extension, such subsequent action being to recover the additional twenty-four per cent interest agreed to by the maker. *McKay v. Fee*, 20 U. C. Q. B. (Can.) 268.

[h] An action against a surety is not barred by a consent judgment against his principal, which is not paid, when the surety was not a party to the judgment on the contract on which he was bound as such surety. *Maine Cent. R. Co. v. National Surety Co.*, 113 Me. 465, 94 Atl. 929.

[i] Where two separate contracts relate to the same subject-matter, an action on one is no bar to an action on the other. *Peacock v. Coltrane* (Tex. Civ. App.), 116 S. W. 389.

[j] A judgment granting the relief prayed for in a suit for specific performance of a contract to convey real estate, will bar a subsequent suit for the conveyance of other lands described in the contract. *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566.

31. **Ill.**—Bressler v. Martin, 133 Ill. 278, 24 N. E. 518. **Mass.**—Hanham v. Sherman, 114 Mass. 19; *Perry v. Harrington*, 2 Mete. 368, 37 Am. Dec. 98; *Badger v. Titecomb*, 15 Pick. 409, 26 Am. Dec. 611. **Mo.**—Stifel v. Lynch, 7 Mo. App. 326. **N. Y.**—Parmenter v. State, 135 N. Y. 154, 31 N. E. 1035; *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *De Graff & Palmer v. Mayper*, 65 Misc. 185, 119 N. Y. Supp.

times,<sup>32</sup> or where separate causes of action accrue at different times, from partial breaches of the contract,<sup>33</sup> each subsequent to the commencement of the suit in which the recovery next prior thereto was had,<sup>34</sup> several successive actions may be brought based upon the same contract, and the prior actions based thereon will not bar those subsequent thereto.<sup>35</sup> But each action must include all claims due at the time the particular suit is filed,<sup>36</sup> and in some jurisdictions, up to

657. *Tex.*—*Howe v. Harding*, 84 *Tex.* 74, 19 *S. W.* 363. *Wash.*—*Harstad v. Olson*, 57 *Wash.* 264, 106 *Pac.* 741.

32. *Smith Bros. v. Stern*, 148 *N. Y. Supp.* 1; *Jones & Co. v. Gammel-Statesman Pub. Co.*, 100 *Tex.* 320, 99 *S. W.* 701, 8 *L. R. A. (N. S.)* 1197. See *infra*, XVII, B, 2, g, (II), (B).

33. See the following: *Cal.*—*Abbott v. The 76 Land & Water Co.*, 161 *Cal.* 42, 118 *Pac.* 425; *Shanklin v. Gray*, 111 *Cal.* 88, 43 *Pac.* 399. *Ill.*—*Just v. Greve*, 13 *Ill. App.* 302. *Ind.*—*Franke v. Franke*, 15 *Ind. App.* 529, 43 *N. E.* 468. *Ia.*—*Richmond v. Dubuque*, 40 *Iowa* 264, 33 *Iowa* 422. *Ky.*—*Louisville & N. R. Co. v. Cumnock*, 25 *Ky. L. Rep.* 1330, 77 *S. W.* 933. *Md.*—*Orendorff v. Utz*, 48 *Md.* 298. *Mass.*—*Badger v. Titecomb*, 15 *Pick.* 409, 26 *Am. Dec.* 611. *Minn.*—*Reynolds v. Franklin*, 47 *Minn.* 145, 49 *N. W.* 648. *Mo.*—*Menges v. Milton Piano Co.*, 96 *Mo. App.* 611, 70 *S. W.* 728; *Brown v. Chadwick*, 32 *Mo. App.* 615. *Neb.*—*State ex rel. Gordon v. Moores*, 70 *Neb.* 48, 96 *N. W.* 1011. *N. J.*—*Edward C. Jones Co. v. Guttenberg*, 66 *N. J. L.* 659, 51 *Atl.* 274. *N. Y.*—*Johnson v. Meeker*, 96 *N. Y.* 93, 48 *Am. Rep.* 609; *Beach v. Crain*, 2 *N. Y.* 86, 49 *Am. Dec.* 369; *Stuyvesant v. New York*, 11 *Paige* 414. *Ohio.*—*Gardner v. Letson*, 8 *Ohio Dec.* 256, 5 *Ohio N. P.* 112. *Pa.*—*Merchants' Ins. Co. v. Algeo*, 31 *Pa.* 446; *Wolf v. Welton*, 30 *Pa.* 202. *Tex.*—*Howe v. Harding*, 84 *Tex.* 74, 19 *S. W.* 363; *Old River Rice Irr. Co. v. Stubbs* (*Tex. Civ. App.*), 168 *S. W.* 29. *Wash.*—*Harsin v. Oman*, 68 *Wash.* 281, 123 *Pac.* 1.

See also *supra*, XVII, B, 2, g, (I).

[a] A recovery for a partial breach is not a bar to an action for a total breach, occurring thereafter. *Livingston v. Klaw*, 137 *App. Div.* 639, 122 *N. Y. Supp.* 264.

34. *Minn.*—*McEvoy v. Bock*, 37 *Minn.* 402, 34 *N. W.* 740. *N. Y.*—*De Graff & Palmer v. Mayper*, 65 *Misc.* 185, 119 *N. Y. Supp.* 657; *Gould v.*

*Olympic Min. Co.*, 49 *Misc.* 612, 96 *N. Y. Supp.* 455. *Wash.*—See *Harsin v. Oman*, 68 *Wash.* 281, 123 *Pac.* 1.

35. *U. S.*—*Pittsburg, etc. R. Co. v. Keokuk, etc. Bridge Co.*, 107 *Fed.* 781, 46 *C. C. A.* 639. *Cal.*—*People v. Rodgers*, 118 *Cal.* 393, 46 *Pac.* 740, 50 *Pac.* 668; *Wagner v. Wagner*, 104 *Cal.* 293, 37 *Pac.* 935; *Southern Pac. R. Co. v. Purcell*, 77 *Cal.* 69, 18 *Pac.* 886; *Jones v. Petaluma*, 36 *Cal.* 230. *Conn.*—*Avery v. Fitch*, 4 *Conn.* 362. *Ill.*—*Henderson v. Harness*, 184 *Ill.* 520, 56 *N. E.* 786; *Chicago Opera House Co. v. Paquin*, 70 *Ill. App.* 596. *Ky.*—*Maize v. Bowman*, 93 *Ky.* 205, 19 *S. W.* 589, 17 *L. R. A.* 81; *Cook v. Vimont*, 6 *Mon.* 284, 17 *Am. Dec.* 157. *La.*—*Glaude v. Peat*, 43 *La. Ann.* 161, 8 *So.* 884. *Minn.*—*State v. Torinus*, 28 *Minn.* 175, 9 *N. W.* 725. *Mo.*—*Priest v. Deaver*, 22 *Mo. App.* 276. *N. Y.*—*Skinner v. Walter A. Wood Mowing, etc. Mach. Co.*, 140 *N. Y.* 217, 35 *N. E.* 491, 37 *Am. St. Rep.* 540; *Butler v. Wright*, 2 *Wend.* 369; *Montrose v. Wanamaker*, 57 *Hun* 590, 11 *N. Y. Supp.* 106, 32 *N. Y. St.* 1059; *McCleary v. Malcom Brewing Co.*, 56 *App. Div.* 531, 67 *N. Y. Supp.* 258; *Cooper v. Brooklyn*, 18 *N. Y. Supp.* 438, 45 *N. Y. St.* 266. But see *People v. Board of Supervisors*, 26 *Misc.* 233, 56 *N. Y. Supp.* 318. *N. C.*—*North Carolina University v. Maultsby*, 55 *N. C.* 241. *Ore.*—*Knott v. Stephens*, 5 *Ore.* 235. *Tenn.*—*Underwood v. Smith*, 93 *Tenn.* 687, 27 *S. W.* 1008, 42 *Am. St. Rep.* 946; *McKissick v. McKissick*, 6 *Humph.* 75. *Vt.*—*McLaughlin v. Hill*, 6 *Vt.* 20.

36. *Kan.*—*Whitaker v. Hawley*, 30 *Kan.* 317, 1 *Pac.* 508. *Mo.*—*Union R. & Transp. Co. v. Traube*, 59 *Mo.* 355. *N. Y.*—*Lorillard v. Clyde*, 122 *N. Y.* 41, 25 *N. E.* 292, 19 *Am. St. Rep.* 470; *Byrnes v. Byrnes*, 102 *N. Y.* 4, 5 *N. E.* 776; *McCleary v. Malcom Brewing Co.*, 56 *App. Div.* 531, 67 *N. Y. Supp.* 258; *Welch v. Buchans Soap Corp.*, 56 *Misc.* 689, 107 *N. Y. Supp.* 616; *Gould v. Olympic Min. Co.*, 49 *Misc.* 612, 96 *N.*



the time of the trial thereof,<sup>37</sup> as it will bar any later action upon any claim in existence at the time and which could properly have been included in the prior suit. Where suit is brought for the recovery of damages for an entire breach of the contract, a recovery therefor bars further litigation thereon.<sup>38</sup>

A judgment for the defendant in one of several actions growing out of the same contract or subject-matter is not a bar to other actions arising thereon, unless it goes to the merits of the whole subject-matter, in which event it operates as an estoppel to any subsequent suit thereon.<sup>39</sup>

Y. Supp. 455; *Smith Bros. v. Stern*, 148 N. Y. Supp. 1. Pa.—*Brandenburg v. Brooke*, 45 Pa. Super. 490. Tex.—*Jones & Co. v. Gammel*-Statesman Pub. Co., 100 Tex. 320, 99 S. W. 701, 8 L. R. A. (N. S.) 1197.

See also *infra*, XVII, B, 2, g, (II), (B); XVII, B, 2, g, (II), (C).

[a] But see *Kennedy v. New York*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847, holding that each holding over at the expiration of the term and of yearly periods thereafter, by a tender under a lease for a definite term of years, constitutes a new term, separate and distinct from those that preceded it, so that a recovery for the rent due for one term after that for several has become due will not bar an action for the rent which accrued on the other terms.

[b] A judgment against a stockholder for less than the amount due on his stock, is a bar to another action for a further assessment on such stock. *De Weese v. Smith*, 97 Fed. 309.

37. See the title "Successive Suits," as to whether installments or damages accruing up to the time of trial must be included in the recovery.

[a] In Connecticut the plaintiff is required by statute to introduce by amendment any cause of action accruing under the contract after the institution of the suit and before trial, else it was barred. *Clafin & Kimball v. Mather Electric Co.*, 87 Fed. 795.

38. Ala.—*Cooke v. Cook*, 110 Ala. 567, 20 So. 64. Cal.—*Abbott v. The 76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425. Ill.—*Greenwald v. Ruby*, 178 Ill. App. 415; *Alexander v. Potts*, 151 Ill. App. 587; *Manton v. Gammon*, 7 Ill. App. 201. Minn.—*Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151. Mo.—*Priest v. Deaver*, 22 Mo. App. 276. N. Y.—*New York v. Con-*

*stantine*, 60 N. Y. Super. 469, 18 N. Y. Supp. 788, 46 N. Y. St. 247. Pa.—*Corbet v. Evans*, 25 Pa. 310; *Stradley v. Bath Portland Cement Co.*, 19 Pa. Dist. 45. Tex.—*Ben C. Jones & Co. v. Gammel*-Statesman Co. (Tex. Civ. App.), 94 S. W. 191.

39. U. S.—*Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411; *Cromwell v. Sacramento*, 94 U. S. 351, 24 L. ed. 195; *Priest v. Glenn*, 51 Fed. 405, 2 C. C. A. 311; *Edwards v. Bates*, 55 Fed. 436; *Johnson v. United States*, 4 Ct. Cl. 248. Ala.—*Gadsden First Nat. Bank v. Denson*, 115 Ala. 650, 22 So. 518; *Rake's Admr. v. Pope*, 7 Ala. 161. Ill.—*Markley v. People*, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234. Ind.—*Hoover v. Kilander*, 135 Ind. 600, 34 N. E. 697; *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. 796; *Cleveland v. Creviston*, 93 Ind. 31, 47 Am. Rep. 367; *Felton v. Smith*, 88 Ind. 149, 45 Am. Rep. 454; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Lacy v. Eller*, 8 Ind. App. 286, 35 N. E. 847. Ia.—*Aultman v. Mount*, 62 Iowa 674, 18 N. W. 306; *Goodenow v. Litchfield*, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; *Clark v. Sammans*, 12 Iowa 368. Kan.—*Knickerbocker v. Ream*, 42 Kan. 17, 21 Pac. 795; *Furneaux v. First Nat. Bank of Whitewater*, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541; *Peru Plow, etc. Co. v. Ward*, 6 Kan. App. 289, 51 Pac. 805. Mich.—*Hazen v. Reed*, 30 Mich. 331. Minn.—*Osborne v. Williams*, 39 Minn. 353, 40 N. W. 165. N. Y.—*Williams v. Fitzhugh*, 44 Barb. 321; *De Wolf v. Crandall*, 2 Jones & S. 14; *Bouchaud v. Dias*, 3 Denio 238; *Coyle v. Ward*, 36 App. Div. 181, 55 N. Y. Supp. 388; *Burdick v. Cameron*, 10 App. Div. 589, 42 N. Y. Supp. 78. Okla.—*Barnett v. Worrell*, 148 Pac. 133. Pa.—*Danziger v. Williams*, 91 Pa. 234. Tex.—*Hanrick v. Gurley*, 93 Tex.

(B.) **SEVERAL NOTES OR INSTALMENTS.** — A subsequent action is not barred by a former recovery had upon one or more of several notes constituting the consideration of a conveyance or contract, and payable at stated intervals,<sup>40</sup> or for one of several instalments of interest,<sup>41</sup> or for purchase money for land or other property,<sup>42</sup> or for a debt secured by mortgage, payable in instalments.<sup>43</sup> Likewise a recovery in an action for a special assessment for improvement of land,<sup>44</sup> for indemnity insurance,<sup>45</sup> or for rent,<sup>46</sup> wages,<sup>47</sup> or other obligation, payable in instalments,<sup>48</sup> does not bar a subsequent action based

453, 51 S. W. 347, 55 S. W. 119, 56 S. W. 330. **Utah.**—Rio Grande W. R. Co. v. Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995. **Wash.** Doan v. Scott, 25 Wash. 214, 65 Pac. 190.

**Judgment on merits as bar generally,** see *infra*, XVII, B, 3, d.

40. **Ill.**—Buckner v. Thompson, 11 Ill. 563. **Ind.**—Gammon v. Cottrell, 87 Ind. 213. **Ia.**—Bayliss v. Deford, 73 Iowa 495, 35 N. W. 596. **Mass.**—Wood v. Corl, 4 Mete. 203. **N. Y.**—Kieley v. Kahn, 50 Misc. 309, 98 N. Y. Supp. 774; Smith Bros. v. Stern, 148 N. Y. Supp. 1.

[a] But see Banzer v. Richter, 68 Misc. 192, 123 N. Y. Supp. 678, holding that, under a chattel mortgage securing several notes, in terms payable monthly, providing that on default in payment of one all shall become due and payable immediately, such default makes all due absolutely, and not at the option of the payee, and that a recovery on one of such notes after such default, is a bar to a subsequent action on the others.

41. **U. S.**—Butterfield v. Ontario, 44 Fed. 171. **Ill.**—Telford v. Garrels, 122 Ill. 550, 24 N. E. 573; Wehrly v. Morfoot, 103 Ill. 183; Dulaney v. Payne, 101 Ill. 325, 40 Am. Rep. 205. **Mass.** Andover Sav. Bank v. Adams, 1 Allen 28; Sparhawk v. Wills, 6 Gray 163. **Mich.**—Near v. Donnelly, 93 Mich. 460, 53 N. W. 616. **Mo.**—Curry v. La Fon, 155 Mo. App. 678, 135 S. W. 511. **Tex.** Kempner v. Comer, 73 Tex. 196, 11 S. W. 194.

But see Bowler v. Estate of Alvarez, 23 Phil. Isl. 561.

42. **Stroud v. Conine**, 114 Ark. 304, 169 S. W. 959; **Kane v. Fisher**, 2 Watts (Pa.) 246; **Hamm v. Beaver**, 1 Grant's Cas. (Pa.) 448.

43. **Cal.**—McDougal v. Downey, 45 Cal. 165. **Ia.**—Bynum v. Gordan, 24 La. Ann. 160. **Mo.**—Curry v. La Fon,

155 Mo. App. 678, 135 S. W. 511. **Wis.** Bliss v. Weil, 14 Wis. 35, 80 Am. Dec. 766.

44. **People v. Cohen**, 219 Ill. 200, 76 N. E. 388.

45. **Puckett v. National Annuity Assn.**, 134 Mo. App. 501, 114 S. W. 1039; **Porter v. Casualty Co. of America**, 65 Misc. 485, 120 N. Y. Supp. 71.

46. **Colo.**—Curtis v. Hammond, 43 Colo. 277, 95 Pac. 921. **Ill.**—McDole v. McDole, 106 Ill. 452; **Marshall v. John Grosse Clothing Co.**, 83 Ill. App. 338 (*affirmed* in 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181). **Ind.**—Epstein v. Greer, 85 Ind. 372. **Ky.**—Webb v. Bailey, 17 Ky. L. Rep. 1117, 33 S. W. 935. **La.**—Elliott v. La Barre, 5 La. 223. **Mass.**—Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623. **N. Y.**—Kennedy v. New York, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847; **Brennan v. Blath**, 3 Daly 478; **Underhill v. Collins**, 60 Hun 585, 15 N. Y. Supp. 495; **Smith v. Lehigh Zinc, etc. Co.**, 59 Hun 618, 13 N. Y. Supp. 449; **Holthausen v. Kells**, 18 App. Div. 80, 45 N. Y. Supp. 471; **Gerson v. Blanck**, 79 Misc. 24, 139 N. Y. Supp. 47; **Dusenbury v. Habisreiting**, 72 Misc. 61, 129 N. Y. Supp. 2; **Kieley v. Kahn**, 50 Misc. 309, 98 N. Y. Supp. 774. **Ohio.** **Strangward v. American Brass Bedstead Co.**, 82 Ohio St. 121, 91 N. E. 988; **Fox v. Althorp**, 40 Ohio St. 322. **Okla.**—**Barnett v. Worrell**, 148 Pac. 133. **Ore.**—**Weiler v. Henarie**, 15 Ore. 28, 13 Pac. 614. **Pa.**—**Stiles v. Himmelwright**, 16 Pa. Super. 649. **Tenn.**—**Barnes v. Black Diamond Coal Co.**, 101 Tenn. 354, 47 S. W. 498. **Tex.**—**Davidson v. Hirsch**, 45 Tex. Civ. App. 631, 101 S. W. 269. **Wyo.**—**Bath v. Lindenmyer**, 1 Wyo. 240.

47. **Stradley v. Bath Portland Cement Co.**, 19 Pa. Dist. 45; **Speier v. Locust Laundry**, 56 Pa. Super. 323.

48. **U. S.**—**Breakwater Co. v. Donovan**, 218 Fed. 340, 134 C. C. A. 148. **Ark.**—**Stroud v. Conine**, 114 Ark. 304,

thereon, since a distinct cause of action arises upon each note or instalment when the same becomes due and payable, which may be enforced by successive actions.<sup>49</sup> But the plaintiff will generally be required to include in the first action all such notes or instalments due at the time he brings his suit,<sup>50</sup> in the absence of statutory pro-

169 S. W. 959. **Ill.**—Greenwald v. Ruby, 178 Ill. App. 415. **Mich.**—Love v. Flitcraft, 149 Mich. 149, 112 N. W. 735. **N. Y.**—Smith Bros. v. Stern, 148 N. Y. Supp. 1.

49. See the following: **U. S.**—Breakwater Co. v. Donovan, 218 Fed. 340, 134 C. C. A. 148. **Colo.**—Curtis v. Hammond, 43 Colo. 277, 95 Pac. 921; Hallack v. Gagnon, 4 Colo. App. 360, 36 Pac. 70. **Ill.**—People v. Cohen, 219 Ill. 200, 76 N. E. 388; Greenwald v. Ruby, 178 Ill. App. 415. **Ky.**—Schmidt v. Louisville, etc. R. Co., 119 Ky. 287, 84 S. W. 314. **La.**—Overton v. Gervais, 6 Mart. (N. S.) 685. **Md.**—Ahl v. Ahl, 60 Md. 207. **Mich.**—Love v. Flitcraft, 149 Mich. 149, 112 N. W. 735; Raymond v. White, 120 Mich. 165, 78 N. W. 1071. **Minn.**—Doescher v. Spratt, 61 Minn. 326, 63 N. W. 736; Ramsey County Bldg. Soc. v. Lawton, 49 Minn. 362, 51 N. W. 1163. **Miss.**—Armfield v. Nash, 31 Miss. 361. **Mo.**—Puckett v. National Annuity Assn., 134 Mo. App. 501, 114 S. W. 1039; Burnside v. Wand, 108 Mo. App. 539, 84 S. W. 995; Jones v. Silver, 97 Mo. App. 231, 70 S. W. 1109; West v. Moser, 49 Mo. App. 201; Priest v. Deaver, 22 Mo. App. 276. **N. H.**—Wheeler v. Bancroft, 18 N. H. 537. **N. Y.**—Kennedy v. New York, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847; Nathans v. Hope, 77 N. Y. 420; Cashman v. Bean, 2 Hilt. 340; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Seed v. Johnston, 63 App. Div. 340, 71 N. Y. Supp. 579; Gerson v. Blanck, 79 Misc. 24, 139 N. Y. Supp. 47; Dusenbury v. Habisreitering, 72 Misc. 61, 129 N. Y. Supp. 2. **Ohio.** Strangward v. American Brass Bedstead Co., 82 Ohio St. 121, 91 N. E. 988. **Okl.**—Barnett v. Worrell, 148 Pac. 133. **Pa.**—Hamm v. Beaver, 31 Pa. 58; Sterner v. Gower, 3 Watts & S. 136; Speier v. Locust Laundry, 56 Pa. Super. 323; Stradley v. Bath Portland Cement Co., 19 Pa. Dist. 45. **Tex.** Davidson v. Hirsch, 45 Tex. Civ. App. 631, 101 S. W. 269; Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Tex. Civ. App.), 94 S. W. 191. **Eng.**—Hem-

ing v. Wilton, 5 Car. & P. 54, 24 E. C. L. 450.

50. **Ark.**—Stroud v. Conine, 114 Ark. 304, 169 S. W. 959. **Colo.**—Curtis v. Hammond, 43 Colo. 277, 95 Pac. 921. **Conn.**—Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79. **Ky.**—Outen v. Mitchells, 1 Bibb 360. **Mass.**—Warren v. Comings, 6 Cush. 103. **Mo.**—Union R. & Transp. Co. v. Traube, 59 Mo. 355; Curry v. La Fon, 155 Mo. App. 678, 135 S. W. 511; Puckett v. National Annuity Assn., 134 Mo. App. 501, 114 S. W. 1039; Morrison v. De Donato, 76 Mo. App. 643; Kerr v. Simmons, 9 Mo. App. 376. **N. H.**—Brown v. West, 64 N. H. 385, 10 Atl. 615. **N. Y.**—Reformed Protestant Dutch Church v. Brown, 54 Barb. 191; Jex v. Jacob, 19 Hun 105, 7 Abb. N. C. 452; Banzer v. Richter, 68 Misc. 192, 123 N. Y. Supp. 678; Smith Bros. v. Stern, 148 N. Y. Supp. 1. **Ohio.**—Althop v. Fox, 6 Ohio Dec. (Reprint) 985, 9 Am. L. Rec. 381. **Pa.**—Speier v. Locust Laundry, 56 Pa. Super. 323. **Tex.**—Jones & Co. v. Gammel-Statesman Pub. Co. (Tex. Civ. App.), 94 S. W. 191.

See also *supra*, XVII, B, 2, g, (II), (A).

But see **Mass.**—Andover Sav. Bank v. Adams, 1 Allen 28, holding that a recovery for an instalment of interest will not bar an action for the principal, although the latter was due at the time of the former recovery. **Mo.** Williams & Co. v. Kitchen, 40 Mo. App. 604, holding that two notes given in the same transaction by the same maker to the payee, constitute separate and distinctive causes of action, and a recovery on one will not bar an action on the other, although both were due when the first suit was brought. **N. Y.**—Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470 (holding that where the former judgment had the legal effect of adjudging that the contract upon which the actions were based was divisible, an action on a second instalment is not barred); Kieley v. Kahn, 50 Misc. 309, 98 N. Y. Supp. 774, holding that a re-



vision to the contrary.<sup>51</sup> under penalty of having them barred in case he fails to do so.

(C.) SEPARATE COVENANTS OR PROVISIONS OF CONTRACT.—A recovery for the breach of one covenant, provision or condition contained in a contract or other obligation, will not operate as a bar to an action upon another distinct and independent covenant, provision or condition contained in the same contract or other instrument.<sup>52</sup> But the plaintiff is required to include in one action all breaches of the same covenant, provision or condition,<sup>53</sup> or of the several covenants contained in the same instrument,<sup>54</sup> which have occurred prior to the time the action is begun, and all damages resulting from such breaches, whether present or prospective,<sup>55</sup> since those not included will be concluded by the recovery therein.<sup>56</sup>

(D.) ACCOUNTS. — A recovery upon a part of a single account for goods sold, money advanced or loaned, work and labor performed or services rendered, is a bar to a subsequent action for the recovery of the residue thereof or for other items thereon,<sup>57</sup> except as to items

covery for an instalment of rent does not bar a subsequent action for instalments due prior to the one recovered, where an action for those instalments was pending when the action for the instalment recovered was brought, but was dismissed before judgment in that action.

[a] And to bring in by amendment all others falling due up to the date of the trial. *Jones & Co. v. Gammel-Statesman Pub. Co.* (Tex. Civ. App.), 94 S. W. 191. *Compare, Carter-Crume v. Seurrung*, 99 Fed. 888, 40 C. C. A. 150.

51. *Brandagee v. Chamberlain*, 2 Rob. (La.) 207.

52. U. S.—*New Orleans v. Whitney*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. ed. 1102; *Union Switch & Signal Co. v. Johnson*, 72 Fed. 147, 18 C. C. A. 490; *Oregon R. Co. v. Oregon R., etc. Co.*, 28 Fed. 505, lease. Ala.—*Moore v. Johnston*, 108 Ala. 324, 18 So. 825. Ky.—*Givens v. Peake*, 1 Dana 225. Me.—*Donald v. Thompson*, 10 Me. 170, 25 Am. Dec. 216. Mass.—*Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976. Minn.—*Wright v. Tileston*, 60 Minn. 34, 61 N. W. 823; *West v. Hennessey*, 58 Minn. 133, 59 N. W. 284; *Tremblay v. Tappan*, 55 Minn. 264, 54 N. W. 750. N. H.—*Parker v. Roberts*, 63 N. H. 431; *Robinson v. Crownin-Shield*, 1 N. H. 76. N. Y.—*Mahesh v. Lown*, 10 Barb. 550; *La Haye v. Borated Specialty Co.*, 61 Misc. 569, 115 N. Y. Supp. 843. Ore.—*Krebs Hop Co. v. Livesley*,

59 Ore. 574, 114 Pac. 944, 118 Pac. 165. Pa.—*Merchants Ins. Co. v. Algeo*, 31 Pa. 446. Wis.—*Andrew v. Schmidt*, 64 Wis. 664, 26 N. W. 190.

[a] But see *Leggett v. Lippincott*, 50 N. J. L. 462, 14 Atl. 577, wherein a recovery of the consideration and interest thereon in an action on a covenant of lawful ownership, was held to be a bar to an action on covenant of title.

53. Ga.—*Mitchell v. Gillespie*, 25 Ga. 346. Ind.—*Reid v. Huston*, 55 Ind. 173. Mass.—*Osborne v. Atkins*, 6 Gray 423.

[a] A judgment on a covenant of warranty, for damages for an ouster from part of the land by paramount title, is a bar to a subsequent action on the same covenant to recover an amount which the plaintiff has been obliged to pay the owner of that title for occupying the whole land previously to such ouster. *Osborne v. Atkins*, 6 Gray (Mass.) 423.

54. *Joyce v. Moore*, 10 Mo. 271; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

55. *Taylor v. Heitz*, 87 Mo. 660.

56. See *supra*, XVII, B, 2, g, (II), (A); XVII, B, 2, g, (II), (B).

57. Ala.—*Oliver v. Holt*, 11 Ala. 574, 16 Am. Dec. 228. Conn.—*Bunnet v. Pinto*, 2 Conn. 431; *Lane v. Cook*, 3 Day 255. Ia.—*Williams-Abbott Electric Co. v. Model Electric Co.*, 134 Iowa 435, 112 N. W. 181; *Banning v. Irish*, 47 Iowa 650. Kan.—*Manley v. Tufts*, 59 Kan. 66, 51 Pac. 683; *Bolen Coal*

for which payment was not due when the suit was filed,<sup>58</sup> and those for which indebtedness was incurred after the institution of such suit.<sup>59</sup> But where separate and distinct accounts exist between the same parties,<sup>60</sup> or separate bills of goods are bought, upon which different periods of credit are given,<sup>61</sup> or where, by agreement, the amount of purchases on account during each month is due and payable at the end of the month, a recovery on one will not bar an action on another.<sup>62</sup>

(E.) EMPLOYMENT CONTRACTS. — A recovery by an employe for his wrongful discharge before the expiration of the period for which he was employed, will operate as a bar to another action for the breach of the contract of employment.<sup>63</sup> But a recovery in an action solely

Co. v. Whittaker, 52 Kan. 747, 35 Pac. 810. **Ky.**—Hobson v. Com., 1 Duv. 172; Anderson's Admr. v. Meredith, 10 Ky. L. Rep. 460, 9 S. W. 407. **Minn.** Memmer v. Carey, 30 Minn. 458, 15 N. W. 877. **Mo.**—Hermann v. Schwartz Bros. Commission Co., 59 Mo. App. 649; La Crosse Lumb. Co. v. Andrain County Agricultural, etc. Soc., 59 Mo. App. 24; Piel v. Fink, 19 Mo. App. 338. **N. Y.**—Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Stevens v. Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60; Keys v. Hoppe, 85 Misc. 364, 147 N. Y. Supp. 443; Frank J. Lennon Co. v. New York Mail Co., 81 Misc. 251, 142 N. Y. Supp. 483; Darrow v. Clipper Mfg. Co., 48 Misc. 635, 96 N. Y. Supp. 194. **Pa.**—Buck v. Wilson, 113 Pa. 423, 6 Atl. 97; Ingraham v. Hall, 11 Serg. & R. 78. **Tenn.**—Johnson v. Staleup, 4 Baxt. 283. **Vt.**—Hayward v. Clark, 50 Vt. 612; Warren v. Newfane, 25 Vt. 250. **Wis.**—Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757. **Eng.**—Bagot v. Williams, 3 B. & C. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115, 107 Eng. Reprint 721. **Can.**—Davidson v. Belleville, etc. R. Co., 5 Ont. App. 315.

[a] But see Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611, holding that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will not constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred.

58. Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; McLaughlin v. Hill, 6 Vt. 20.

59. Avery v. Fitch, 4 Conn. 362.

60. Tommey & Stewart v. Finney, 45 Ga. 155.

61. Stickel v. Steel, 41 Mich. 350, 1 N. W. 1046; Secor v. Sturgis, 2 Abb. Pr. (N. Y.) 69 (affirmed in 16 N. Y. 548); Staples v. Goodrich, 21 Barb. (N. Y.) 317.

62. Beck v. Deveraux, 9 Neb. 109, 2 N. W. 365.

63. **U. S.**—Breakwater Co. v. Donovan, 218 Fed. 340, 134 C. C. A. 148; Hughes v. Dundee Mortg. & Tr. Inv. Co., Ltd., 26 Fed. 831. **Ark.**—Van Winkle v. Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853. **Colo.** Saxonia M. & R. Co. v. Cook, 7 Colo. 569, 4 Pac. 1111. **Ill.**—Doherty v. Schipper & Block, 250 Ill. 128, 95 N. E. 75, 34 L. R. A. (N. S.) 557, Ann. Cas. 1912B, 364 (affirming 157 Ill. App. 413); Rosenmueller v. Lampe, 89 Ill. 212, 31 Am. Rep. 74; Alexander v. Potts, 151 Ill. App. 587; Weill v. Fontanel, 31 Ill. App. 615. See Mt. Hope Cemetery Assn. v. Weidenmann, 139 Ill. 67, 28 N. E. 834. **Ind.**—Hamilton v. Love, 152 Ind. 641, 53 N. E. 181, 71 Am. St. Rep. 384; Aetna L. Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Commissioners v. Binford, 70 Ind. 208; Chicago, etc. R. Co. v. Yawger, 24 Ind. App. 460, 56 N. E. 50. **Kan.**—Madden v. Smith, 28 Kan. 798. **Me.**—Alie v. Nadeau, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346. **Md.**—See Gottlieb v. Fred W. Wolf Co., 75 Md. 126, 23 Atl. 198. **Mass.**—Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010; Mullaly v. Austin, 97 Mass. 30. **Neb.**—Kahn v. Kahn, 24 Neb. 709, 40 N. W. 135. **N. Y.** Montrose v. Wanamaker, 134 N. Y. 590, 31 N. E. 252; Colburn v. Wood-

for wages earned up to the time of the employee's discharge is not a bar to an action for damages for breach of the contract,<sup>64</sup> though if such recovery is for any period subsequent to the discharge of the employee, when no services were rendered,<sup>65</sup> or before the payment is due,<sup>66</sup> it will be regarded as a recovery of damages for a breach of the contract,<sup>67</sup> and constitute a bar to any other action.<sup>68</sup> A recovery

worth, 31 Barb. 381; *Wiseman v. Pan-*  
*ama R. Co.*, 1 Blitt. 300; *Spragg v.*  
*Barton*, 158 App. Div. 81, 142 N. Y.  
Supp. 616; *Maeder v. Wexler*, 98 App.  
Div. 68, 90 N. Y. Supp. 598 (*affirmed*);  
in 182 N. Y. 519, 74 N. E. 1120; *Wieland v. Wilhoix*, 40 App. Div. 213,  
57 N. Y. Supp. 1038; *Waldron v. Hendrickson*, 40 App. Div. 7, 57 N. Y.  
Supp. 561; *Landsberg v. Lewis*, 6 N. Y.  
Supp. 561, 22 Abb. N. C. 277; *Rauh v.*  
*Wolf*, 62 Misc. 621, 116 N. Y. Supp.  
13. **Ohio**.—*James v. Allen County*, 44  
Ohio St. 226, 6 N. E. 246, 58 Am. Rep.  
821. **Pa.**—*Jenkins v. Scranton*, 205 Pa.  
508, 55 Atl. 788; *Allen v. Colliery Eng.*  
*Co.*, 196 Pa. 512, 46 Atl. 899; *Stradley v.*  
*Bath Portland Cement Co.*, 19 Pa.  
Dist. 45; *Eisenhower v. School District*,  
13 Pa. Super. 51; *Moser v. Guaranty*  
*Trust & S. D. Co.*, 2 Sadler 183, 3 Atl.  
454. **Tenn.**—*Menihan Co. v. Hopkins*,  
129 Tenn. 24, 164 S. W. 775; *Tarbox v.*  
*Hartenstein*, 4 Baxt. 78; *East Tennessee, V. & G. R. Co. v. Staub*,  
7 Lea 237. **Tex.**—*Lichtenstein v.*  
*Brooks*, 75 Tex. 196, 12 S. W. 975.  
**Wash.**—*Carmean v. North American*  
*Transp. & T. Co.*, 45 Wash. 446, 88 Pac.  
824, 8 L. R. A. (N. S.) 595. **Wis.**  
*Ornstein v. Yahr & Lang Drug Co.*, 119  
Wis. 429, 96 N. W. 826. **Can.**—*Hayes v.*  
*Harshaw*, 30 Ont. L. 157.

[a] As to election of the remedy, see the following cases: **U. S.**—*Alaska Fish & Lumb. Co. v. Chase*, 128 Fed. 886, 64 C. C. A. 1. **Ill.**—*Hope Cemetery Assn. v. Weidenmann*, 139 Ill. 67, 28 N. E. 834. **Mo.**—*Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Ehrlich v. Aetna L. Ins. Co.*, 88 Mo. 249. **S. C.**—*Watts v. Todd*, 1 McMull. 26. **Vt.**—*Chamberlin v. Scott*, 33 Vt. 80. **Wis.**—*Kennedy v. South Shore Lumb. Co.*, 102 Wis. 284, 78 N. W. 567.

64. **U. S.**—*Farnum v. Kennebec Water Dist.*, 170 Fed. 173, 95 C. C. A. 355; *American China Dev. Co. v. Boyd*, 148 Fed. 258. **Ga.**—*Blun & Sterne v. Hallam*, 53 Ga. 82. **Ind.**—(*Chicago, & N. W. Ry. Co. v. Yawger*, 24 Ind. App. 460,

56 N. E. 50. **Kan.**—*James v. Parsons, R. & Co.*, 70 Kan. 156, 78 Pac. 438. **Mont.**—*Boucher v. Powers*, 29 Mont. 342, 74 Pac. 942. **N. Y.**—*Levin v. Standard Fashion Co.*, 16 Daly 404, 11 N. Y. Supp. 706 (*affirming* 25 N. Y. St. 817, 4 N. Y. Supp. 867); *La Haye v. Borated Specialty Co.*, 61 Misc. 509, 115 N. Y. Supp. 843; *Neustaedter v. Lewis*, 125 N. Y. Supp. 438; *Landsberg v. Lewis*, 6 N. Y. Supp. 561, 22 Abb. N. C. 277. And see *Weed v. Burt*, 78 N. Y. 191 (*affirming* 7 Daly 267). **Wash.** *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741. **Can.**—*Jeykal v. Nova Scotia Glass Co.*, 20 Nova Scotia 388.

65. **Ill.**—*Alexander v. Potts*, 151 Ill. App. 587. **N. Y.**—*Broder v. Lord*, 14 Jones & S. 205; *Waldron v. Hendrickson*, 40 App. Div. 7, 57 N. Y. Supp. 561. **Tenn.**—*Menihan Co. v. Hopkins*, 129 Tenn. 24, 164 S. W. 775. **Eng.** *Dunn v. Murray*, 9 Barn. & Cress. 780, 109 Eng. Reprint 290; *Barnsley v. Taylor*, 37 L. J. Q. B. (N. S.) 39. **Can.** *Hayes v. Harshaw*, 30 Ont. L. 157.

[a] But see *Frost v. International Rubber Co.*, 37 R. I. 406, 92 Atl. 1022. Also *Sharp v. McBride*, 134 La. 249, 63 So. 892, holding that an overseer of a plantation, discharged about the middle of the contract period, who sued for and recovered his salary for the entire contract period, was not thereby barred from a second suit for his percentage of the net proceeds of the crop, which was not ascertainable at the time of the first recovery.

66. *James v. Parsons, R. & Co.*, 70 Kan. 156, 78 Pac. 438.

67. *Ill.*—*Alexander v. Potts*, 151 Ill. App. 587; *Monarch Cycle Mfg. Co. v. Mueller*, 83 Ill. App. 359, 363; *Jones v. Dunton*, 7 Ill. App. 580. **Mo.**—*Boage v. Pacific R. R.*, 33 Mo. 212, 82 Am. Dec. 160; *Soursin v. Salorgne*, 14 Mo. App. 486. **Neb.**—*Kahn v. Kahn*, 24 Neb. 709, 40 N. W. 135. **N. Y.**—*Parry v. American Opera Co.*, 19 Abb. N. C. 269, 9 N. Y. St. 521.

68. **Ill.**—*Alexander v. Potts*, 151 Ill. App. 587. **N. Y.**—*Colburn v. Wood-*



by an employe for wages earned, under his contract of employment, and a recovery by him for damages for breach of the contract, being different in their scope and measure of damages, do not operate as a bar to each other;<sup>69</sup> but a recovery on quantum meruit for the value of services actually rendered, will bar an action for damages for breach of the contract,<sup>70</sup> or if a claim was unknown to the plaintiff at the time of the institution and pendency of the former suit,<sup>71</sup> the judgment rendered therein will not operate as a bar to a subsequent action for the recovery of such claim. But if such omission was due to the negligence of the plaintiff to include such claim in the former suit,<sup>72</sup> or to

worth, 31 Barb. 381. **Ohio**.—James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821. **Tenn**.—Menihan Co. v. Hopkins, 129 Tenn. 24, 164 S. W. 775.

[a] **An action for work under contract** is not a bar to a subsequent action for extra work done under a separate contract. Baehler v. Hartman, 1 Pearson (Pa.) 500.

[b] **But where labor is performed at various times under an entire contract**, a recovery for a part of the work will bar a second suit for the balance, even where the items constituting the basis of the second suit were withdrawn at the trial of the first with a reservation of the right to bring another suit thereon. Logan v. Caffrey, 30 Pa. 196.

[c] **Commissions**.—A recovery by an employe for damages sustained by a wrongful discharge where his compensation was in part a salary and in part commissions, is a bar to a subsequent action for commissions which he would have earned but for the discharge, but not a bar to an action for commissions earned prior to the discharge. Landsberg v. Lewis, 22 Abb. N. C. 277, 6 N. Y. Supp. 561; Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663 (affirming 7 Abb. N. Cas. 466).

69. **Ga**.—Blun & Sterne v. Holitzer, 53 Ga. 82. **Ill**.—Great Northern Hotel Co. v. Leopold, 72 Ill. App. 108. **Kan**.—James v. Parsons, R. & Co., 70 Kan. 156, 78 Pac. 438. **Md**.—See Olmstead v. Bach, 25 Atl. 343. **Mass**.—Mullaly v. Austin, 97 Mass. 30. **Mo**.—Evans v. St. Louis, I. M. & S. R. Co., 24 Mo. App. 114. **N. Y**.—Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663 (affirming 7 Abb. N. C. 466); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Tullis v. Hassell, 22 Jones & S. 391; Thompson v. Wood, 1

Hilt. 93; Levin v. Standard Fashion Co., 4 N. Y. Supp. 867, 25 N. Y. St. 817. **Can**.—Jeykal v. Nova Scotia Glass Co., 20 Nova Scotia 388.

[a] See also Mt. Hope Cemetery Assn. v. Weidenmann, 139 Ill. 67, 28 N. E. 834, holding that a person suing for damages for a wrongful discharge, may, by adding a common count for work and labor to his complaint, recover under it for work actually done.

70. **Ill**.—Mt. Hope Cemetery Assn. v. Weidenmann, 139 Ill. 67, 28 N. E. 834. **Kan**.—James v. Parsons, R. & Co., 70 Kan. 156, 78 Pac. 438. **Md**.—Keedy v. Crane, 71 Md. 395, 18 Atl. 707; Keedy v. Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759. **Mo**.—Glover v. Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; Ehrlich v. Aetna L. Ins. Co., 88 Mo. 249. **N. Y**.—Levin v. Standard Fashion Co., 16 Daly 404, 11 N. Y. Supp. 706 (affirming 4 N. Y. Supp. 867, 25 N. Y. St. 817); Moody v. Leverich, 14 Abb. Pr. (N. S.) 145. **S. C**.—Watts v. Todd, 1 McMull. L. 26. **Vt**.—Chamberlin v. Scott, 33 Vt. 80. **Wis**.—Ornstein v. Yahr & Lang Drug Co., 119 Wis. 429, 96 N. W. 826.

71. **Ark**.—Alexander v. Bridgford, 59 Ark. 195, 27 S. W. 69. **Mich**.—Johnson v. Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49. **Mo**.—Moran v. Plankinton, 64 Mo. 337; Edmonston v. Jones, 96 Mo. App. 83, 69 S. W. 741. **N. Y**.—Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Conklin v. Field, 37 How. Pr. 455; Farrington v. Payne, 15 Johns. 432. **N. C**.—Jones v. Beaman, 119 N. C. 300, 25 S. E. 970, 117 N. C. 259, 23 S. E. 248. **Ohio**.—Ruehlmann v. Eleventh Ward Bldg. Assn., 1 Ohio Pl. 428, 7 Ohio N. P. 296. **Vt**.—Post v. Smilie, 48 Vt. 185.

72. **U. S**.—Stockton v. Ford, 18 How. 418, 15 L. ed. 395. **Ga**.—The Macon & Augusta R. Co. v. Garrard, 54 Ga.

the mistake or error of the court or a referee, which the plaintiff neglects to have corrected or take an appeal from, he is estopped from recovering such claims or items in a second suit therefor.<sup>73</sup> This rule does not apply to any cause of action which was neither joined nor embraced within the pleadings of the former action, although it might have been brought into the litigation.<sup>74</sup>

(F.) SECURED CONTRACTS OR OBLIGATIONS, ETC. — Where two distinct causes of action exist, one upon a principal debt and the other upon a security held as collateral thereto, a recovery upon one will not merge the other, or bar an action thereon,<sup>75</sup> unless the judgment has

327. *Ia.*—*Keokuk v. Alexander*, 21 Iowa 377. *Ky.*—*Newport, etc. Bridge Co. v. Douglas*, 12 Bush 673; *Russell v. England*, 20 Ky. L. Rep. 1879, 50 S. W. 250; *Callahan v. Murrell*, 20 Ky. L. Rep. 28, 45 S. W. 67; *Russell v. McIlvoy*, 19 Ky. L. Rep. 755, 41 S. W. 765. *Mass.*—*Folsom v. Clemence*, 119 Mass. 473. *Mo.*—*Wickersham v. Whedon*, 33 Mo. 561. *N. J.*—*Weber v. Morris, etc. R. Co.*, 36 N. J. L. 213. *N. Y.*—*Hayes v. Reese*, 34 Barb. 151; *Platner v. Best*, 11 Johns. 530; *Rockefeller v. St. Regis Paper Co.*, 39 Misc. 746, 80 N. Y. Supp. 975. *N. C.*—*Hornner v. Dunnagan*, 41 N. C. 371. *Ohio.* *Ewing v. McNairy & Claflin*, 20 Ohio St. 315. *Pa.*—*Ahl's Estate*, 169 Pa. 609, 32 Atl. 621; *Buffington's Admr. v. Burhman*, 3 Clark 73, 4 Pa. L. J. 418. *S. C.*—*Dukes v. Broughton*, 2 Spears 620.

73. *Town v. Smith*, 14 Mich. 218; *Bancroft v. Winspear*, 44 Barb. (N. Y.) 209. But see *Adams v. United States*, 33 Ct. Cl. 411, holding that where a commissioner in passing upon claims presented, excludes those subsequent to a given date "without prejudice," a second suit may be had for the excluded claims.

74. *Shakespeare v. Land Co.*, 144 N. C. 516, 57 S. E. 213.

75. See the following: *U. S.*—*Clark v. Young*, 1 Cranch 181, 2 L. ed. 74; *Phillips v. Bossard*, 35 Fed. 99; *Bank of United States v. Johnson*, 3 Cranch C. C. 228, 2 Fed. Cas. No. 919. *Ark.* *Ford v. Burks*, 37 Ark. 91. *Conn.* *Fairechild v. Holly*, 10 Conn. 474. *Ga.* *Dykes v. McVay*, 67 Ga. 502. *Ill.* *Wanack v. People*, 187 Ill. 116, 58 N. E. 242. *Ind.*—*Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992; *Jenkinson v. Ewing*, 17 Ind. 505. *Ia.*—*Reed v. Lane*, 96 Iowa 454, 65 N. W. 380; *Burnheimer Bros. v. Hart*, 27 Iowa 19, 99 Am. Dec.

641, 1 Am. Rep. 209. *Me.*—*Hill v. Crocker*, 87 Me. 208, 32 Atl. 878, 47 Am. St. Rep. 321; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231. *Mass.* *Hervey v. Rawson*, 164 Mass. 501, 41 N. E. 682; *Vanuxem v. Burr*, 151 Mass. 286, 24 N. E. 773, 21 Am. St. Rep. 458; *Storer v. Storer*, 6 Mass. 390. *Minn.*—*Macomb Sewer-Pipe Co. v. Hanley*, 61 Minn. 330, 63 N. W. 744. *N. Y.*—*Ackley v. Westervelt*, 86 N. Y. 448; *Corn Exch. Ins. Co. v. Babcock*, 57 Barb. 231; *Hawks v. Hincheliff*, 17 Barb. 492; *Clapp v. Meserole*, 1 Abb. Dec. 362, 1 Keyes 281; *Chappell v. Potter*, 11 How. Pr. 365; *Davis v. Anable*, 2 Hill 339; *Chipman v. Martin*, 13 Johns. 240; *Empire Trust Co. v. Magee*, 117 App. Div. 34, 102 N. Y. Supp. 9; *Frisbee v. Tufts*, 74 Misc. 49, 133 N. Y. Supp. 641; *Friedman v. Lowenstein*, 135 N. Y. Supp. 569. *Ohio.*—*Hammond v. Deaver*, 2 Ohio Dec. (Reprint) 395. *Ore.* *McCullough v. Hellman*, 8 Ore. 191. *Pa.* *Anderson v. Neef*, 32 Pa. 379; *Myers v. Clark*, 3 Watts & S. 535; *Elbert v. Jeanes*, 2 Pa. Co. Ct. 67. *S. C.*—*Noble v. Cothran*, 18 S. C. 439; *Treasurers of State v. Oswald's Sureties*, 2 Bailey 214. *Wash.*—*Fischer v. Quigley*, 8 Wash. 327, 35 Pac. 1071. *Wis.*—*First Nat. Bank of Milwaukee v. Finck*, 100 Wis. 446, 76 N. W. 608. *Eng.*—*Drake v. Mitchell*, 2 East 251, 7 Rev. Rep. 449, 102 Eng. Reprint 594.

*Compare, Rhinelander v. Barrow*, 17 Johns. (N. Y.) 758; *Moan v. Vredenburg*, Lohr (N. Y.) 392.

[a] The plaintiff may pursue his remedy upon the debt and upon the security at the same time, and judgment in one is not a bar to judgment in the other. The debt is not discharged by judgment, but by satisfaction. There may be several judgments, but only one satisfaction. *Friedman v. Lowenstein*, 135 N. Y. Supp. 569.

been satisfied,<sup>76</sup> especially when the equitable rights of the plaintiff would be thereby endangered.<sup>77</sup> Nor will a former recovery against a person acting in an official or fiduciary capacity bar a subsequent action on his official or indemnity bond.<sup>78</sup> But where a note and a bond,<sup>79</sup> or a mortgage and a bond, is given to secure the payment of the same debt, a judgment on one security will bar an action on the other;<sup>80</sup> and where the whole of the plaintiff's claim, upon both the debt and the security, was submitted in the former action, the judgment rendered therein will bar a subsequent action, although the jury ignored one of the causes in the former trial.<sup>81</sup>

A judgment against the endorser of a note does not merge the cause of action except as to such endorser, and is no bar to an action against the debtor on the note.<sup>82</sup> But a recovery for the full amount of a note is a bar to a subsequent action by the surety thereon to recover the amount of an uncredited payment made prior to suit, where both maker and surety were sued and failed to defend, or claim credit for the payment.<sup>83</sup>

**Recovery on Debt or Lien.** — An unsatisfied judgment recovered on a debt secured by a lien, is not a bar to an action seeking to enforce the lien;<sup>84</sup> nor is the foreclosure of a mortgage, or other lien against property, a bar to an action upon a note or bond, to secure the payment of which the mortgage or lien is given,<sup>85</sup> unless the judgment

76. **Mass.**—National Security Bank v. Hunnewell, 124 Mass. 260. **N. Y.** Lembeck & Betz Eagle Brewing Co. v. Crudo, 134 N. Y. Supp. 576. **Va.**—Blackwell's Admr. v. Bragg, 78 Va. 529.

77. **Mass.**—Fisher v. Fisher, 98 Mass. 303. **N. Y.**—Steele v. Lord, 28 Hun 27. **Pa.**—White v. Smith, 33 Pa. 186, 75 Am. Dec. 589.

78. **D. C.**—United States v. Hine, 3 McArthur 27. **Ga.**—Morton v. Gahona, 70 Ga. 569. **Ill.**—People v. Allen, 86 Ill. 166. **Ia.**—Charles v. Haskins, 11 Iowa 329, 77 Am. Dec. 148. **Mass.** Hawkes v. Davenport, 5 Allen 390; Greenfield v. Wilson, 13 Gray 384. **Miss.** McAllister v. Clopton, 60 Miss. 207. **Mo.**—Worley v. Heath, 1 Mo. App. 378. **N. J.**—Richman v. Powell, 7 N. J. L. J. 45. **N. C.**—Walton v. Pearson, 85 N. C. 34. **Pa.**—Carmack v. Com., 5 Binn. 184; Com. v. Whitaker, 2 Del. Co. Rep. 36; Com. v. Lelar, 1 Phila. 173, 8 Leg. Int. 50. **S. C.**—State v. Cason, 11 S. C. 392; Treasurers of State v. Bates, 2 Bailey 362. **Tex.**—McKee v. Price, 3 Wills. Civ. Cas., §335.

*Contra*, Hall v. Forman, 82 Ky. 505.

[a] "A recovery against a principal alone, without satisfaction, for a matter which constitutes a breach of his official bond, is not a bar to a subse-

quent suit against him and his sureties on the bond." McKee v. Price, 3 Wills. Civ. Cas. (Tex.), §335.

79. *Seaman v. Haskins*, 2 Johns. Cas. (N. Y.) 195.

80. *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756.

81. *Brockway v. Kinney*, 2 Johns. (N. Y.) 210.

82. *Bunker v. Langs*, 76 Hun 543, 28 N. Y. Supp. 210; *Howell v. McCracken*, 87 N. C. 399.

83. *Buick v. Wood*, 43 Barb. (N. Y.) 315.

84. **Ill.**—Palmer v. Harris, 100 Ill. 276. **Kan.**—Rossiter v. Merriman, 80 Kan. 739, 104 Pac. 858, 24 L. R. A. (N. S.) 1095. **Tex.**—Waldrom v. Zacharie, 54 Tex. 503. **Wis.**—Hyland v. Bohn Mfg. Co., 91 Wis. 574, 65 N. W. 369.

[a] A creditor may take judgment on a note secured by mortgage without releasing the mortgage or waiving his right to foreclose it. *Rossiter v. Merriman*, 80 Kan. 739, 104 Pac. 858, 24 L. R. A. (N. S.) 1095.

85. **Conn.**—Peck's Appeal, 31 Conn. 215. **Ill.**—Bressler v. Martin, 133 Ill. 278, 24 N. E. 518; *Rockwell v. Servant*, 63 Ill. 424; *Russell v. Hamilton*, 3 Ill. 56. **Ind.**—Rodman v. Rodman, 64 Ind.



or decree of foreclosure awards a personal judgment for any deficiency which may occur;<sup>86</sup> in which event the cause of action on the principal debt will be merged, and another action thereon barred, where the mortgage or lien is coextensive with the debt;<sup>87</sup> or if the mortgagee takes a judgment of foreclosure only, neglecting to take a judgment for the deficiency also, he will be thereby barred from maintaining another action for the unsatisfied deficiency after exhausting the premises.<sup>88</sup> An action to foreclose a lien is not barred by the judgment or decree of another state holding that an action on the note secured by such lien is barred by the statute of limitations.<sup>89</sup>

A successful defense on the merits will bar a second action, whether upon the principal debt or the security,<sup>90</sup> or lien held in connection therewith;<sup>91</sup> but a defense which succeeds upon some other ground or question, such as the validity of the instrument sued on,<sup>92</sup> or the

<sup>87</sup> *Huston v. Feltz*, 36 Ind. App. 392, 66 N. E. 74. Mich.—*Goodrich v. White*, 39 Mich. 489. Mo.—*Watson v. Hawkins*, 60 Mo. 550. N. Y.—*O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496. Ohio.—*McClelland v. Bishop*, 42 Ohio St. 113; *Avery v. Vansickle*, 35 Ohio St. 270. Vt.—*Manly v. Slason*, 28 Vt. 346.

[a] See *Smith v. Lamb*, 1 Vt. 395, holding that a decree of foreclosure satisfied by payment is not a bar to an action on the mortgage securities for the recovery of a sum omitted from such decree.

[b] Where a mortgage is given to secure several notes falling due at different times, a foreclosure on a part of the land to satisfy one note is not a bar to a second suit to foreclose on the balance of the land to satisfy the other notes and an unsatisfied balance on the first note sued on. *Bressler v. Martin*, 133 Ill. 278, 24 N. E. 518.

[c] A judgment on a scire facias to foreclose a mortgage does not extinguish the debt evidenced by the collateral note. *Rockwell v. Servant*, 63 Ill. 424. But see *Reedy v. Burgert*, 1 Ohio 157, holding that a judgment on a scire facias and mortgage is an extinguishment of the original debt secured by the mortgage.

<sup>86</sup> Ga.—*Shackelford v. Covington*, 130 Ga. 858, 61 S. E. 984. La.—*Denistoun & Co. v. Payne*, 7 La. Ann. 333. Me.—*Fuller v. Eastman*, 81 Me. 284, 17 Atl. 67. N. J.—*New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 750.

<sup>87</sup> Cal.—*Kittridge v. Stevens*, 16 Cal. 381. N. Y.—*Toope v. Frigge*, 7

Dale 298. Ohio.—*Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991.

[a] Compare, *Bice v. Marquette Opera-House Bldg. Co.*, 96 Mich. 24, 55 N. W. 382, holding that where an action was commenced to recover the value of material in the construction of a building, the fact that plaintiff had instituted suits against the contractors, and to enforce a lien, did not affect plaintiff's rights, so long as the judgments therein remain unsatisfied.

<sup>88</sup> *Crosby v. Jeroloman*, 37 Ind. 264.

<sup>89</sup> *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 226, 90 N. E. 834; *House v. Carr*, 185 N. Y. 453, 78 N. E. 171, 113 Am. St. Rep. 936, 6 L. R. A. (N. S.) 510; *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; *Greenley v. Greenley*, 114 App. Div. 640, 100 N. Y. Supp. 114; *Piper v. Hayward*, 71 Misc. 41, 127 N. Y. Supp. 240.

<sup>90</sup> U. S.—*Chapman v. Smith*, 16 How. 114, 14 L. ed. 868. Ill.—*Palmer v. Sanger*, 143 Ill. 34, 32 N. E. 390. Ky.—*Bush's Heirs v. Hampton*, 4 Dana 83. La.—*Flagg v. St. Charles Parish*, 48 La. Ann. 765, 19 So. 944; *Johnson v. Forstall*, 3 La. Ann. 446. Me.—*Lander v. Arno*, 65 Me. 26. N. J.—*Inhabitants of Lower Alloways Creek v. Moore*, 15 N. J. L. 146. Ohio.—*Longworth v. Flagg*, 10 Ohio 300. Pa.—*Sykes v. Gerber*, 98 Pa. 179.

<sup>91</sup> *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756; *Whelan v. Hill*, 2 Whart. (Pa.) 118.

<sup>92</sup> Ind.—*Winningham v. State*, 56 Ind. 243. N. Y.—*Slason v. Engle-*

existence of the lien claimed, does not extinguish the cause of action, or bar a subsequent action on the debt.<sup>93</sup>

(III.) *Arising Ex Delictu.*—(A.) IN GENERAL.—A former recovery on tort is not a bar to a subsequent action based upon a separate and distinct tortious act committed at a different time or place.<sup>94</sup> But any recovery upon the merits in an action for any part of the damages resulting from a single tort will bar a recovery in any subsequent action predicated upon the same tortious act or transaction.<sup>95</sup> This rule applies where a recovery has been had for damages to a part of an entire tract of land and a subsequent suit for damages for another

hart, 34 Barb. 198; *Wells v. Salina*, 71 Hun 559, 25 N. Y. Supp. 134. Pa. *Darlington v. Gray*, 5 Whart. 487. S. C. *Stoddard & Co. v. McIlwain*, 9 Rich. L. 451. Tenn.—*Betterton v. Roope*, 3 Lea 215, 31 Am. Rep. 633. Wis.—*Eastman v. Porter*, 14 Wis. 39.

[a] A successful defense to a forged note, in an action against sureties, is not a bar to a subsequent action against them on a genuine note which had been surrendered to the principal on delivery of the forged note. *Bowman v. Humphrey*, 18 Ky. L. Rep. 511, 37 S. W. 150.

93. *Geary v. Bangs*, 138 Ill. 77, 27 N. E. 462.

94. See the following: Cal.—*De La Guerra v. Newhall*, 55 Cal. 21. Kan. *Missouri Pac. R. Co. v. Scammon*, 41 Kan. 521, 21 Pac. 590. Mass.—*Adams v. Haffards*, 20 Pick. 127; *White v. Moseley*, 8 Pick. 356. N. Y.—*Bender-nagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448. Pa.—*Amrhein v. Quaker City Dye Works*, 192 Pa. 253, 43 Atl. 1008.

[a] But see *Fields v. Law*, 2 Root (Conn.) 320, holding a judgment for trespass merges all prior trespasses of the same kind, and will bar a subsequent action\* for a like trespass committed prior to the commencement of the former action.

Where distinct causes of action to both person and property arise from same tort, see *infra*, XVII, B, 2, g, (III), (C), (1).

95. See the following: U. S.—*Rankin v. St. Louis*, etc. R. Co., 98 Fed. 479. Ala.—*Foster v. Napier*, 73 Ala. 595; *Pratt Consol. Coal Co. v. Morton* (Ala. App.), 68 So. 1015; *Birmingham Ry., Light & Power Co. v. Long*, 5 Ala. App. 510, 59 So. 382. Ark.—*Hydrick v. St. Louis, I. M. & S. R. Co.*, 118 Ark. 402, 177 S. W. 5; *St. Louis, I. M. & S. R.*

*Co. v. Brundidge*, 115 Ark. 606, 171 S. W. 859. Cal.—*Herriter v. Porter*, 23 Cal. 385. Fla.—*Tidwell v. Wither-spoon*, 21 Fla. 359, 58 Am. Rep. 665. Ill.—*Palmer v. People*, 111 Ill. App. 381. Kan.—*Wichita & W. R. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502. Ky. *Dils v. Justice*, 137 Ky. 822, 127 S. W. 472; *McCain v. Louisville*, etc. R. Co., 97 Ky. 804, 15 Ky. L. Rep. 80, 22 S. W. 325; *Cole's Admx. v. Illinois Cent. R. Co.*, 27 Ky. L. Rep. 1087, 87 S. W. 1082; *Covington*, etc. El. R. Co. v. *Klim-er*, 20 Ky. L. Rep. 1415, 49 S. W. 484. Md.—*Packham v. German F. Ins. Co.*, 91 Md. 515, 46 Atl. 1066, 80 Am. St. Rep. 461, 50 L. R. A. 828. Mass. *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Goodrich v. Yale*, 97 Mass. 15. Mich.—*Jannitich v. Michigan Malleable Iron Co.*, 121 Mich. 460, 80 N. W. 245; *Finn v. Peck*, 47 Mich. 208, 10 N. W. 202. Miss.—*Kimball v. Louis-ville & N. R. Co.*, 94 Miss. 396, 48 So. 230. See *Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514. Mo.—*Kellogg v. City of Kirksville*, 149 Mo. App. 1, 129 S. W. 57; *Linville v. Green*, 125 Mo. App. 289, 102 S. W. 67. N. J.—*Ochs v. Public Service Ry. Co.*, 80 N. J. L. 148, 77 Atl. 533. N. Y.—*Sheldon v. Carpenter*, 4 N. Y. 579, 55 Am. Dec. 301; *Barnard v. Devine*, 34 Misc. 182, 68 N. Y. Supp. 859. See *Rockwell v. Brown*, 36 N. Y. 207. N. C.—*Eller v. Carolina & N. W. R. Co.*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225. Pa.—*Long v. Long*, 5 Watts 102. Tenn.—*Saddler v. Apple*, 9 Humph. 342. Vt.—*Kennett v. Tudor*, 85 Vt. 190, 81 Atl. 633. Va.—*Hite v. Long*, 6 Rand. (27 Va.) 457, 18 Am. Dec. 719. Wash.—*Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041.

Compare, Colo.—*Hattersley v. Bur-rows*, 4 Colo. App. 538, 36 Pac. 889. Ill. *O'Byrne v. Cregier*, 181 Ill. App. 569.

part of it is sought to be maintained,<sup>96</sup> as well as where a judgment has been recovered for a part of a tract of land of which plaintiff has been dispossessed and it is sought by another action to recover the balance thereof.<sup>97</sup> It also obtains where a recovery has been had as to any of several different chattels or items of property affected by the same tortious act or transaction.<sup>98</sup> It applies to prospective damages as well as those already suffered.<sup>99</sup>

A recovery in an action for damages for injuries resulting from a tortious act bars a recovery in an action for a penalty, based upon the same tortious act, where the penalty is given by way of compensation for the injury.<sup>1</sup> A civil action may be maintained for the recovery of a penalty for a tortious act in addition to a criminal prosecution for the same act.<sup>2</sup>

So also a recovery in an action for a penalty does not bar a subse-

**Ky.**—*Harp v. Southern Ry. Co.*, 150 Ky. 564, 150 S. W. 663, holding that a recovery, on an agreed case made up, for damages to a growing crop, does not bar a subsequent action for injury to plaintiff's house and household effects in the same explosion, since defendant might have insisted that the whole controversy be embraced in the agreed case. **Miss.**—*Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co.*, 106 Miss. 244, 63 So. 455.

[a] A judgment for nominal damages will bar an action for actual damages. *Kennett v. Tudor*, 85 Vt. 190, 81 Atl. 633.

96. **Cal.**—*Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57. **Ga.**—*Cunningham v. Morris*, 19 Ga. 583, 65 Am. Dec. 611. **Mass.**—*Knowlton v. New York, etc. R. Co.*, 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625. **Minn.**—*Pierro v. St. Paul, etc. R. Co.*, 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673.

Compare, *O'Byrne v. Cregier*, 181 Ill. App. 569, and *Pantall v. Rochester, etc. Coal, etc. Co.*, 204 Pa. 158, 53 Atl. 751.

97. *Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041.

98. **Ala.**—*O'Neal v. Brown*, 21 Ala. 482. **Kan.**—*Burdge v. Kelchner*, 66 Kan. 642, 72 Pac. 232; *Thisler v. Miller*, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302. **Mass.**—*McCaffrey v. Carter*, 125 Mass. 330; *Trask v. Hartford, etc. R. Co.*, 2 Allen 331. **Mo.**—*Union R. & Transp. Co. v. Traube*, 59 Mo. 355; *Garth v. Everett*, 16 Mo. 490; *Skeen v. Springfield Engine, etc. Co.*, 42 Mo. App. 158. **N. Y.**—*Phillips v. Berick*, 16 Johns. 136, 8 Am. Dec. 299; *Farrington*

*v. Payne*, 15 Johns. 432. **Tex.**—*St. Louis, etc. R. Co. v. Moss*, 9 Tex. Civ. App. 6, 28 S. W. 1038. **Wis.**—*Stern v. Riches*, 111 Wis. 591, 87 N. W. 555, 87 Am. St. Rep. 892.

99. **Ala.**—*Pratt Consol. Coal Co. v. Morton* (Ala. App.), 68 So. 1015. **Ark.**—*Hydrick v. St. Louis, I. M. & S. R. Co.*, 118 Ark. 402, 177 S. W. 5. **Ia.**—*Watson v. Van Meter*, 43 Iowa 76. **Mo.**—*Kellogg v. City of Kirksville*, 149 Mo. App. 1, 129 S. W. 57. **N. Y.**—*Bender-nagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448. **Vt.**—*Whitney's Admr. v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150. **Eng.**—*Hodsoll v. Stallebrass*, 11 A. & E. 301, 9 C. & P. 63, 38 E. C. L. 49, 8 Dowl. P. C. 482, 9 L. J. Q. B. 132, 3 P. & D. 200, 113 Eng. Reprint 429; *Fetter v. Beale*, 1 Salk. 11, 91 Eng. Reprint 11.

[a] But see *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553, holding that a recovery of damages for grading a street will not bar an action for negligent grading, where the former recovery was before the completion of the grading.

1. *Illinois Cent. R. Co. v. People*, 84 Ill. App. 260; *Wabash R. Co. v. People*, 78 Ill. App. 268; *Terre Haute, etc. R. Co. v. People*, 41 Ill. App. 513.

[a] It is otherwise where the action for damages and for the penalty are separate and distinct. *Vincent v. Southern Railway*, 88 S. C. 413, 70 S. E. 1056.

2. *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *State v. Schoonover*, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767.



quent action for damages based upon the same tortious act, where the penalty is given by way of punishment rather than damages.<sup>2½</sup>

(B.) BY REPETITION OR CONTINUANCE OF TRESPASS OR NUISANCE. — A former recovery of damages for a tortious act is not a bar to a subsequent action for the recovery of additional or other damages resulting from a repetition of the wrongful act,<sup>3</sup> or from the continuous, or recurrent, nature of the trespass,<sup>4</sup> or nuisance, whereby the plaintiff suffers a repetition or continuance of the injury.<sup>5</sup> Thus a recovery for dam-

2½. *St. Louis, etc. R. Co. v. Trimble*, 54 Ark. 354, 15 S. W. 899.

3. *Ill.*—Sanitary Dist. *v. Ray*, 199 Ill. 63, 64 N. E. 1048, 93 Am. St. Rep. 102. *Ind.*—Henson *v. Veatch*, 1 Blackf. 369. *Kan.*—See Beard *v. Kansas City*, 96 Kan. 102, 150 Pac. 540. *Ky.*—Shepherd *v. Thompson*, 2 Bush 176. *N. Y.*—Rockwell *v. Brown*, 36 N. Y. 207. *Ohio.*—Shepherd *v. Willis*, 19 Ohio 142. *Tenn.*—Underwood *v. Smith*, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946.

*Compare*, District of Columbia *v. Hutchinson*, 1 App. Cas. (D. C.) 403.

[a] Successive publications of the same libel (1) will support as many successive actions, and a recovery upon one is no bar to another. *Woods v. Pangborn*, 14 Hun (N. Y.) 540. (2) See Union Associated Press *v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96, holding that a judgment against a press association for sending out a libel article to its customers, is not a bar to an action against one of such newspapers for publishing it. *Compare supra*, XVII, B, t, e, note 85 [a]. (3) But where the damages are enhanced by evidence of repetitions of a slander, such judgment operates as a bar to an action for a further repetition. *Leonard v. Pope*, 27 Mich. 145.

[b] A former recovery does not bar an action for damages for a wrong occurring after such recovery for the original negligence, since it could not be included therein. *Texas & P. R. Co. v. Scoggin & Brown*, 42 Tex. Civ. App. 335, 95 S. W. 651.

[c] A recovery for permanent injuries may be had, even where damages for permanent injury were claimed in a former suit, based upon another accident, if no damages were recovered on such claim, and the plaintiff has since fully recovered her health, or if the injuries were to another part of her body. *Thomas v. Altoona & Logan Valley Electric Co.*, 236 Pa. 365, 84 Atl. 846.

4. *Ark.*—Chicago, R. I. & P. Ry. *v. McCutchen*, 80 Ark. 235, 96 S. W. 1054. *Conn.*—Platt Bros. & Co. *v. City of Waterbury*, 80 Conn. 179, 67 Atl. 508, 125 Am. St. Rep. 111. *Ky.*—Madisonville, H. & E. R. Co. *v. Thomas*, 148 Ky. 131, 146 S. W. 33. *Me.*—See *Rollins v. Blackden*, 112 Me. 459, 92 Atl. 521. *Mass.*—Curtis Mfg. Co. *v. Spencer Wire Co.*, 203 Mass. 448, 89 N. E. 534, 133 Am. t. Rep. 307. *N. H.*—Troy *v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. *N. J.*—P. Ballantine & Sons *v. Public Service Corp.*, 86 N. J. L. 331, 91 Atl. 95, L. R. A. 1915A, 369. *N. Y.*—Klingenberg *v. City of New York*, 164 App. Div. 718, 150 N. Y. Supp. 199; *Covert v. Brooklyn*, 13 App. Div. 188, 43 N. Y. Supp. 310. But see *Porter v. Cobb*, 22 Hun 278. *Tex.*—Gulf, B. & G. N. R. Co. *v. Roberts* (Tex. Civ. App.), 86 S. W. 1052. *W. Va.*—Pickens *v. Coal River Boom & Timber Co.*, 66 W. Va. 10, 38, 65 S. E. 865, 24 L. R. A. (N. S.) 354.

[a] A riparian owner whose lands were eroded at each successive rise of the river, because of deflections of the water, due to wing dams constructed by the opposite owner, is entitled to maintain successive actions for the successive injuries. *Gulf, C. & S. F. Ry. Co. v. Moseley*, 6 Ind. Ter. 369, 98 S. W. 129.

5. *Ala.*—Pratt Consol. Coal Co. *v. Morton*, 68 So. 1015. *Cal.*—Donahue *v. Stockton Gas & Electric Co.*, 6 Cal. App. 276, 92 Pac. 196. *Ga.*—Southern R. Co. *v. Cook*, 117 Ga. 286, 43 S. E. 697; *Mulligan v. City Council of Augusta*, 115 Ga. 337, 41 S. E. 604. *Ill.*—Kewanee *v. Otley*, 204 Ill. 402, 68 N. E. 388. *Ia.*—Bennett *v. Marion*, 119 Iowa 473, 93 N. W. 558. *Me.*—Russell *v. Brown*, 63 Me. 203. *Mass.*—Kent *v. Gerrish*, 18 Pick. 564; *Staple v. Spring*, 10 Mass. 72. *Minn.*—Byrne *v. Minneapolis, etc. R. Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; *Sloggy v. Dilwarth*, 38 Minn. 179, 36 N. W.

ages to real property caused by the construction of a railroad or other works,<sup>6</sup> or the wrongful or improper construction of a bridge, culvert, fill or other works, whereby the waters of a stream, or other drainage waters, are so obstructed as to overflow the lands of an adjoining owner, does not bar a subsequent action to recover damages for a recurrence of the injury resulting from such construction,<sup>7</sup> where such damages accrue subsequently to the former recovery.<sup>8</sup> A judgment for the abatement of a nuisance is not a bar to an action for damages

451, 8 Am. St. Rep. 656; *Brakken v. Minneapolis, etc. R. Co.*, 32 Minn. 425, 21 N. W. 414. **Mo.**—*Charles v. St. Louis, M. & S. E. R. Co.*, 124 Mo. App. 293, 101 S. W. 680. **Neb.**—*Omaha, etc. R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183. **N. H.**—*Cheshire Turnpike v. Stevens*, 13 N. H. 28. **N. J.**—*P. Ballantine & Sons v. Public Service Corp.*, 86 N. J. L. 331, 91 Atl. 95, L. R. A. 1915A, 369. **N. Y.**—*Beckwith v. Griswold*, 29 Barb. 291; *Seigel v. Neary*, 38 Misc. 297, 77 N. Y. Supp. 854. **Pa.** *Smith v. Elliott*, 9 Pa. 345; *Hartman v. Pittsburgh Incline Plane Co.*, 11 Pa. Super. 438. **Tex.**—*Uvalde Electric Light Co. v. Parsons (Tex. Civ. App.)*, 138 S. W. 163. **Wis.**—*Hazeltine v. Case*, 46 Wis. 391, 1 N. W. 66, 32 Am. Rep. 715. **Eng.**—*Holmes v. Wilson*, 10 Ad. & El. 503, 37 E. C. L. 273, 113 Eng. Reprint 190. *Compare, Clarke v. Yorke*, 52 L. J. Ch. 32, 47 L. T. Rep. (N. S.) 381, 31 Wkly. Rep. 62.

[a] A judgment of not guilty of the violation of a smoke ordinance in one year is not a bar to an action for violating the ordinance in a subsequent year. *City of Buffalo v. George P. Ray Mfg. Co.*, 124 N. Y. Supp. 913.

[b] A former recovery for damages to a water-mill from deposits of sand, caused by a boom, will not bar other recoveries as often as the damages occur. *Pickens v. Coal River Boom & Timber Co.*, 66 W. Va. 10, 38, 65 S. E. 865, 24 L. R. A. (N. S.) 354.

6. **Ala.**—*Pratt Consol. Coal Co. v. Morton*, 68 So. 1015. **Ariz.**—*Brady v. Pinal County*, 8 Ariz. 114, 71 Pac. 910. **Ill.**—*Morgenstern v. Klees*, 30 Ill. 422; *Vansant v. Allmon*, 23 Ill. 30. **Ind.** *Crause v. Holman*, 19 Ind. 30. **N. Y.** *De Graft & Palmer v. Mayper*, 65 Misc. 185, 119 N. Y. Supp. 657; *Meth v. Butler & Herriman*, 126 N. Y. Supp. 656. **Ohio.**—*Gardner v. Letson*, 8 Ohio Dec. 256, 5 Ohio N. P. 112. **Wash.**—*Hartstad v. Olson*, 57 Wash. 264, 106 Pac.

741. **Wis.**—*Bliss v. Weil*, 14 Wis. 35, 80 Am. Dec. 766.

7. **U. S.**—*Evey v. Mexican Cent. R. Co.*, 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387. **Ill.**—*Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239; *Cleveland, C. C. & St. L. R. Co. v. Nuttall*, 59 Ill. App. 639; *Ohio, etc. R. Co. v. Dooley*, 32 Ill. App. 228. **Ind.** *Rarey v. Lee*, 7 Ind. App. 518, 34 N. E. 749. **Minn.**—*Bowers v. Mississippi, etc. Boom Co.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395. **Mo.**—*McKee v. St. Louis, etc. R. Co.*, 49 Mo. App. 174. **N. C.**—*Candler v. Asheville Electric Co.*, 135 N. C. 12, 47 S. E. 114; *Ridley v. Seaboard, etc. R. Co.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. **Tex.**—*Clark v. Dyer*, 81 Tex. 339, 342, 16 S. W. 1061; *Gulf, C. & S. F. Ry. v. Helsley*, 62 Tex. 593; *International & G. N. Ry. v. Kyle (Tex. Civ. App.)*, 101 S. W. 272; *Gulf, W. T. & P. Ry. v. Goldman*, 8 Tex. Civ. App. 257, 28 S. W. 267; *Texas, etc. R. Co. v. Long*, 1 White & W. Civ. Cas., §559. **Va.**—*Ellis v. Harris' Exr.*, 32 Gratt. (73 Va.) 684.

[a] Damages resulting from an abatable nuisance, such as a railroad embankment with openings insufficient to pass the water in times of high water, may be recovered by successive actions within the period of limitations after each injury occurs. *Hayes v. St. Louis & S. F. R. Co.*, 177 Mo. App. 201, 162 S. W. 266.

[b] A ditch or embankment which only becomes a nuisance at intervals by diverting water to the plaintiff's land, is not a permanent injury, and damages resulting therefrom may be recovered in successive suits as they occur. *International & G. N. R. Co. v. Slusher (Tex. Civ. App.)*, 115 S. W. 673.

8. *Rumsey v. New York, etc. R. Co.*, 63 Hun 200, 17 N. Y. Supp. 672, 45 N. Y. St. 33 (affirmed in 137 N. Y. 563,

sustained prior thereto.<sup>9</sup> But where the continuance and operation of a permanent structure are necessarily injurious, the damages resulting therefrom must be recovered in one suit, and such recovery is a bar to a subsequent action for damages arising from the same tort;<sup>10</sup> though in some jurisdictions the plaintiff may elect whether he will treat the injury as permanent and recover his full damages in one action, or as continuing, and recover in successive actions as the damage accrues.<sup>11</sup> Claims for damages from an abatable nuisance or remediable trespass cannot be separated from those based upon permanent injuries, and where both exist there can be but one recovery.<sup>12</sup>

33 N. E. 338); *Hoeh v. Manhattan Ry. Co.*, 59 Hun 541, 625, 13 N. Y. Supp. 633; *Hartman v. Pittsburgh Incline Plane Co.*, 11 Pa. Super. 438.

[a] A recovery by a former owner of abutting property for damages resulting from a failure of a railroad company to keep its track in repair, is not a bar to a suit by a subsequent owner of the property for later injuries incident to changes in the condition of such track. *Stein v. Chesapeake & O. Ry. Co.*, 132 Ky. 322, 116 S. W. 733.

9. *Gleason v. Gary*, 4 Conn. 418. See generally the title "Nuisance."

10. Ark.—*Chicago, R. I. & P. Ry. Co. v. McCutchen*, 80 Ark. 235, 96 S. W. 1054; *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804. Cal.—*Los Angeles v. Baldwin*, 53 Cal. 469. Colo.—*Denver City Irr. etc. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234. D. C.—*District of Columbia v. Hutchinson*, 1 App. Cas. 403. Ga.—*Clark v. Lanier*, 104 Ga. 184, 30 S. E. 741. Ill.—*Vette v. Sanitary Dist. of Chicago*, 260 Ill. 432, 103 N. E. 241; *Miller v. Sanitary Dist. of Chicago*, 242 Ill. 321, 90 N. E. 1; *Chicago, etc. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *Decatur Gas-light, etc. Co. v. Howell*, 92 Ill. 19; *Chicago & Alton R. Co. v. Maher*, 91 Ill. 312; *Atchison, T. & S. F. R. Co. v. Jones*, 110 Ill. App. 626; *Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 573. Ind.—*North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821. Ia.—*Hodge v. Shaw*, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290; *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa 145, 30 N. W. 172; *Stodghill v. Chicago, etc. R. Co.*, 53 Iowa 341, 5 N. W. 495; *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792. Ky.—*Oliver v. Illinois Cent. R. Co.*, 25 Ky. L. Rep. 235,

74 S. W. 1078. Mass.—*Fowle v. New Haven, etc. Co.*, 112 Mass. 334, 17 Am. Rep. 106. Minn.—*Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735. Neb.—*Omaha, etc. R. Co. v. Standen*, 22 Neb. 343, 35 N. W. 183. N. H.—*Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. N. C.—*Harper v. Town of Lenoir*, 152 N. C. 723, 68 S. E. 228. Pa.—*Murphy v. Matthews*, 43 Pa. Super. 286. Tex.—*Brown v. Southwestern Tel., etc. Co.*, 17 Tex. Civ. App. 433, 44 S. W. 59; *International & G. N. R. Co. v. Geiselman*, 12 Tex. Civ. App. 123, 34 S. W. 658. Vt.—*Whitney's Admr. v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150. Eng.—*Clarke v. Midland Great Western R. Co.*, 2 Ir. 294.

[a] Damages for depreciation of the value of land, because of the construction of the roadbed of a railroad, are permanent, and such recovery is a bar to further actions founded on the same trespass to the land. *Lewis v. St. Louis, I. M. & S. Ry. Co.*, 107 Ark. 41, 154 S. W. 198.

[b] A recovery by a landowner for the entire destruction of the beneficial use of land flooded by seepage of water from a raceway operated by a corporation, will bar an action by a grantee of the land for a later loss of crops or injury to the use and occupation of the same land, no change in the amount of land flooded, or condition of the raceway being shown. *Vanderslice v. Irondale Electric Light, Heat & Power Co.*, 232 Pa. 435, 81 Atl. 445.

11. Ia.—*Risher v. Acken Coal Co.*, 147 Iowa 459, 124 N. W. 764. N. C.—*Harper v. Town of Lenoir*, 152 N. C. 723, 68 S. E. 228. Pa.—*Murphy v. Matthews*, 43 Pa. Super. 286.

12. *Chesapeake & O. Ry. Co. v. Blankenship*, 158 Ky. 270, 164 S. W. 943.



(C.) WHERE SEVERAL INJURIES ARISE FROM SINGLE ACT. — (1.) *In General.* Where several injuries arise from a single act, the question of whether a recovery for any one of such injuries constitutes a bar to a recovery upon any other depends upon whether a single cause of action is created by such act, or whether several causes of action are created thereby. Thus the authorities are in conflict as to whether injuries resulting to both person and property from a single tortious act constitute two distinct causes of action or only one. Some cases hold that where injury to the person and damage to the property result from one and the same negligent act, distinct causes of action arise, upon which separate actions may be maintained, one for injury to the person and the other for injury to the property, and a recovery in one is not a bar to a recovery in the other.<sup>13</sup> But some authorities hold that the claim for both kinds of injuries constitute but a single cause of action, and that separate actions cannot be maintained therefor and that one recovery is a bar to further litigation on the same tortious act.<sup>14</sup>

Injuries to distinct kinds or parts of property,<sup>15</sup> or to different interests or rights, may constitute distinct causes of action, upon which separate suits may be maintained without the recovery on one of them operating as a bar to a recovery on the other.<sup>16</sup>

13. **U. S.**—*Boyd v. Atlantic Coast Line R. Co.*, 218 Fed. 653. **Cal.**—*Schermerhorn v. Los Angeles Pac. R. Co.*, 18 Cal. App. 454, 123 Pac. 351. **N. J.** *Ochs v. Public Service R. Co.*, 81 N. J. L. 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D, 255 (*reversing* 80 N. J. L. 148, 77 Atl. 533). **N. Y.** *Reilly v. Sicilian Asphalt Pav. Co.*, 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176; *McInerney v. Main*, 82 App. Div. 543, 81 N. Y. Supp. 539; *Eagan v. New York Transp. Co.*, 39 Misc. 111, 78 N. Y. Supp. 209, 11 Ann. Cas. 394; *Griffith v. Friendly*, 30 Misc. 393, 62 N. Y. Supp. 391. **Tex.**—*Watson v. Texas*, etc. R. Co., 8 Tex. Civ. App. 144, 27 S. W. 924. **Wash.** *Mullerleile v. Brandt*, 64 Wash. 280, 116 Pac. 868. **Eng.**—*Brunsdon v. Humphrey*, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. (N. S.) 529, 32 Wkly. Rep. 944 (*reversing* 11 Q. B. D. 712).

See also 14 STANDARD PROC. 639.

[a] The resultant injuries, rather than the negligent act, constitutes the grounds of action. *Boyd v. Atlantic Coast Line R. Co.*, 218 Fed. 653; *Ochs v. Public Service R. Co.*, 81 N. J. L. 661, 80 Atl. 495, Ann. Cas. 1912D, 255, 36 L. R. A. (N. S.) 240 (*reversing* 80 N. J. L. 148, 77 Atl. 533).

14. **U. S.**—*Southern R. Co. v. King*,

160 Fed. 332, 87 C. C. A. 284. **Ky.** *Cole's Admx. v. Illinois Cent. R. Co.*, 120 Ky. 686, 87 S. W. 1082. **Mass.** *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647. **Minn.**—*King v. Chicago*, etc. Ry. Co., 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161. **Mo.**—*Von Fragstein v. Windler*, 2 Mo. App. 598. **Tenn.**—*Mobile*, etc. R. Co. *v. Matthews*, 115 Tenn. 172, 91 S. W. 194.

See also 14 STANDARD PROC. 639.

15. **Cal.**—*De La Guerra v. Newhall*, 55 Cal. 21. **Mass.**—*White v. Moseley*, 8 Pick. 356. **Miss.**—*Illinois Cent. R. Co. v. Wilbourn*, 74 Miss. 284, 21 So. 1. **Va.**—*Southside R. Co. v. Daniel*, 20 Gratt. (61 Va.) 344. **Wis.**—*Hagan v. Casey*, 30 Wis. 553.

[a] But see *St. Louis Southwestern R. Co. v. Moss*, 9 Tex. Civ. App. 6, 28 S. W. 1038, holding that the killing of two horses at the same time and place constitutes but one cause of action, indivisible in its nature.

[b] Injuries to land are distinct from injuries to crops growing on it. *Southside R. Co. v. Daniel*, 20 Gratt. (61 Va.) 344.

16. **Mass.**—*McCarthy v. William H. Wood Lumb. Co.*, 219 Mass. 566, 107 N. E. 439. **Tex.**—*St. Louis S. W. Ry. Co. v. Hall*, 23 Tex. Civ. App. 211, 56 S. W. 140; *Texas & P. Ry. Co. v. Nelson*, 9 Tex. Civ. App. 156, 29 S. W.

(2.) *Several Persons Injured by Single Act.*—Where several persons sustain injuries by a single tortious act, generally separate causes of action arise in favor of such persons and a recovery by one of such persons upon any cause of action in his favor will not bar a recovery by the others.<sup>17</sup> Thus where both husband and wife have a separate cause of action arising from the same subject-matter, a judgment in one action is not a bar to the other action.<sup>18</sup> So where an infant is injured through the negligence or fault of another, two distinct causes of action arise, one by the infant for his pain and suffering and permanent impairment of earning capacity after attainment of his majority; the other by the parent for loss of the child's services during minority, and for medical treatment; and upon these separate actions may be maintained, and a recovery in one will not operate as a bar to the other.<sup>19</sup>

78; *St. Louis, etc. R. Co. v. Edwards*, 3 Wills. Civ. Cas., §346. **Vt.**—*Newbury v. Connecticut, etc. R. Co.*, 25 Vt. 377.

[a] There is no privity between an administrator prosecuting an action for the conscious suffering of his intestate before death and the same administrator prosecuting an action for the death of the intestate, and a recovery in one is not a bar to the other. *McCarthy v. William H. Wood Lumb. Co.*, 219 Mass. 566, 107 N. E. 439; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463.

[b] But see *Clare v. New York, etc. R. Co.*, 172 Mass. 211, 51 N. E. 1083, holding that a judgment for an administrator in an action by him under a statute for personal injuries suffered by his intestate, is a bar to a second action by him to recover for such injuries under the common law.

17. See the following: **U. S.**—*California Dry Dock Co. v. Armstrong*, 17 Fed. 216, 8 Sawy. 523. **Colo.**—*Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476. **Ill.**—*Illinois Cent. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830. **Mich.**—*Bennett v. Miller's Estate*, 160 Mich. 309, 125 N. W. 2. **Mo.**—*Duffy v. Gray*, 52 Mo. 528. **Okla.**—*St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784, 142 Pac. 1185. **R. I.**—*Brierly v. Union R. Co.*, 26 R. I. 119, 58 Atl. 451. **Tex.**—*Galveston, H. & S. A. Ry. Co. v. Kutae*, 72 Tex. 643, 11 S. W. 127; *San Antonio, etc. R. Co. v. Flato*, 13 Tex. Civ. App. 214, 35 S. W. 859.

[a] The right of a tenant is distinct from that of the freeholder, and a recovery by one for waste is not a bar

to an action by the other for the same waste. *California Dry-Dock Co. v. Armstrong*, 17 Fed. 216, 8 Sawy. 523.

[b] A judgment for the mother of a decedent for his death from intoxication from liquor bought of the defendant, does not bar an action by decedent's sister, who by contract was entitled to support and assistance from him during her life. *Bennett v. Miller's Estate*, 160 Mich. 309, 125 N. W. 2.

18. 11 STANDARD PROC. 803, et seq.

19. **Ala.**—*McNamara v. Logan*, 100 Ala. 187, 14 So. 175; *South, etc. Alabama R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142. **Ark.**—*Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686. **Cal.**—*Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59; *Karr v. Parks*, 44 Cal. 46. **Conn.**—*Beebe v. Trafford*, Kirby 215. **Ga.**—*Hooper v. Southern Ry. Co.*, 112 Ga. 96, 37 S. E. 165; *Central R. Co. v. Brinson*, 64 Ga. 475. **Ind.**—*Bartlett v. Koehel*, 88 Ind. 425; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483, 488; *Boyd v. Blaisdell*, 15 Ind. 73. **Ky.**—*Akers v. Fulkerson*, 153 Ky. 228, 154 S. W. 1101; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233. **Me.**—*Bernard v. Merrill*, 91 Me. 358, 40 Atl. 136. **Mass.**—*Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504; *Wilton v. Middlesex R. Co.*, 125 Mass. 130. **Minn.**—*Bamka v. Chicago, etc. R. Co.*, 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. **N. Y.**—*Traver v. Eighth Ave. R. Co.*, 4 Abb. Dec. 422, 3 Keyes 497, 6 Abb. Pr. (N. S.) 46; *Lieberman v. Third Ave. R. Co.*, 25 Misc. 704, 55 N. Y. Supp. 677. **Ohio.**—*Larwill v. Kirby*, 14 Ohio 1. **S. C.**—*Bridger v. Asheville, etc. R. Co.*, 27 S.

h. *Defenses, Counterclaims, Set-Offs and Cross-Actions.*—(L) *Defenses.*—(A.) *SET UP IN PRIOR ACTION.*—Where a defense has been presented and adjudicated under a recovery by the plaintiff in a former action, it is thereby concluded, and is not available as a defense in any subsequent litigation between the same parties or their privies on the same subject-matter or the judgment recovered thereon;<sup>20</sup> nor

C. 456, 3 S. E. 860, 13 Am. St. Rep. 653. **Tex.**—Texas & P. Ry. Co. v. Morin, 66 Tex. 133, 18 S. W. 345; Texas, etc. R. Co. v. Howard, 2 Posey Unrep. Cas. 429. **Vt.**—Bradley v. Andrews, 51 Vt. 525.

*Compare, Lathrop v. Schutte*, 61 Minn. 196, 63 N. W. 493.

[a] **But a suit for both elements of damage, the minor's damages and the parent's loss of the services of his child, is a bar to a subsequent suit by the parent in his own name for loss of his child's services.** *Chicago Screw Co. v. Weiss*, 107 Ill. App. 39 (*affirmed* in 203 Ill. 536, 68 N. E. 54). See also *Baker v. Flint*, 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154.

[b] **A satisfied judgment for damages for the death of a minor, recovered in an action in which proof is made of the value of the decedent's services during minority, is a bar to a subsequent action by the parent for the loss of such services, where the recovery was under statute and the second suit on the common law.** *Graham v. Hannibal & St. J. R. Co.*, 28 Fed. 744.

20. **U. S.**—Wilcox & Gibbs Sew. Mach. Co. v. Sherborne, 123 Fed. 875, 59 C. C. A. 363; *Fisher v. Rutherford*, *Baldw.* 188, 9 Fed. Cas. No. 4,823. **Ala.**—Penny v. British, etc. Mortg. Co., 132 Ala. 357, 31 So. 96. **Conn.**—Perkins v. Brazos, 66 Conn. 242, 33 Atl. 908; *Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94. **Ga.**—Jones v. Laurens Banking Co., 137 Ga. 561, 73 S. E. 835; *Fowler v. Davis*, 1 Ga. App. 549, 57 S. E. 939. **Ill.**—Merki v. Merki, 212 Ill. 121, 72 N. E. 9; *Stevens v. Hadfield*, 178 Ill. 532, 52 N. E. 875. **Ind.**—Stanton v. Kenrick, 135 Ind. 382, 35 N. E. 19; *Stevens v. Frazee*, 19 Ind. App. 284, 49 N. E. 385. **Ia.**—Strow v. Allen, 98 N. W. 141; *Heichew v. Hamilton*, 4 G. Gr. 317, 61 Am. Dec. 122. **Kan.**—Gordon City v. Merchants, etc. Nat. Bank, 65 Kan. 345, 69 Pac. 325, 93 Am. St. Rep. 284. **La.**—Rice v. Garrett, 12 La. Ann. 755. **Mass.**—Sherer v. Collins, 106 Mass. 417. **Mich.**—Farr

v. Lachman, 130 Mich. 40, 89 N. W. 688; *Busch v. Wilcox*, 106 Mich. 514, 64 N. W. 485. **Miss.**—Gross v. Todd, 94 Miss. 168, 47 So. 801. **Mo.**—Hickerson v. Mexico, 58 Mo. 61. **Neb.**—Gilmore v. Whiteman, 50 Neb. 760, 70 N. W. 364; *Latta v. Visel*, 37 Neb. 612, 56 N. W. 311. **N. J.**—Delaware, etc. R. Co. v. Breckenridge, 58 N. J. Eq. 581, 43 Atl. 1097; *Manley v. Mickle*, 53 N. J. Eq. 155, 32 Atl. 210, *affirming* 52 N. J. Eq. 712, 29 Atl. 434. **N. Y.**—Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334; *Campbell v. Consalus*, 25 N. Y. 613; *Candee v. Burke*, 10 Hun 350; *Hartnett v. Adler*, 15 Daly 69, 2 N. Y. Supp. 713, 19 N. Y. St. 798; *Morris v. Floyd*, 5 Barb. 130. *Compare, Bath Gas Light Co. v. Rowland*, 178 N. Y. 631, 71 N. E. 1127. **Pa.**—Peoples' Water Co. v. City of Pittston, 241 Pa. 208, 88 Atl. 503; *Allen v. International Text Book Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. Rep. 834; *Rauwolf v. Glass*, 184 Pa. 237, 39 Atl. 79; *McClain's Estate*, 180 Pa. 231, 63 Atl. 743. **R. I.**—Mills v. Allen, 26 R. I. 177, 58 Atl. 622. **Tenn.**—Matilda v. Crenshaw, 4 Yerg. 299. **Tex.**—Fricke v. Wood, 31 Tex. Civ. App. 167, 71 S. W. 784. **Vt.**—Carpenter v. Gleason, 58 Vt. 244, 4 Atl. 706; *Gilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289. **W. Va.**—Sayre's Admr. v. Harpold, 33 W. Va. 553, 11 S. E. 16; *Coville v. Gilman*, 13 W. Va. 314. **Eng.**—Dawson v. Gregory, 7 Q. B. 756, 9 Jur. 688, 14 L. J. Q. B. 286, 53 E. C. L. 756, 115 Eng. Reprint 673; *Shoe Machine Co. v. Cutlan*, 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. (N. S.) 166. **Can.**—Leinster v. Stabler, 17 U. C. C. P. 532; *Gordon v. Robinson*, 14 U. C. C. P. 566.

See generally the title "Res Judicata."

[a] **Adjudication of a defense of failure of consideration for three notes in a suit on one of them precludes that defense in an action on the other notes.** *Gross v. Todd*, 94 Miss. 168, 47 So. 801.

[b] **Where the defense of settlement**



can it be made the basis of a subsequent action.<sup>21</sup> But this rule does not extend to matters which are independent of the subject of the litigation,<sup>22</sup> or to defenses not embraced by the issues of the litigation or determined therein.<sup>23</sup>

(B.) NOT SET UP IN PRIOR SUIT, BUT WHICH MIGHT HAVE BEEN. — (1.) *Generally*. — Since a defendant is required to interpose all the defenses upon which he relies,<sup>24</sup> a recovery by the plaintiff in a former action is conclusive in a subsequent suit between the same parties or their privies as to every defense which was or might have been interposed thereto, so as to render them unavailable as either a defense,<sup>25</sup> or

was set up in a suit upon two of a series of four notes and adjudicated in a recovery for the plaintiff thereon, such defense is not available in a subsequent action on the other two notes. *Jones v. Laurens Banking Co.*, 137 Ga. 561, 73 S. E. 835.

[c] Where the validity of an agreement has been adjudicated against the defendant, he cannot set it up in defense of another action between the same parties or their privies under identical conditions and circumstances. *Peoples' Water Co. v. Pittston*, 241 Pa. 208, 88 Atl. 503.

[d] A defense unsuccessfully pleaded in a proceeding to revive a judgment, cannot be set up in an ejectment suit to recover possession of land purchased by plaintiff at execution sale under such judgment. *Greer v. Major*, 114 Mo. 145, 21 S. W. 481.

**Necessity for identity of subject-matter**, see generally *supra*, XVII, B, 2, e, (I).

21. *Drevet Mfg. Co. v. Moore Bros. Glass Co.*, 168 Fed. 246, 93 C. C. A. 522; *Fowler v. Davis*, 1 Ga. App. 549, 57 S. E. 939.

22. *Summet v. City Realty & Brokerage Co.*, 208 Mo. 501, 106 S. W. 614; *Edgell v. Sigerson*, 26 Mo. 583; *Mason v. Summers*, 24 Mo. App. 174.

23. *Ala.*—*Corey v. Penney*, 165 Ala. 234, 51 So. 624. *Ga.*—*Henderson v. Fox*, 80 Ga. 479, 6 S. E. 164. *Ind.* *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467. *Ky.*—*Falkenburg v. Johnson*, 102 Ky. 543, 44 S. W. 80, 80 Am. St. Rep. 369. *Mo.*—*McMahan v. Geiger*, 73 Mo. 145, 39 Am. Rep. 489. *N. Y.* *Goodale v. Tuttle*, 29 N. Y. 459. *W. Va.* *Garrett v. South Penn Oil Co.*, 66 W. Va. 587, 66 S. E. 741.

[a] A defense successfully pleaded in a former action on part of a series

of notes given for a stock of goods and interest on the balance, setting up partial failure of consideration, where the value of the entire stock is not necessarily determined, may be again urged in a suit on the balance of the notes wherein the total value of the stock is properly litigated. *Corey v. Penney*, 165 Ala. 234, 51 So. 624.

24. *McPherson v. Alta Irr. Dist.*, 14 Cal. App. 353, 112 Pac. 193; *Harrington v. Huff & Mitchell Co.*, 155 Mich. 139, 118 N. W. 924. See *Tibbetts v. Terrill*, 26 Colo. App. 64, 140 Pac. 936.

25. *U. S.*—*Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. ed. 817; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; *Brown v. Newton First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 293; *Allen v. Davenport*, 132 Fed. 209, 65 C. C. A. 641; *Hanley v. Beatty*, 117 Fed. 59, 54 C. C. A. 445. *Ala.*—*Brown v. Tillman*, 121 Ala. 626, 25 So. 836; *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; *Murrell v. Smith*, 51 Ala. 301; *Mervine v. Parker*, 18 Ala. 241. *Ark.*—*Briggs v. Manning*, 80 Ark. 304, 97 S. W. 289; *Livingston v. New England Mortgage Security Co.*, 77 Ark. 379, 91 S. W. 752. *Cal.*—*Johnson v. Reed*, 125 Cal. 74, 57 Pac. 680; *Byers v. Neal*, 43 Cal. 210. *Colo.*—*Comrs. of Rio Grande County v. Burpee*, 24 Colo. 57, 48 Pac. 539. *D. C.*—*Karrick v. Wetmore*, 25 App. Cas. 415. *Fla.* *Mattair v. Card*, 19 Fla. 455. *Ga.* *Stewart v. Ellis*, 130 Ga. 685, 61 S. E. 597; *Ryan v. Kingsbery*, 89 Ga. 228, 15 S. E. 302; *Stiles v. Elliott*, 68 Ga. 83; *Desvergers v. Willis*, 58 Ga. 388; *Grubb v. Kolb*, 55 Ga. 630. *Ill.*—*Harvey v. Aurora, etc. R. Co.*, 186 Ill. 283, 57

- N. E. 857; *Ruegger v. Indianapolis*, etc. R. Co., 103 Ill. 449; *Kelly v. Donlin*, 70 Ill. 378; *Union Pac. R. Co. v. Chicago*, etc. R. Co., 57 Ill. App. 430. Ind.—*Turner v. Allen*, 66 Ind. 252. Ia. *Fulliam v. Drake*, 105 Iowa 615, 75 N. W. 479; *Baxter v. Myers*, 47 N. W. 879; *Keokuk Gas-Light & Coke Co. v. Keokuk*, 80 Iowa 137, 45 N. W. 555; *Mally v. Mally*, 52 Iowa 654, 3 N. W. 670; *Heichew v. Hamilton*, 4 G. Gr. 317, 61 Am. Dec. 122. Ky.—*Jefferson, Noyes & Brown v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 308; *Upton's Committee v. Handley*, 123 S. W. 1188; *Hardwick v. Young*, 110 Ky. 501, 62 S. W. 10; *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74; *Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705; *Shaw v. Milby's Exr.*, 23 Ky. L. Rep. 645, 63 S. W. 577; *Bell County Coke, etc. Co. v. Pineville Graded School*, 19 Ky. L. Rep. 789, 42 S. W. 92. La.—*Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 So. 641; *Ludeling v. Chaffe*, 40 La. Ann. 645, 4 So. 586; *State v. Clinton*, etc. R. Co., 21 La. Ann. 156; *Franklin v. Warfield's Syndies*, 2 La. 126. Me.—*White v. Savage*, 94 Me. 138, 47 Atl. 138. Md.—*State v. Brown*, 64 Md. 199, 1 Atl. 54, 6 Atl. 172. Mass.—*Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733. Mich.—*Harrington v. Huff & Mitchell Co.*, 155 Mich. 139, 118 N. W. 924; *Napper v. Fitzpatrick*, 139 Mich. 139, 102 N. W. 642; *Sayers v. Auditor-Gen.*, 124 Mich. 259, 82 N. W. 1045; *Hoppin v. Avery*, 87 Mich. 551, 49 N. W. 887. Minn.—*Harbek v. Carpenter-Robinson Co.*, 123 Minn. 389, 143 N. W. 916; *Irish v. Daniels*, 100 Minn. 189, 110 N. W. 968; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Fowler v. Atkinson*, 6 Minn. 503. Miss.—*Mosby & Kyle v. Wall*, 23 Miss. 81, 55 Am. Dec. 71. Mo.—*Randall v. Snyder*, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653; *Swinford v. Teegarden*, 159 Mo. 635, 60 S. W. 1089; *Lyman v. Milwaukee Harvester Co.*, 68 Mo. App. 637. N. H.—*Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655. N. J.—*Brinkerhoff v. Ransom*, 57 N. J. Eq. 312, 41 Atl. 725, reversing 56 N. J. Eq. 149, 38 Atl. 919. N. M.—*El Capitan Land & Cattle Co. of New Mexico v. Lees*, 13 N. M. 407, 86 Pac. 924. N. Y.—*Foulke v. Thalmessinger*, 158 N. Y. 725, 53 N. E. 1125; *Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307; *Woodhouse v. Duncan*, 106 N. Y. 527, 13 N. E. 334; *Bowe v. Wilkins*, 105 N. Y. 322, 11 N. E. 839; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Foot v. Sprague*, 12 How. Pr. 355; *Winfield v. Bacon*, 24 Barb. 154; *Wilcox v. Gilchrist*, 85 Hun 1, 32 N. Y. Supp. 608; *Phipps v. Oprandy*, 69 App. Div. 497, 74 N. Y. Supp. 985; *Fritz v. Tompkins*, 39 App. Div. 73, 56 N. Y. Supp. 847; *Zerega v. Will*, 34 App. Div. 488, 54 N. Y. Supp. 361; *White v. Cuthbert*, 10 App. Div. 220, 41 N. Y. Supp. 818; *Weinman v. Salit*, 85 Misc. 456, 147 N. Y. Supp. 758; *Crompton, etc. Loom Works v. Brown*, 27 Misc. 319, 57 N. Y. Supp. 823; *Barber v. Rutherford*, 12 Misc. 33, 33 N. Y. Supp. 89; *Goldberg v. Ziegler*, 92 N. Y. Supp. 777; *McLaughlin v. Great Western Ins. Co.*, 20 N. Y. Supp. 536, 46 N. Y. St. 759. N. C. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210; *Tysor v. Lutterloh*, 57 N. C. 247; *Bond v. Billups*, 53 N. C. 423. Ohio. *Mengert v. Brinkerhoff*, 67 Ohio St. 472, 66 N. E. 530; *Kunneke v. Mapel*, 60 Ohio St. 1, 53 N. E. 259; *Cincinnati v. Emerson*, 57 Ohio St. 132, 48 N. E. 667; *Bell v. McCulloch's Exrs.*, 31 Ohio St. 397. Ore.—*Morrill v. Morrill*, 20 Ore. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155. Pa.—*Allen v. International Text Book Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. Rep. 834; *Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. 961; *Lawrence's Estate*, 169 Pa. 185, 32 Atl. 406; *In re Schwartz*, 14 Pa. 42. R. I.—*Tucker v. Carr*, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 892. S. C.—*Crenshaw v. Julian*, 26 S. C. 283, 2 S. E. 133, 4 Am. St. Rep. 719; *Rice v. Mahaffey*, 9 S. C. 281. S. D.—*Howard v. Huron*, 6 S. D. 180, 60 N. W. 803. Tenn.—*Evans v. International Trust Co.*, 59 S. W. 373; *Daniel v. Gunn*, 45 S. W. 468. Tex.—*Harkness v. Hutcherson*, 90 Tex. 383, 38 S. W. 1120; *Muhle v. New York, etc. R. Co.*, 86 Tex. 459, 25 S. W. 607; *Thomas v. Junction City Irr. Co.*, 80 Tex. 550, 16 S. W. 324; *Thompson v. Lester*, 75 Tex. 521, 14 S. W. 20; *Powell v. Davis*, 19 Tex. 380; *O'Connor v. Lucio*, 14 Tex. Civ. App. 682, 39 S. W. 139; *Cook v. Carroll*, 6 Tex. Civ. App. 326, 25 S. W. 1034. Utah.—*Everill v. Swan*, 20 Utah 56, 57 Pac. 716. Vt.—*Weed v. Hunt*, 81 Vt. 302, 70 Atl. 564; *Spaulding v. Warner*, 59 Vt. 646, 11 Atl. 186; *Marshall v. Aiken*, 25 Vt. 327. Wash. *State ex rel. Cook v. Fairley*, 45 Wash. 52, 87 Pac. 1052; *State ex rel. Pub. Co.*

grounds upon which another action may be maintained,<sup>26</sup> in equity as well as at law;<sup>27</sup> and the rule applies even where a good defense is offered and the court improperly rejects it.<sup>28</sup> But the rule does not

*v. Gloyd*, 14 Wash. 5, 44 Pac. 103; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25. **W. Va.** *State v. Boner*, 57 W. Va. 81, 49 S. E. 944; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16. **Eng.**—*In re Defries*, 31 Wkly. Rep. 720. **Can.**—*Leinster v. Stabler*, 17 U. C. C. P. 532.

[a] But see (1) *Bond v. Markstrum*, 102 Mich. 11, 60 N. W. 282, holding that defenses not litigated or passed on in the former action are not barred in a subsequent suit, and that the burden is on the plaintiff to show that such defenses were actually made and passed on in the former action. (2) *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1013, holding that where, in an action upon a lease for rent, the defendant's failure to deny under oath the execution of the lease, precluded him from disputing such execution, he was not barred by the judgment therein rendered from setting up such defense in a subsequent suit on the same lease for other rents accruing thereunder. (3) *Farrell v. St. Paul*, 62 Minn. 271, 64 N. W. 809, 54 Am. St. Rep. 641, 29 L. R. A. 778, holding that a tax judgment, entered upon default, against a lot for street improvement, being in rem, does not bar the owner of the lot from subsequently bringing an action for damages against the former plaintiff for the wrongful grading of the street to the injury of the lot. *State v. Cooley*, 58 Minn. 514, 60 N. W. 338; *Adams v. Adams*, 25 Minn. 72. *Compare*, *Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520.

[b] A defendant, in a suit for rent under a lease, who sets up the claim that the tenancy had been changed by agreement from a yearly rental into one from month to month, cannot, in a subsequent suit for the next month's rent, interpose a defense of surrender and release, or a violation of the contract by the lessor, since he should set up all his defenses in the first suit. *Harrington v. Huff & Mitchell Co.*, 155 Mich. 139, 118 N. W. 924.

[c] A claim for the reduction of the amount of a judgment in condemnation proceedings, which the plaintiff omits to urge, cannot be set up in defense

of mandamus proceedings, to compel payment of the full amount of the judgment. *State ex rel. Cook v. Fairley*, 45 Wash. 52, 87 Pac. 1052.

[d] A default judgment, against which defendant was prevented from setting up a defense by reason of accident and mistake, is conclusive, and equity will not restrain its enforcement upon such defense, where defendant had an adequate remedy at law for opening the default and neglected to avail herself of it. *Weed v. Hunt*, 81 Vt. 302, 70 Atl. 564.

[e] A probate decree adjudicating a widow's right to dower in the estate of her deceased husband was res judicata as to all defenses which might have been, but were not, set up in bar of her right. *Briggs v. Manning*, 80 Ark. 304, 97 S. W. 289.

[f] A decree foreclosing a mortgage is conclusive of all defenses which might have been pleaded therein. *Livingston v. New England Mortgage Security Co.*, 77 Ark. 379, 91 S. W. 752.

[g] A previous recovery for breach of contract is conclusive on defendant in a second action on the same contract except as to the subsequent breach and the damage claimed therefor. *Heichew v. Hamilton*, 4 G. Gr. (Iowa) 317, 61 Am. Dec. 122.

[h] A satisfied judgment for salary due for two weekly instalments, under an employment for one year, based upon a claim of wrongful discharge, conclusively establishes the wrongfulness of the discharge, and estops the defendant from denying it in a subsequent action by the discharged employe for the recovery of salary for the balance of the year. *Allen v. International Text Book Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. Rep. 834.

26. *Weinman v. Salit*, 85 Misc. 456, 147 N. Y. Supp. 758.

27. **Cal.**—*Parnell v. Hahn*, 61 Cal. 131. **Ill.**—*Oliver v. Oliver*, 179 Ill. 9, 53 N. E. 304. **Ia.**—*Painter v. Hogue*, 48 Iowa 426. **Mo.**—*Mallory v. Patterson*, 174 Mo. App. 605, 161 S. W. 306. **Va.** *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760.

28. *Smith v. McCluskey*, 45 Barb. (N. Y.) 610.



apply to a defense accruing after the former judgment was rendered,<sup>29</sup> nor where the first action was purely in rem and the second in personam,<sup>30</sup> or where the second action is upon a different claim;<sup>31</sup> nor, in some jurisdictions does it prevent the defendant from basing a claim for equitable relief from a judgment, on a defense which was not known to him when the judgment was rendered.<sup>32</sup> Where the former action was at law and the defense was not available because purely equitable in nature, the former recovery does not preclude resort to the defense in a subsequent suit.<sup>33</sup>

(2.) *Rule Applied.*—For partial payments made and not credited on the debt, a defendant is required to seek redress in the action brought for its recovery, and a failure to plead and prove the payment in such action is a bar to a subsequent suit to recover it back.<sup>34</sup> So also,

29. **Ky.**—*Upton's Committee v. Handley*, 123 S. W. 1188. **Miss.**—*Neville v. Ihrie*, 103 Miss. 454, 60 So. 577. **N. Y.**—*Smith v. McCluskey*, 45 Barb. 610; *People v. Van Gaasbeck*, 118 App. Div. 511, 913, 103 N. Y. Supp. 249.

[a] A decision, reversing a judgment for defendants and determining that they were not entitled to the property claimed by plaintiff, is conclusive as to all defenses which could have been made in the trial court, but not as to matters arising after the original judgment was rendered and prior to its reversal. *Upton's Committee v. Handley* (Ky.), 123 S. W. 1188.

30. *Bliss v. Heasty*, 61 Ill. 338.

31. *Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520.

[a] Where A brought suit against B for an assault committed upon him, a recovery by him in such action did not bar a suit by B against A for A's excessive use of force in repelling the assault of B. *Cade v. McFarland*, 48 Vt. 47.

See the title "Res Judicata."

32. See *White v. Smith*, 174 Mo. 186, 73 S. W. 610, and the title "Judgments."

33. **U. S.**—*People's Pure Ice Co. v. Trumbull*, 70 Fed. 166, 17 C. C. A. 43; *Tompkins v. Drennen*, 56 Fed. 694, 6 C. C. A. 83; *Hawkins v. Wills*, 49 Fed. 506, 1 C. C. A. 339. **Ala.**—*Stricklin v. Kimbrell*, 69 So. 14; *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121. **Cal.**—*Hills v. Sherwood*, 48 Cal. 386; *Hough v. Waters*, 30 Cal. 309; *Lorraine v. Long*, 6 Cal. 452. **Ga.**—*Waters v. Perkins*, 65 Ga. 32. **Mich.**—*Petrie v. Badenoeh*, 102 Mich. 45, 60 N. W. 449, 47 Am. St. Rep. 503; *Bush v. Merriman*,

87 Mich. 260, 49 N. W. 567; *Nims v. Vaughn*, 40 Mich. 356. **Miss.**—*Mosby & Kyle v. Wall*, 23 Miss. 81, 55 Am. Dec. 71. **Mo.**—*Witte v. Storm*, 236 Mo. 470, 139 S. W. 384. **N. C.**—*Mauney v. Hamilton*, 132 N. C. 303, 43 S. E. 903. *Compare*, *Tuttle v. Harrill*, 85 N. C. 456. **Ore.**—*McMahan v. Whelan*, 44 Ore. 402, 75 Pac. 715; *Hill v. Cooper*, 6 Ore. 181. **S. D.**—*Cassill v. Morrow*, 13 S. D. 109, 82 N. W. 418. **Tex.**—*Owens v. Heidbreder* (Tex. Civ. App.), 44 S. W. 1079.

[a] A defendant in ejectment, having an equitable defense only, is not prevented from maintaining a bill to restrain the enforcement of the judgment because he did not assert his equitable defense in equity before the rendition of the judgment in ejectment. *Stricklin v. Kimbrell* (Ala.), 69 So. 14.

[b] Where an equitable defense was set up, but dismissed without being presented to the court, a judgment rendered in such action is not a bar to a subsequent action, begun in due time, embracing the subject-matter of such equitable defense. *McCreary v. Casey*, 45 Cal. 128.

34. **Ala.**—*State v. McBride*, 76 Ala. 51; *Bobe's Heirs v. Stickney*, 36 Ala. 482; *Mitchell v. Sanford*, 11 Ala. 695; *Broughton v. McIntosh*, 1 Ala. 103; *De Sylva v. Henry*, 3 Port. 132. **Ia.**—*Doyle v. Reilly*, 18 Iowa 108, 85 Am. Dec. 582; *Wright v. Leclair*, 3 Iowa 221. **Ky.**—*Callahan v. Murrell*, 20 Ky. L. Rep. 28, 45 S. W. 67. **Me.**—*Fuller v. Eastman*, 81 Me. 284, 17 Atl. 67; *Hagar v. Springer*, 60 Me. 436; *Baker v. Stinchfield*, 57 Me. 363; *Tootman v. Stetson*, 32 Me. 17, 52 Am. Dec. 634. **Mass.**—*Hunt v. Brown*, 146 Mass. 253,

according to the weight of authority, a defendant is required to plead a defense of usury in the action on the usurious debt, and his failure to do so will bar him from subsequently setting it up or maintaining an action for its recovery.<sup>35</sup>

It is incumbent upon the defendant to any action involving a claim of title to or trespass on real property, or a foreclosure of mortgage thereon, to plead all the defenses he has, since he will be estopped, by his failure to set up any title or claim in such action, from afterwards asserting the same.<sup>36</sup>

15 N. E. 587; *Fuller v. Shattuck*, 13 Gray 70, 74 Am. Dec. 622; *Sacket v. Loomis*, 4 Gray 148; *Loring v. Mansfield*, 17 Mass. 394. **Minn.**—*Harbek v. Carpenter-Robinson Co.*, 123 Minn. 389, 143 N. W. 916. **Miss.**—*Williams v. Jones*, 10 Smed. & M. 108. **Mo.**—*Greenbaum v. Elliott*, 60 Mo. 25. **N. H.**—*Tilton v. Gordon*, 1 N. H. 33. **N. Y.**—*Binck v. Wood*, 43 Barb. 315; *Walker v. Ames*, 2 Cow. 428; *Loomis v. Pulver*, 9 Johns. 244; *Potter v. Gates*, 56 Hun 639, 9 N. Y. Supp. 87; *Weiser v. Weiser*, 53 N. Y. Supp. 578. **Ohio.**—*Swenson v. Cresop*, 28 Ohio St. 668. **Pa.**—*Ahl's Estate*, 169 Pa. 609, 32 Atl. 621; *Lawrence's Estate*, 169 Pa. 185, 32 Atl. 406. **S. C.**—*Davis v. Murphy*, 2 Rich. 560, 45 Am. Dec. 749. **Tenn.**—*Kirkland & Hickson v. Brown*, 4 Humph. 174, 40 Am. Dec. 635. **Vt.**—*Corey v. Gale*, 13 Vt. 639. **W. Va.**—*Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16. **Eng.**—*Cadaval v. Collins*, 4 A. & E. 858, 31 E. C. L. 376, 111 Eng. Reprint 1006.

But see *Woodward v. Hill*, 6 Wis. 143.

35. **Conn.**—*Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94. **Ill.**—*Lagerquist v. Williams*, 74 Ill. App. 17. **Ia.**—*Philips v. Gephart*, 53 Iowa 396, 5 N. W. 683. **N. Y.**—*Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805; *Davidson v. Weed*, 20 Misc. 147, 45 N. Y. Supp. 718. **Pa.**—*Montague v. McDowell*, 99 Pa. 265. **Tex.**—*Henry v. Sansom*, 2 Tex. Civ. App. 150, 21 S. W. 69. **W. Va.**—*Snyder v. Middle States Loan, etc. Co.*, 52 W. Va. 635, 44 S. E. 250; *Tracey v. Shumate*, 22 W. Va. 474. **Wis.**—*Heath v. Frackleton*, 20 Wis. 320, 91 Am. Dec. 405. **Vt.**—*Weed v. Hunt*, 81 Vt. 302, 70 Atl. 564.

But see **Ky.**—*Owsley v. Boles' Admr.*, 124 Ky. 775, 99 S. W. 1157; *Chinn v. Mitchell*, 2 Mete. 92. **Minn.**—*Wetherell v. Stewart*, 35 Minn. 496, 29 N. W.

196. **Tenn.**—*Wood v. Todd*, 3 Baxt. 89. **Can.**—*Edinburgh Life Assurance Co. v. Clark*, 10 U. C. C. P. 351, holding that where a defendant pleaded payment to a suit for the foreclosure of a mortgage it did not bar him from impeaching the same mortgage in an action of ejectment brought thereon on the ground of usury.

[a] But where the original note and mortgage is not usurious, the subsequent payment of usury upon it has no legal connection with it, and the amount so paid may be recovered back in an action for money had and received, notwithstanding a failure to urge the usury as an off-set in a previous foreclosure suit. *Grow v. Albee*, 19 Vt. 540.

36. See the following: **U. S.**—*Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. ed. 463; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123. **Cal.**—*Flynn v. Hite*, 107 Cal. 455, 40 Pac. 749. **Ind.**—*Masters v. Templeton*, 92 Ind. 447; *McCaffrey v. Corrigan*, 49 Ind. 175. **Ia.**—*Dodd v. Scott*, 81 Iowa 319, 46 N. W. 1057, 25 Am. St. Rep. 492, 10 L. R. A. 360. **Kan.**—*Provident Loan & Trust Co. v. Marks*, 6 Kan. App. 34, 49 Pac. 625. **Ky.**—*Ligon v. Triplett*, 12 B. Mon. 283. **La.**—*Lindquist v. Maurepas Land, etc. Co.*, 112 La. 1030, 36 So. 843; *Howcott v. Pettit*, 106 La. 530, 31 So. 61; *Shaffer v. Scuddy*, 14 La. Ann. 575. **Mich.**—*Pierson v. Conley*, 95 Mich. 619, 55 N. W. 387. **Minn.**—*Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238. **Miss.**—*Jones v. Merrill*, 69 Miss. 747, 11 So. 23. **Pa.**—*Church's Appeal*, 7 Atl. 751; *Eisenhart v. Slaymaker*, 14 Serg. & R. 153. **S. C.**—*Jones v. Weathersbee*, 4 Strob. 50, 51 Am. Dec. 653; *Caston v. Perry*, 1 Bailey 533, 21 Am. Dec. 482. **Tex.**—*Nichols v. Dibrell*, 61 Tex. 539; *McCray v. Freeman*, 17 Tex. Civ. App. 268, 43 S. W. 37; *Beer v. Thomas*, 13 Tex. Civ. App. 30, 34 S. W. 1010. **Va.**

Defenses of illegality, invalidity and fraud came under the foregoing rule, and are barred by a judgment rendered in a former action to which they might have been interposed.<sup>37</sup>

(II.) Counterclaim or Set-Off.—(1. WHERE SUCH OR BE PLEASED IS PRIOR SUIT.—Where a counter-claim or set-off has been passed upon and adjudicated in a former action between the same parties or their privies, such demand is thereby concluded, and cannot thereafter be used as a whole or in part as a defense or counter-claim,<sup>38</sup> or made

*Simpson v. Dugger*, 48 Va. 523, 14 S. E. 769; *Can. v. Leinster v. Stabler*, 17 U. C. R. P. 522.

37. *U. S. v. Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87; *Edmondson v. East*, 57 Fed. 571, 6 C. C. A. 471; *McMullen v. Ritchie*, 61 Fed. 253. *Ala.* *Pant v. Hatcher*, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45. *Cal.*—*Pavisich v. Dean*, 18 Cal. 364. *Ky.*—*Raymer v. Trustees White School Dist. No. 18*, 194 Ky. 96, 98 S. W. 523; *Gray v. Roberts*, 2 A. K. Marsh. 208, 12 Am. Dec. 383. *Compare*, *Myers v. Sander*, 7 Dana 595. *Md.*—*Keystone v. Horner*, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510. *Mass.*—*Flint v. Bodge*, 10 Allen 128. *Mo.*—*Pitts v. Fugate*, 41 Mo. 405. *Neb.*—*Gilmore v. Whiteman*, 50 Neb. 760, 70 N. W. 364. *N. Y.* *People v. Van Gaasbeck*, 118 App. Div. 511, 913, 103 N. Y. Supp. 249. *Pa.* *Rauwolf v. Glass*, 184 Pa. 237, 39 Atl. 79; *Lewis v. Nenzel*, 38 Pa. 222. *S. C.* *Ruff v. Doty*, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709; *Pettus v. Smith*, 4 Rich. Eq. 197. *Tenn.*—*Arnold v. Kyle*, 8 Baxt. 319. *Vt.*—*Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520. *Eng.* *In re Hilton*, 67 L. T. Rep. (N. S.) 594, 9 Moor. Bankr. Cas. 286.

[a] But see *Branham v. San Jose*, 24 Cal. 585, holding that a city is not bound by a decree of foreclosure, when its interest in the land was not affected by the mortgage foreclosed, and that it is not thereby estopped from thereafter setting up the invalidity of such mortgage.

38. *U. S.*—*Janney v. Smith*, 2 Cranch C. C. 499, 13 Fed. Cas. No. 7,214. *Ala.* *Evans v. Mackey*, 189 Ala. 283, 66 So. 3; *South & North Ala. R. Co. v. Henning*, 55 Ala. 368; *House v. Donnelly*, 7 Ala. App. 267, 61 So. 18. *Compare*, *Penny v. Corey*, 147 Ala. 617, 41 So. 978. *Cal.*—*Reed v. Cross*, 116 Cal. 473, 48 Pac. 491; *Rich v. Davis*, 6 Cal. 141. *Colo.*—*Worrel v. Smith*, 6 Colo. 141. *Ill.*—*Litch v. Clinch*, 136 Ill. 410, 26 N.

E. 579; *Hilton v. Searight*, 103 Ill. App. 605. *Iad.*—*Nave v. Wilson*, 23 Ind. 294; *Newman v. Gates* (Ind. App.), 67 N. E. 468. *Ia.*—*J. J. Smith Lumb. Co. v. Sisters of Charity*, 146 Iowa 454, 123 N. W. 214; *Hogle v. Smith*, 100 Iowa 32, 113 N. W. 556. *Ky.*—*Jefferson, Noyes & Brown v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 377; *Campbell v. Mayhugh*, 15 B. Mon. 142. *La.*—*Witlow v. Suarez*, 46 La. Ann. 715, 15 So. 89; *Glaude v. Peat*, 43 La. Ann. 161, 8 So. 884. *Me.*—*Baker v. Stinchfield*, 57 Me. 363; *Smith v. Abbott*, 40 Me. 442. But see *Smith v. Berry*, 37 Me. 298. *Mass.*—*Stevens v. Miller*, 13 Gray 283; *O'Connor v. Varney*, 10 Gray 241; *Jones v. Richardson*, 5 Jdts. 247. *Mich.*—*Paccalona v. Peninsula Bank & Lumber Co.*, 171 Mich. 605, 137 N. W. 518. *Mo.*—*Union R. & Transp. Co. v. Traube*, 59 Mo. 355; *Mallory v. Patterson*, 174 Mo. App. 605, 161 S. W. 306. *Neb.*—*Latta v. Visel*, 37 Neb. 612, 56 N. W. 311. *N. H.*—*Andrews v. Varrell*, 46 N. H. 17. *N. J.*—*Conover v. Scott*, 11 N. J. L. 400. *N. Y.*—*Wright v. Miller*, 147 N. Y. 362, 41 N. E. 978; *Wilder v. Case*, 16 Wend. 583; *Skelding v. Whitney*, 3 Wend. 154; *Miller v. Covert*, 1 Wend. 487; *Hatch v. Benton*, 6 Barb. 28; *Timpano v. David Stevenson Brewing Co.*, 123 App. Div. 903, 107 N. Y. Supp. 317. See *Collyer v. Collins*, 17 Abb. Pr. 467; *Wolfe v. Washburn*, 6 Cow. 261. *N. C.*—*Case Mfg. Co. Moore*, 144 N. C. 527, 57 S. E. 213; *Evans v. Cumberland Mills*, 118 N. C. 583, 24 S. E. 215. *Ohio.*—*Sandoy v. Dewey*, 17 Ohio 156; *Dougherty v. Cummings*, 9 Ohio Cir. Ct. 718, 6 Ohio Cir. Dec. 714. *Tex.*—*Bemus v. Donnigan*, 18 Tex. Civ. App. 125, 43 S. W. 1067; *Lewis v. Smith* (Tex. Civ. App.), 43 S. W. 294; *Hoefling v. Dobbin* (Tex. Civ. App.), 46 S. W. 58. *Vt.*—*Tidham v. Tillison*, 63 Vt. 411, 22 Atl. 531; *Peach v. Mills*, 14 Vt. 371. *Wis.*—*New London Bank v. Ketchum*, 66 Wis. 428, 29 N. W. 216; *Evans v. Ely*, 55 Wis. 194,



the basis of a separate action;<sup>39</sup> and this is true whether or not it was a proper subject of set-off,<sup>40</sup> and whether it was set up in the first action merely as a defense,<sup>41</sup> pleaded as a counter-claim or set-off

12 N. W. 372. **Eng.**—Eastmure v. Lawes, 2 Arn. 54, 5 Bing. N. Cas. 444, 7 Dowl. P. C. 431, 3 Jur. 460, 8 L. J. C. P. 236, 7 Scott 461, 35 E. C. L. 241, 132 Eng. Reprint 1170.

39. **U. S.**—Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. ed. 244; Watkins v. American Nat. Bank, 134 Fed. 36, 67 C. C. A. 110; Smith v. United States, 11 Ct. Cl. 707. **Ala.** Riddle v. McLester-Van Hoose Co., 145 Ala. 307, 40 So. 101; McLane v. Miller, 12 Ala. 643. **Compare**, Vincent v. Rogers, 33 Ala. 224. **Dak.**—Thompson v. Schuster, 4 Dak. 163, 28 N. W. 858. **Ga.**—Brown v. Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813. **Ill.**—Barnes v. Huffman, 113 Ill. App. 226; Miller v. Ticker, 14 Ill. App. 558. **Ind.**—Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835. **Ia.**—Hogle v. Smith, 136 Iowa 32, 113 N. W. 556; Munn v. Shannon, 86 Iowa 363, 53 N. W. 263; Gunsaulis v. Cadwallader, 48 Iowa 48. **Ky.**—Jefferson, Noyes & Brown v. Western Nat. Bank, 144 Ky. 62, 138 S. W. 308. **Me.** Smith v. Berry, 37 Me. 298. **Mass.** Sargent v. Fitzpatrick, 4 Gray 511; Burnett v. Smith, 4 Gray 50; White v. Dingley, 4 Mass. 433. **Mo.**—Thompson v. Wineland, 11 Mo. 243. **N. H.**—Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. **N. Y.**—Conkling v. Secor Sewing Mach. Co., 55 How. Pr. 269; Vanderbilt v. Vanderbilt, 54 How. Pr. 250; Rogers v. Rogers, 1 Daly 194; Inslee v. Hampton, 11 Hun 156; Timpano v. David Stevenson Brewing Co., 123 App. Div. 903, 107 N. Y. Supp. 317. **Ohio.** Bell v. McColloch's Exrs., 31 Ohio St. 397. **Pa.**—Cox v. Hartranft, 154 Pa. 457, 26 Atl. 304; Boland v. Spitz, 153 Pa. 590, 26 Atl. 22; Simes & Co. v. Zane, 24 Pa. 212. **S. C.**—Smith v. Smith, 1 Rich. Eq. 130. **Wis.**—Dorer v. Hood, 113 Wis. 607, 88 N. W. 1009; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614. **Eng.**—Danks v. Harley, 1 Wkly. Rep. 291.

40. Thayer v. Kansas, L. & T. Co., 100 Fed. 901, 41 C. C. A. 106; Blodgett & Orswell v. George S. Lings & Co., 194 Fed. 569; Hight v. Hirsch, 149 Fed. 890; Janney v. Smith, 2 Cranch C. C. 499, 13 Fed. Cas. No. 7,214. **Ala.**

Wood v. Wood, 134 Ala. 557, 33 So. 347. **Ark.**—Jenkins v. Jenkins, 78 Ark. 388, 94 S. W. 45; Walker v. Byers, 19 Ark. 323. **Dak.**—Thompson v. Schuster, 4 Dak. 163, 28 N. W. 858. **Ga.**—Bryan v. Jones, 138 Ga. 719, 75 S. E. 1117. **Ill.**—Howell v. Goodrich, 69 Ill. 556; Rork v. McDavid, 91 Ill. App. 262; Miller v. Ticker, 14 Ill. App. 558. **Ky.** Home Const. Co. v. Duncan, 111 Ky. 914, 64 S. W. 997. **La.**—Barr v. Henderson, 107 La. 323, 31 So. 762. **Minn.** Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449. **Miss.**—Miller v. Bulkley, 85 Miss. 706, 38 So. 99. **Mo.**—Sturgeon v. Mudd, 190 Mo. 200, 88 S. W. 630. **N. H.**—Haynes v. Ordway, 58 N. H. 167. **N. Y.**—Wright v. Miller, 147 N. Y. 362, 41 N. E. 698 (*affirming* 67 Hun 649, 22 N. Y. Supp. 24); Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497; Collyer v. Collins, 17 Abb. Pr. 467; Smith v. Kelly, 2 Hall 217; Wilder v. Case, 16 Wend. 583; Skelding v. Whiting, 3 Wend. 154. **N. C.**—Evans v. Cumberland Mills, 118 N. C. 583, 24 S. E. 215. **Ohio.**—Dougherty v. Cummings, 9 Ohio Cir. Ct. 718, 6 Ohio Cir. Dec. 714. **Ore.**—Kafka v. Simon, 3 Ore. 555. **R. I.**—Hodges v. Bullock, 15 R. I. 592, 10 Atl. 643. **Tex.**—Murphy v. Wallace, 3 Will. Civ. Cas., §432. **Vt.** Peach v. Mills, 14 Vt. 371. **Va.**—Huff v. Broyles, 26 Gratt. (67 Va.) 283. **Wis.** Evans v. Ely, 55 Wis. 194, 12 N. W. 372; Driscoll v. Damp, 17 Wis. 419. **Can.**—Leinster v. Stabler, 17 U. C. C. P. 532.

[a] A note merely introduced in evidence, but not pleaded as a counter-claim or set-off, is not concluded by a judgment for the plaintiff, nor is a subsequent suit thereon thereby barred. Leask v. Dew, 102 App. Div. 529, 92 N. Y. Supp. 891.

41. **Kan.**—Bierer v. Fretz, 37 Kan. 27, 14 Pac. 555. **Ky.**—Jefferson, Noyes & Brown v. Western Nat. Bank, 144 Ky. 62, 138 S. W. 308. **Mass.**—O'Connor v. Varney, 10 Gray 231. **N. Y.** Patrick v. Shaffer, 94 N. Y. 423.

[b] But this rule does not apply where the action was such, as in case of replevin, that the matter though proper defensively, could not be used

therein,<sup>42</sup> either as a whole or in part,<sup>43</sup> or constituted the claim, demand or cause of action upon which such former action was predicated.<sup>44</sup>

**When Not Adjudicated.**—In order for such judgment to operate as a merger of the defendant's claim, and a bar to a subsequent recovery thereon, there must have been an adjudication thereof.<sup>45</sup> Where a counter-claim or set-off pleaded in a former action between the parties,

as a counter-claim. *Osborne v. Williams*, 30 Minn. 352, 40 N. W. 165.

42. **U. S.**—*Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. ed. 244; *Smith v. United States*, 11 Ct. Cl. 707. **Ala.**—*McLane v. Miller*, 12 Ala. 643; *House v. Donnelly*, 7 Ala. App. 267, 61 So. 18. **Dak.**—*Thompson v. Schuster*, 4 Dak. 163, 28 N. W. 858. **Ga.**—*Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 404, 36 S. E. 813. **Ill.**—*Hilton v. Seagrigh*, 163 Ill. App. 605; *Barnes v. Huffman*, 113 Ill. App. 226; *Miller v. Ticker*, 14 Ill. App. 558. **Ia.**—*J. J. Smith Lumb. Co. v. Sisters of Charity*, 146 Iowa 454, 125 N. W. 214; *Munn v. Shuman*, 80 Iowa 203, 53 N. W. 203; *Gunsaulus v. Cadwallader*, 48 Iowa 48. **Ky.**—*Jefferson, Noyes & Brown v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 308. **Me.**—*Smith v. Berry*, 37 Me. 298. **Mass.**—*Sargent v. Fitzpatrick*, 4 Gray 511; *Burnett v. Smith*, 4 Gray 50; *White v. Dingley*, 4 Mass. 433. **Mo.**—*Thompson v. Wineland*, 11 Mo. 243; *Mallory v. Patterson*, 174 Mo. App. 605, 161 S. W. 306. **N. H.**—*Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713. **N. Y.**—*Inslee v. Hampton*, 11 Hun 156; *Rogers v. Rogers*, 1 Daly 194; *Conkling v. Secor Sewing Mach. Co.*, 55 How. Pr. 269; *Vanderbilt v. Vanderbilt*, 54 How. Pr. 250; *Timpano v. David Stevenson Brewing Co.*, 123 App. Div. 903, 107 N. Y. Supp. 317. *Compare*, *Gordon v. Van Cott*, 38 App. Div. 564, 56 N. Y. Supp. 554. **N. C.**—*Case Mfg. Co. v. Moore*, 144 N. C. 527, 57 S. E. 213. **Ohio.**—*Bell v. McColloch's Exrs.*, 31 Ohio St. 397. **Pa.**—*Cox v. Hartmanft*, 154 Pa. 457, 26 Atl. 304; *Boland v. Spitz*, 153 Pa. 590, 26 Atl. 22; *Simces & Co. v. Zane*, 24 Pa. 242. **S. C.**—*Smith v. Smith*, 1 Rich. Eq. 130. **Wis.**—*Dorer v. Hood*, 113 Wis. 607, 88 N. W. 1009; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614.

[a] A judgment is presumed to include a counter-claim or set-off which accrued prior to the rendition of such

judgment, but the contrary may be shown. *Carter v. Hanna*, 2 Ind. 45.

43. *House v. Donnelly*, 7 Ala. App. 267, 61 So. 18.

44. **Colo.**—*Worrell v. Smith*, 6 Colo. 141. **Ill.**—*Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579. **Ind.**—*Nave v. Wilson*, 33 Ind. 294. **Ky.**—*Campbell v. Mayhugh*, 15 B. Mon. 142. **Mass.**—*Stevens v. Miller*, 13 Gray 283; *O'Connor v. Varney*, 10 Gray 231; *Jones v. Richardson*, 5 Mete. 247. **Mich.**—*Paccalona v. Peninsula Bank & Lumber Co.*, 171 Mich. 605, 137 N. W. 518. **Mo.**—*Union R. & Transp. Co. v. Traube*, 59 Mo. 355. **N. H.**—*Andrews v. Varrell*, 46 N. H. 17. **N. J.**—*Conover v. Scott*, 11 N. J. L. 400. **N. Y.**—*Miller v. Covert*, 1 Wend. 487. **Ohio.**—*Smiley v. Dewey*, 17 Ohio 156.

[a] A claim litigated and allowed in part and paid, is thereby extinguished and cannot afterwards be set up as a counter-claim. *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614. And see *Townsend v. Niles*, 210 Mass. 524, 96 N. E. 1035.

45. **Ala.**—*De Sylva v. Henry*, 3 Port. 132. **Cal.**—*Hobbs v. Duff*, 23 Cal. 506. **Ill.**—*Morton v. Bailey*, 2 Ill. 213, 27 Am. Dec. 767; *Sheetz v. Baker*, 38 Ill. App. 349. **Ia.**—*Gunsaulus v. Cadwallader*, 48 Iowa 48. **Ky.**—*City Nat. Bank v. Gardner*, 5 Ky. L. Rep. 682. *Compare*, *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74, as to when application for homestead allowance becomes barred by a decree. **Me.**—*Smith v. Abbott*, 40 Me. 442; *Smith v. Berry*, 37 Me. 298. **Mass.**—*Burnett v. Smith*, 4 Gray 50. **Mich.**—*Nichols v. Marsh*, 61 Mich. 509, 28 N. W. 699; *Baker v. Morehouse*, 48 Mich. 334, 12 N. W. 170. **Mo.**—*Mason v. Summers*, 24 Mo. App. 174. **N. J.**—*Longstreet v. Philo*, 39 N. J. L. 63. **N. Y.**—*Wolfe v. Washburn*, 6 Cow. 261; *Rogers v. Rogers*, 1 Daly 194. **Pa.**—*Thropp v. Susquehanna Mut. Fire Ins. Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909; *Muirhead v. Kirkpatrick*, 2 Pa. 425.

was voluntarily withdrawn by the defendant,<sup>46</sup> or where, for any cause, it is rejected or excluded by the court, so as to prevent its adjudication therein, it is not concluded by the judgment rendered in such action, and may, therefore, be made the basis of a separate action.<sup>47</sup> Even where a plaintiff voluntarily credits the defendant with any item or claim which would be available as a counterclaim or set-off, but fails to allow full value therefor, his judgment, if entered upon a default, is not a bar to a subsequent action by the defendant to recover the balance of the amount for which he should have received credit;<sup>48</sup> but credit for the full value will bar an action

46. Md.—*Davison Chemical Co. v. Andrew Miller Co.*, 122 Md. 134, 89 Atl. 401. N. Y.—*McDonald v. Christie*, 42 Barb. 36; *Weinman v. Salit*, 85 Misc. 456, 147 N. Y. Supp. 758. Ore.—*Spence v. Hull*, 75 Ore. 267, 146 Pac. 95. Pa.—*Muirhead v. Kirkpatrick*, 2 Pa. 425.

[a] Submission to the jury, after withdrawal of defendant's set-off, was harmless error, where it clearly appeared that the question was not determined by the jury, and the judgment rendered in such action was no bar to a separate suit on the counterclaim. *Davison Chemical Co. v. Andrew Miller Co.*, 122 Md. 134, 89 Atl. 401.

[b] A failure to appear at the trial and urge a counterclaim is equivalent to a withdrawal or dismissal of the same and the judgment in the action is not a bar to a subsequent action thereon. *North Baltimore Bottle Glass Co. v. Altpeter*, 133 Wis. 112, 113 Wis. 435.

47. U. S.—*Central Trust Co. v. Clark*, 81 Fed. 269, 26 C. C. A. 397. Ala.—*Haas v. Taylor*, 80 Ala. 459, 2 So. 633. Cal.—*Hobbs v. Duff*, 23 Cal. 596. Ill.—*Crabtree v. Welles*, 19 Ill. 55 (as counterclaim not due when offered as a set-off); *Litch v. Clinch*, 35 Ill. App. 654, as for failure to appear at the trial. Ind.—*Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654. Ia.—*Secor v. Siver*, 165 Iowa 673, 146 N. W. 845. La.—*Maillet v. Martin*, 7 La. Ann. 635, for defective pleading. Md.—*Dubreuil v. Gaither*, 98 Md. 541, 56 Atl. 965; *Garrott v. Johnson*, 11 Gill & J. 173, 35 Am. Dec. 272. Mass.—*Clapp v. Thomas*, 5 Allen 158. Mich.—*Fifield v. Edwards*, 39 Mich. 264. N. Y.—*De Graff v. Wyckoff*, 118 N. Y. 1, 22 N. E. 1118; *Ives v. Goddard*, 1 Hilt. 434; *Beebe v. Bull*, 12 Wend. 504, 27 Am. Dec. 150; *Weinman v. Salit*, 85 Misc.

456, 147 N. Y. Supp. 758; *Jarvis v. New York House Wrecking Co.*, 84 N. Y. Supp. 191 (for failure to present any proof in support of it). Ohio.—*Lancaster Mfg. Co. v. Colgate*, 12 Ohio St. 344, for attempting to set off a part only of an indivisible claim, so as to come within the jurisdiction of the justice. Ore.—*Spence v. Hull*, 75 Ore. 267, 146 Pac. 95. Pa.—*Goodhart v. Bishop*, 142 Pa. 416, 21 Atl. 876; *Thropp v. Susquehanna Mut. F. Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909. Tex.—*Anderson v. Rogge* (Tex. Civ. App.), 28 S. W. 106. But see *Crain v. National Life Ins. Co.*, 56 Tex. Civ. App. 406, 120 S. W. 1098, holding that where, in an action for land sold, defendants sought by cross-action to obtain judgment against the plaintiff only as a condition precedent to plaintiff's recovery of the land, the award of the land to plaintiff unconditionally was equivalent to an express finding against them on such cross-action. Va.—*Niday v. Harvey*, 9 Gratt. (50 Va.) 454.

[a] Where a demurrer is sustained to a counterclaim, and judgment rendered for plaintiff on the other issues, such counterclaim is not thereby concluded. *Secor v. Siver*, 165 Iowa 673, 146 N. W. 845.

48. Mass.—*Minor v. Walter*, 17 Mass. 237. Mich.—*McEwen v. Bigelow*, 40 Mich. 215. Pa.—*Moloney v. Davis*, 48 Pa. 512; *Kauff v. Messner*, 4 Brewst. 98. W. Va.—*Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 291.

[a] A dismissal, though a bar to another action by plaintiff, is no bar to a subsequent action by defendant to recover a sum credited him by plaintiff. *Means v. Hoar*, 110 Me. 409, 86 Atl. 772. Judgment of dismissal generally as bar, see *infra*, XVII, B, 3, d, (II), (G).



on the same items,<sup>43</sup> and so will a judgment if the action be contested.<sup>44</sup>

(B.) *What May Pleaded in Prior Suit.*—The fact that defendant in a former action in which judgment was rendered against him, had a cause of action against the plaintiff which he might have pleaded defensively by way of set-off, counter-claim, or recoupment, but failed to do so, does not bar a subsequent action by him upon such cause of action,<sup>45</sup> or preclude him from using it as a counter-claim or set-off

40. *Minor v. Walter*, 17 Mass. 237; *Briggs v. Richmond*, 10 Pick. (Mass.) 341, 20 Am. Dec. 526; *Hudelmeyer v. Hughes*, 17 Mo. 87.
50. Mass.—*Abbott v. Stevens*, 117 Mass. 240. Mo.—*Hermann v. Schwartz*, Commission Co., 59 Mo. App. 649. Ore.—*Kafka v. Simon*, 3 Ore. 555.
51. U. S.—*Brown v. Newton First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 203; *Pittsburgh v. McKinney*, 43 Fed. 461; *Robinson v. Wiley*, 1 Hempst. 38, 20 Fed. Cas. No. 11,968a. Ala.—*New England Mortg. Sec. Co. v. Fry*, 143 Ala. 637, 42 So. 57, 111 Am. St. Rep. 62; *Weaver v. Brown*, 87 Ala. 533, 6 So. 354; *South & North Alabama R. Co. v. Henlein*, 56 Ala. 368; *Robbins v. Harrison*, 31 Ala. 160; *De Sylva v. Henry*, 3 Port. 132; *Garrow v. Carpenter*, 1 Port. 359. Ark.—*Beaty v. Johnston*, 66 Ark. 529, 52 S. W. 129; *Desha's Exrs. v. Robinson's Admr.*, 17 Ark. 228. Cal.—*Gregory v. Clabrough*, 129 Cal. 475, 62 Pac. 72; *Hills v. Sherwood*, 48 Cal. 336; *Hobbs v. Duff*, 23 Cal. 596. Conn.—*Allis v. Hall*, 76 Conn. 322, 56 Atl. 637. Ga.—*Johnson v. Reeves*, 112 Ga. 630, 37 S. E. 980; *Chappell v. Boyd*, 61 Ga. 642. Ill.—*Smith v. Rountree*, 185 Ill. 210, 56 N. E. 1120; *Umlauf v. Umlauf*, 117 Ill. 580, 6 N. E. 455, 57 Am. Rep. 880; *Chicago, etc. R. Co. v. Field*, 86 Ill. 270; *Briscoe v. Power*, 85 Ill. 420; *Sheetz v. Baker*, 38 Ill. App. 349. Ind.—*Wright v. Anderson*, 117 Ind. 349, 20 N. E. 247; *Hildebrand v. McCrum*, 101 Ind. 61; *Axtel v. Chase*, 83 Ind. 546; *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *Indiana Farmers' Live Stock Ins. Co. v. Stratton*, 4 Ind. App. 566, 31 N. E. 480. *Compare, Morcarty v. Calloway*, 134 Ind. 503, 34 N. E. 226. Ia.—*Price v. Macomber*, 163 Iowa 406, 144 N. W. 1020; *Conly v. Scanlin*, 109 N. W. 399; *Jones v. Witousek*, 114 Iowa 11, 86 N. W. 59; *Savery v. Sypher*, 39 Iowa 675; *Fairfield v. McNany*, 37 Iowa 75. Kan.—*Waite v. Tecters*, 36 Kan. 604, 14 Pac. 146. Ky.—*Bishop's Admr. v. Bishop*, 162 Ky. 769, 173 S. W. 130; *Jefferson, Noyes & Brown v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 308; *Emmerson's Admr. v. Herri-ford*, 8 Bush 229; *Chinn v. Mitchell*, 2 Mete. 92; *Truesdale v. Brady*, 31 Ky. L. Rep. 1336, 105 S. W. 122; *City Nat. Bank v. Gardner*, 5 Ky. L. Rep. 682. *Compare, Rogers v. Wiggs*, 12 B. Mon. 504. La.—*Downing v. Delassize*, 13 La. 256; *Commercial Bank v. New Orleans*, 11 La. 213; *Richardson v. Gurney*, 9 La. 285; *Wandell v. Stephens*, 9 Rob. 491; *Delahoussaye v. Judice*, 6 Mart. N. S. 251. Mass.—*Vanuxem v. Burr*, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458; *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587; *Cook v. Brown*, 125 Mass. 503, 28 Am. Rep. 259; *Minor v. Walter*, 17 Mass. 237. Mich.—*Seventh Day Adventist Pub. Assn. v. Fisher*, 95 Mich. 274, 54 N. W. 759; *Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. 717; *Nichols v. Marsh*, 61 Mich. 509, 28 N. W. 699; *Baker v. Morehouse*, 48 Mich. 334, 12 N. W. 179; *McEwen v. Bigelow*, 40 Mich. 215. Mo.—*Patillo v. Martin*, 107 Mo. App. 653, 83 S. W. 1010; *Mason v. Summers*, 24 Mo. App. 174. Neb.—*Richardson v. Halstead*, 44 Neb. 606, 62 N. W. 1077; *Owen v. Edall*, 39 Neb. 19, 57 N. W. 761; *Uppfelt v. Woermann*, 30 Neb. 189, 46 N. W. 419. N. H.—*Parsons v. Crawford*, 64 N. H. 23, 3 Atl. 632; *Metcalf v. Gilmore*, 63 N. H. 174; *Towns v. Nims*, 5 N. H. 259, 20 Am. Dec. 578. N. J.—*Baldwin v. Woodbridge, etc. Eng. Co.*, 59 N. J. L. 317, 36 Atl. 683; *Longstreet v. Phile*, 39 N. J. L. 63. N. Y.—*Brown v. Gallaudet*, 80 N. Y. 413; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Smith v. Weeks*, 26 Barb. 463; *Moore v. Davis*, 11 Johns. 144; *Dean v. Allen*, 8 Johns. 390; *Allen v. Horton*, 7 Johns. 23; *Welch v. Hazelton*, 14 How. Pr. 97;

in another action,<sup>52</sup> unless the defendant's claim constitutes matter of defense to the plaintiff's cause of action in such sense that it is necessarily adjudicated in the recovery therein, so that a subsequent assertion of the claim is, in effect, a denial of the facts affirmed by such judgment,<sup>53</sup> and a former recovery is not a bar to a subsequent action

*Halsey v. Carter*, 1 Duer 667; *Culver v. Barney*, 14 Wend. 161; *Frost v. McGinnis*, 15 Daly 113, 3 N. Y. Supp. 241; *Davis v. Aikin*, 85 Hun 554, 33 N. Y. Supp. 103, 66 N. Y. St. 706; *Weston v. Turner*, 44 Hun 624, 8 N. Y. St. 296; *Felix v. Devlin*, 50 App. Div. 331, 64 N. Y. Supp. 214; *Reiner v. Jones*, 38 App. Div. 441, 56 N. Y. Supp. 423; *Cuff v. Heine*, 26 Misc. 859, 56 N. Y. Supp. 393; *Boyd v. Boyd*, 26 Misc. 679, 56 N. Y. Supp. 760; *Notara v. De Kamalaris*, 22 Misc. 337, 49 N. Y. Supp. 216; *Cantoni v. Forster*, 12 Misc. 376, 33 N. Y. Supp. 645; *Potter v. Gates*, 2 Silv. 389, 9 N. Y. Supp. 87. But see *Ritchie v. Talcott*, 10 Misc. 412, 31 N. Y. Supp. 196; *McKerras v. Gardner*, 3 Johns. 137. **N. C.**—*Cook v. Cook*, 159 N. C. 46, 74 S. E. 639; *Shankle v. Whitley*, 131 N. C. 168, 42 S. E. 574; *Blackwell Durham Tobacco Co. v. McElwee*, 94 N. C. 425. **Ore.**—*Hill v. Cooper*, 6 Ore. 181. **Pa.**—*Bauder's Appeal*, 115 Pa. 480, 10 Atl. 41; *Stevenson v. Kleppinger*, 5 Watts 420. **R. I.** *Dewsnap v. Davidson*, 18 R. I. 98, 26 Atl. 902. **S. C.**—*Kirven v. Virginia-Carolina Chemical Co.*, 77 S. C. 493, 58 S. E. 424; *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 473; *Davis v. Schmidt*, 22 S. C. 128; *Rowand v. Fraser*, 1 Rich. 325. **S. D.** *Turner Tp. v. Williams*, 17 S. D. 548, 97 N. W. 842. **Tex.**—*Norwood v. Interstate Nat. Bank*, 92 Tex. 268, 48 S. W. 3; *Hunt v. Butterworth*, 21 Tex. 133, 73 Am. Dec. 223; *Morgan v. Tims*, 44 Tex. Civ. App. 308, 97 S. W. 832; *Norton v. Wochler*, 31 Tex. Civ. App. 522, 72 S. W. 1025; *Mayfield Lumber Co. v. Carver*, 27 Tex. Civ. App. 467, 66 S. W. 216. **Vt.**—*Felt v. Davis*, 48 Vt. 506; *Davenport v. Hubbard*, 46 Vt. 200, 14 Am. Rep. 620; *Taggart v. Rice*, 37 Vt. 47; *Grow v. Albee*, 19 Vt. 540. *Compare*, *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850. **Va.**—*Danner v. Fredrick*, 82 Va. 414, 5 S. E. 537; *Ragsdale v. Hagy*, 9 Gratt. (50 Va.) 409. **W. Va.** *Kennedy v. Davison*, 46 W. Va. 433, 33 S. E. 291. **Wis.**—*North Baltimore Bottle Glass Co. v. Altpeter*, 133 Wis. 112, 113 N. W. 435. **Eng.**—*Davis v.*

*Hedges*, L. R. 6 Q. B. 687, 40 L. J. Q. B. 276, 25 L. T. Rep. (N. S.) 155, 20 Wkly. Rep. 60; *Sintzenick v. Lucas*, 1 Esp. 44. **Can.**—*Deacon v. Great West. R. Co.*, 6 U. C. C. P. 241.

[a] A set-off may or may not be pleaded, at the election of the defendant; and if not pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff, is not affected or impaired by a judgment against the defendant; and the rule applies to a suit on a judgment rendered in another state, in the absence of proof that a different rule prevails there. *Roach v. Privett*, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819.

[b] A judgment in the United States court on a note for fertilizers is not a bar to an action in a state court for damages to defendant's crops, caused by the use of such fertilizers, where the same question was raised in the United States court, but withdrawn by consent of the court. *Kirven v. Virginia-Carolina Chemical Co.*, 77 S. C. 493, 58 S. E. 424.

[c] Breach of Warranty.—It is optional with a party who sustains damages by fraud or breach of warranty in the purchase of goods, where sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a separate action. *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355.

[d] Where, in a distress proceeding, defendant omitted to reconvene for damages for the wrongful suing out of the warrant, a judgment of foreclosure therein is not a bar to a subsequent action for such damages. *Morgan v. Tims*, 44 Tex. Civ. App. 308, 97 S. W. 832.

52. *Bishop's Admr. v. Bishop*, 162 Ky. 769, 173 S. W. 130, in an action on the former judgment.

53. **U. S.**—*Pindel v. Holgate*, 221 Fed. 342, 137 C. C. A. 158. **Del.**—*Jones v. Charles Warner Co.*, 2 Boyce 566, 83 Atl. 131. **Ind.**—*Reichert v. Krass*, 13 Ind. App. 348, 40 N. E. 706, 41

by the defendant on a claim which he could not properly set off against the plaintiff's demands in the former action.<sup>54</sup> In some states the matter is controlled by statutes requiring the defendant to set off against the plaintiff's demand any counter-claim or set-off he may

N. E. 835. *Compare*, Jefferson, Noyes & Brown v. Western Nat. Bank, 144 Ky. 62, 138 S. W. 308. N. J. Dey v. Jackson, 39 N. J. L. 535. N. Y. Brown v. Gallaudet, 80 N. Y. 413; Schroepfel v. Corning, 10 Barb. 576; Deane v. Loucks, 58 Hun 555, 12 N. Y. Supp. 903, 35 N. Y. St. 772; Calrow v. Watson, 43 Hun 640, 6 N. Y. St. 610. N. C.—Bell v. Mutual Mach. Co., 150 N. C. 111, 63 S. E. 680. Pa.—Armstrong v. Johnson, 2 Chest. Co. Rep. 64. Tex.—Murphy v. Wallace, 3 Wils. Civ. Cas., §432. Vt.—Gilson v. Bingham, 43 Vt. 410, 5 Am. Rep. 289; Grow v. Albee, 19 Vt. 540. Wis.—Driscoll v. Damp, 17 Wis. 419.

See *supra*, XVII, B, 2, h, (I), (B).

[a] Where one partner buys the other's interest for a given sum less one-half the firm debts, a judgment for a balance due on the purchase price bars any claim which the judgment defendant may have had against the firm for services rendered. *Evans v. Mackey*, 189 Ala. 283, 66 So. 3.

[b] Failure of the payees of a note, on being sued thereon by their indorsee and on the maker's bankruptcy, to assert misrepresentations by the indorsee as to maker's solvency, which induced the payees to take the note, precludes subsequent suit by the payees, to recover on that ground, the amount they paid on the judgment obtained against them, the matter being defensive in its nature and not available as a counter-claim on which an independent suit might be brought. *Jefferson, Noyes & Brown v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 308.

[c] *In Equity*.—(1) Where the vendee under a land contract sues for rescission which is granted, the vendor must, in the same suit, set up any claim for rent for the occupancy otherwise his claim is barred. *Rogers v. Wiggs*, 12 B. Mon. (Ky.) 504. But (2) the granting of the relief asked in a counter-claim, by rescinding a contract upon which the note sued on was given, does not estop the defendant from suing for purchase money paid under the contract. *Wright v. Anderson*, 117 Ind. 349, 20 N. E. 247.

[d] A previous agreement to pay the debt upon which plaintiff sues defendant, is a defense which must be pleaded by the latter, and not a counter-claim which may be sued on after judgment in the suit on the note. *Lawrence Sav. Bank v. Stevens*, 46 Iowa 429.

[e] A judgment that a contract had been performed, rendered in an action for making repairs, bars an action for damages from the defectiveness of the work of repair, foundation for the latter being taken away by the judgment in the former. *Bell v. Mutual Mach. Co.*, 150 N. C. 111, 63 S. E. 680.

[f] Where malpractice results in a cause of action for damages, it is not merged in a judgment recovered by a physician for services rendered where it is not pleaded in the action. *Conly v. Seanlin* (Iowa), 109 N. W. 300. But see *contra*, *Gates v. Preston*, 41 N. Y. 113; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534, holding that malpractice is purely defensive and not a matter of counterclaim and must therefore be urged in the action by the physician since the judgment therein will bar the right to subsequently rely upon it. *Compare infra*, XVII, B, 2, h, (III), note 62.

54. Ia.—*Parker v. Albee*, 86 Iowa 46, 52 N. W. 533. N. Y.—*Gay v. Riehmant Mantel Co.*, 53 App. Div. 507, 65 N. Y. Supp. 964. Pa.—*McMichael v. McFalls*, 23 Pa. Super. 256. Tex.—*Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100.

[a] A claim which could not have been recouped in the former action, may be litigated in a subsequent action. *McLane v. Miller*, 12 Ala. 643.

[b] Where the former action was replevin by the mortgagee to obtain possession of mortgaged property, and the defense of failure of consideration for notes and mortgage was successfully interposed, this does not prevent the defendant, in an action on the notes, from interposing a counterclaim based upon the same failure of consideration which was used defensively in the replevin action. *Osborne v. Williams*, 39 Minn. 353, 40 N. W. 165.



have, or forfeit his right of recovery or relief thereon, where such claim is founded upon or connected with, the transaction constituting the plaintiff's cause of action,<sup>55</sup> with special provisions, in some states, applicable to suits before a justice of the peace,<sup>56</sup> but excepting from the rule, claims for unliquidated damages,<sup>57</sup> and counter-claims which exceed the jurisdiction of the court in which the action is brought.<sup>58</sup> Some statutes provide that one who fails to avail himself of a set-off which he might have pleaded shall not be entitled to costs in a subsequent action on such cause of action.<sup>59</sup>

[c] **A chancery suit to compel the several partners to account with each other**, in which all partners are parties and a final decree is rendered, decreeing to each member the amount due him, is a bar to any claim which existed prior thereto. *Hunter's Exrs. v. Stewart*, 23 W. Va. 549.

55. **Cal.**—*Brosnan v. Kramer*, 135 Cal. 36, 66 Pac. 979; *Gregory v. Clabrough*, 129 Cal. 475, 62 Pac. 72. **Minn.** See *Douglas v. Hastings* First Nat. Bank, 17 Minn. 35. **N. J.**—*Links v. Mariowe*, 83 N. J. L. 389, 84 Atl. 1056; *Dey v. Jackson*, 39 N. J. L. 535; *Johnson v. Pennington*, 15 N. J. L. 188; *Henry v. Milbain*, 13 N. J. L. 266; *Righter v. Van Riper*, 3 N. J. L. 715. **N. Y.**—*Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570; *Davis v. Aikin*, 85 Hun 554, 33 N. Y. Supp. 103, 66 N. Y. St. 706; *Calrow v. Watson*, 43 Hun 640, 6 N. Y. St. 610; *Weiser v. Kling*, 38 App. Div. 266, 57 N. Y. Supp. 48. **Tex.** *Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100.

[a] **Where defendant's counterclaim exceeded plaintiff's demand**, and he did not pray for the excess over such demand, he is estopped by the judgment in the former action from suing for the excess of his counter-claim. *Inslee v. Hampton*, 11 Hun (N. Y.) 156.

[b] **An occupying claimant who has made improvements and paid taxes must**, under the Ohio law, interpose his claim for reimbursement in an ejectment suit against him, otherwise it will be barred by an adverse judgment therein. *Raymond v. Ross*, 40 Ohio St. 343, followed in *Klever v. Seawall*, 65 Fed. 373, 12 C. C. A. 653.

56. **Ill.**—*Lathrop v. Hayes*, 57 Ill. 279; *Morton v. Bailey*, 2 Ill. 213, 27 Am. Dec. 767; *Lamkin v. Burnett*, 7 Ill. App. 143. **Mont.**—*Walter v. Cox*, 36 Mont. 20, 91 Pac. 1063. **N. J.**

*Johnson v. Pennington*, 15 N. J. L. 188; *Henry v. Milham*, 13 N. J. L. 266; *Righter v. Van Riper*, 3 N. J. L. 715. **N. Y.**—*Douglas v. Hoag*, 1 Johns. 283. **Pa.**—*Shoup v. Shoup*, 15 Pa. 361; *Herring v. Adams*, 5 Watts & S. 459; *Walsh v. Greenwood*, 2 Pa. Dist. 64; *Light v. Ringler*, 1 Pa. Co. Ct. 156; *White v. Johnson*, 2 Ashm. 146; *Slyhoof v. Flitercraft*, 1 Ashm. 171; *Armstrong v. Johnson*, 2 Chest. Co. Rep. 64. **W. Va.**—*Bowdish & Degarmo Bros. v. Groscup*, 70 W. Va. 758, 74 S. E. 950.

57. *Bush v. Kindred*, 20 Ill. 93; *Lamkin v. Burnett*, 7 Ill. App. 143. *Compare*, *Links v. Mariowe*, 83 N. J. L. 389, 84 Atl. 1056; *White v. Curtis*, 49 Misc. 50, 98 N. Y. Supp. 319.

[a] **Unliquidated damages need not be set off in a suit before a justice of the peace**, although the statute requires that a liquidated claim shall be set off, in an action before a justice of the peace. *Bush v. Kindred*, 20 Ill. 93.

58. **N. J.**—*Sipley v. Wass*, 47 N. J. L. 187. **N. Y.**—*Babcock v. Peck*, 4 Denio 292. **Ohio.**—*Devanny v. Jelly*, Tapp. 159. **Pa.**—*Simpson v. Lapsley*, 3 Pa. 459; *Gillum v. Kahnweiler*, 2 Pa. Dist. 656. **Tex.**—*Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100. **W. Va.**—*Bowdish & Degarmo Bros. v. Groscup*, 70 W. Va. 758, 74 S. E. 950. See the title "**Justices of the Peace.**"

[a] **Where defendant's claim exceeds the jurisdictional amount**, he need not set it up in justice court. *Sipley v. Wass*, 47 N. J. L. 187.

59. **Ind.**—*Indiana Farmers' Live Stock Ins. Co. v. Stratton*, 4 Ind. App. 566, 31 N. E. 380. **Mich.**—*Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. 717. **Ohio.**—*Devanny v. Jelly*, Tapp. 159.

See the title "**Set-Off, Counterclaim and Recoupment.**"

(III.) Cross-Actions. — As in the case of a counter-claim or set-off,<sup>60</sup> the failure of a party to interpose a cross-action available to him does not bar a subsequent independent action upon it unless the facts upon which it depends were adjudicated in the previous action.<sup>61</sup> Thus a recovery for work and labor or personal services does not, as a general rule, bar an action for damages for the negligent or unskillful performance thereof,<sup>62</sup> unless such negligence or lack of skill was set up as a defense or counter-claim in the first action,<sup>63</sup> or has been litigated as a cause of action.<sup>64</sup> Nor will a recovery for the purchase price of goods bar an action for breach of warranty,<sup>65</sup> or for the

60. See *supra*, XVII, B, 2, h, (II).

61. U. S.—Thayer *v.* Kansas L. & T. Co., 100 Fed. 901, 41 C. C. A. 106. Mass.—Riley *v.* Hale, 158 Mass. 240, 33 N. E. 491. Mo.—Lyman *v.* Milwaukee Harvester Co., 68 Mo. App. 637. Pa. Schwan *v.* Kelly, 173 Pa. 65, 33 Atl. 1107, equitable cross-action. W. Va. Garrett *v.* South Penn Oil Co., 66 W. Va. 587, 66 S. E. 741.

62. Ill.—Barton *v.* Southwick, 258 Ill. 515, 101 N. E. 928. Mich.—Mimnaugh *v.* Parlin, 67 Mich. 300, 24 N. W. 717. Minn.—Jordahl *v.* Berry, 72 Minn. 119, 75 N. W. 10, 71 Am. Rep. 469, 45 L. R. A. 541. Ohio.—Sykes *v.* Bonner, 1 Cinc. Super. Ct. 464, 13 Ohio Dec. 662. Tenn.—Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894. Vt.—Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620. W. Va. Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. Wis.—Resseque *v.* Byers, 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

*Compare supra*, XVII, B, 2, h, (II), (B), note 53.

[a] A judgment of a justice of the peace in favor of a physician, for services rendered his patient, is not a bar to an action for malpractice, unless the defense of malpractice was set up in the first action. Barton *v.* Southwick, 258 Ill. 515, 101 N. E. 928.

[b] In New York the rule seems to be otherwise. Davis *v.* Tallcot, 12 N. Y. 184; White *v.* Merritt, 7 N. Y. 352, 57 Am. Dec. 527 (even a fraudulent judgment is a bar); Deane *v.* Loucks, 58 Hun 555, 12 N. Y. Supp. 903, 35 N. Y. St. 772; American Grocery Co. *v.* Pirkil, 25 Misc. 727, 55 N. Y. Supp. 606. See Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570.

[c] Thus (1) where a defendant in a suit by a physician for his profession-

al services, withdrew his answer and made no contest, he is barred by the judgment rendered for the value of plaintiff's services from maintaining a subsequent suit against the plaintiff for malpractice, on the same ground. Blair *v.* Bartlett, 75 N. Y. 150, 31 Am. Rep. 455. And see Gates *v.* Preston, 41 N. Y. 113; Bellinger *v.* Craigie, 31 Barb. (N. Y.) 531. (2) Conversely, a recovery for negligence and unskillfulness against a physician will bar an action for the professional services. Edwards *v.* Stewart, 15 Barb. (N. Y.) 67. (3) The fact that a party permits a default to be entered against him, makes no difference. He is barred by the judgment. Foster *v.* Milliner, 50 Barb. (N. Y.) 385.

63. Ala.—South, etc. Alabama R. Co. *v.* Henlein, 56 Ala. 368. Colo.—McNicholas *v.* Lake, 13 Colo. App. 164, 56 Pac. 987. Ill.—Howell *v.* Goodrich, 69 Ill. 556. Ind.—Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308. Mass.—See Merriam *v.* Woodecock, 104 Mass. 326, holding that a judgment on the merits for the full amount claimed for labor, is a bar to a subsequent action for negligent performance of such labor, where such negligence was set up as a defense in the former action, though without seeking to recoup therefor.

64. Haynes *v.* Ordway, 58 N. H. 167.

65. Mass.—Bodurtha *v.* Phelon, 13 Gray 413. See also Gilmore *v.* Williams, 162 Mass. 351, 38 N. E. 976. Minn.—Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156. N. H.—Parker *v.* Roberts, 63 N. H. 431; Bascom *v.* Manning, 52 N. H. 132. Tex.—Standefor *v.* Aultman, etc. Mach. Co., 34 Tex. Civ. App. 160, 78 S. W. 552. Eng.—Davis *v.* Hedges, 25 R., 6 Q. B. 687, 40 L. J. Q. B. 276, 25 L. T. Rep. (N. S.) 155, 20 Wkly. Rep.

recovery of an over-payment,<sup>66</sup> unless such breach of warranty or over-payment was set up in the other action by way of set-off or recoupment.<sup>67</sup> A recovery for breach of warranty is not a bar to a subsequent action for the purchase-price.<sup>68</sup>

3. **Nature, Requisites and Sufficiency of Former Judgment.** — a. *As Affected by Jurisdiction of Court or Tribunal Rendering It.* (1.) *In General.* — A former adjudication may operate as a bar whether the courts involved in the two actions were of coordinate or concurrent jurisdiction,<sup>69</sup> or the court rendering the former judgment was an appellate court.<sup>70</sup> So the judgments of inferior courts will operate as

60; *Mondel v. Steel*, 1 Dowl. P. C. (N. S.) 1, 10 L. J. Exch. 426, 8 M. & W. 558; *Rigge v. Burbidge*, 15 L. J. Exch. 309, 16 M. & W. 598.

*Compare, Gilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289.

66. *Whitcomb v. Williams*, 4 Pick. (Mass.) 228.

67. Cal.—*Earl v. Bull*, 15 Cal. 421. N. Y.—*Barth v. Burt*, 43 Barb. 628, 17 Abb. Pr. 349; *Cook v. Moseley*, 13 Wend. 277. Ohio.—*Timmons v. Dunn*, 4 Ohio St. 680. Va.—*Huff v. Broyles*, 26 Gratt. (67 Va.) 283.

68. *Barker v. Cleveland*, 19 Mich. 230.

69. U. S.—*Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. ed. 707; *Parrish v. Ferris*, 2 Black 606, 17 L. ed. 317; *Stewart v. Board of Trustees*, 156 Fed. 773, 84 C. C. A. 451; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 Fed. 232, 58 C. C. A. 596; *The President*, 213 Fed. 121; *Case v. Mountain Timber Co.*, 210 Fed. 565; *Gunning System v. City of Buffalo*, 157 Fed. 249. Ill.—*Black v. Thomson*, 120 Ill. App. 424. N. Y.—*In re Livingston*, 34 N. Y. 555, 2 Abb. Pr. (N. S.) 1, 32 How. Pr. 20; *In re Weaver*, 156 App. Div. 927, 141 N. Y. Supp. 1054; *Ungrich v. Ball*, 152 App. Div. 824, 137 N. Y. Supp. 722. Pa.—*Allen v. International Text Book Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. Rep. 834; *Dyer's Appeal*, 3 Grant's Cas. 326; *Wallace v. Stevenson*, 25 Pittsb. Leg. J. (N. S.) 363, 42 Pittsb. Leg. J. (O. S.) 363. W. Va.—*Chesapeake & Ohio R. Co. v. McDonald*, 65 W. Va. 201, 63 S. E. 968. Can.—*Cochrane v. The Hamilton Provident Loan Society*, 15 Ark. 128.

[a] The judgment of a consular court will bar an action in a domestic court for the same cause. *Barber v. Lambe*, 8 C. B. N. S. 95, 6 Jur. N. S. 981, 29 L. J. C. P. 234, 2 L. T. Rep.

N. S. 238, 8 Wkly. Rep. 461, 98 E. C. L. 95, 141 Eng. Reprint 1100.

[b] The doctrine does not depend upon any superior authority of the court rendering the judgment. *The President*, 213 Fed. 121.

Judgment of state court in federal court and vice versa, see *infra*, XVIII.

70. See the following: U. S.—*Puget Sound Electric Ry. v. Lee*, 207 Fed. 860. Cal.—*Lucas v. San Francisco*, 28 Cal. 591. Ga.—*Atlanta v. First Methodist Church, South*, 83 Ga. 448, 10 S. E. 231. Ill.—*Wabash, St. L. & P. R. Co. v. Peterson*, 115 Ill. 597, 6 N. E. 412; *Martin v. Todd*, 121 Ill. App. 230. Ind.—*Sturgis v. Rogers*, 26 Ind. 1. Ky. *Upton's Committee v. Handley*, 123 S. W. 1188; *Mead v. Mead* (Ky.), 112 S. W. 867. Me.—*Atkins v. Wyman*, 45 Me. 399. Miss.—*Wilkes v. Coopwood*, 39 Miss. 348. Mo.—*Chouteau v. Gibson*, 76 Mo. 38; *Miller v. Bernecker*, 46 Mo. 194. Neb.—*Stutzner v. Printz*, 43 Neb. 306, 61 N. W. 620. N. C.—*Herndon v. Aetna Ins. Co.*, 108 N. C. 648, 13 S. E. 188. Pa.—*Walker Tp. v. West Buffalo Tp.*, 11 Pa. 95; *Koan's Estate*, 6 Kulp 520. P. I.—*Bowler v. Estate of Alvarez*, 23 Phil. Isl. 561. Tenn.—*McNairy v. Nashville*, 2 Baxt. 251. Tex.—*Wiren v. Nesbitt*, 85 Tex. 286, 20 S. W. 128; *Stelle v. Shannon*, 62 Tex. 198; *Crane v. Blum*, 56 Tex. 325; *State v. Hodges*, 25 Tex. Supp. 63. Va.—*Findlay v. Trigg's Admr.*, 83 Va. 539, 3 S. E. 142; *Campbell's Exrs. v. Campbell's Exr.*, 22 Gratt. (63 Va.) 649; *Price v. Campbell*, 5 Call (9 Va.) 115. W. Va.—*Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66.

[a] **Identity of Parties and Issues.** In order to bind an appellate court its former decision must have been upon the same subject-matter and between the same parties. *Anderson v. Fowler*, 48 S. C. 8, 25 S. E. 900. Necessity gen-



a merger or bar to the same extent as the judgments of other courts,<sup>71</sup> except as to matters of which they had no jurisdiction.<sup>72</sup>

The judgment of a probate court is a conclusive bar to another action upon the same matter,<sup>73</sup> unless it was without jurisdiction of the matter determined.<sup>74</sup>

Judgments of another state or country as a merger or bar will be found treated elsewhere in this article, and the same is true of federal judgments as a bar in state courts and vice versa.<sup>74½</sup>

(II.) Special and Quasi-Judicial Tribunals. — Judgments of tribunals created by military authority for the trial of civil causes within territory in the firm possession of the forces of such authority, operate as a bar to other actions on the questions adjudicated thereby.<sup>75</sup>

erally for identity of subject-matter and parties, see *supra*, XVII, B, 2, e and f.

[b] Judgment not affected by later decisions that the court had no jurisdiction in such cases. *State v. Wau-paca County Bank*, 20 Wis. 640.

[c] On Appeal From Justice Court. *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 80 Pac. 73.

[d] Original jurisdiction vested in an appellate court will not be exercised where a superior court exercised jurisdiction of the matter. *In re Graham*, 7 Wash. 237, 34 Pac. 931.

71. Ala.—*Davis v. Bedsole*, 69 Ala. 362. Ind.—*Pressler v. Turner*, 57 Ind. 56. Mich.—*Town v. Smith*, 14 Mich. 348. Mo.—*Cooksey v. Kansas City, etc. R. Co.*, 74 Mo. 477; *Hendrickson v. St. Louis, etc. R. Co.*, 34 Mo. 188, 84 Am. Dec. 76; *Langford v. Doniphan*, 61 Mo. App. 288. N. Y.—*Blum v. Hartman*, 3 Daly 47; *Thayer v. Hamilton*, 5 Ill. 443. N. C.—*Brunhild & Bro. v. Freeman*, 80 N. C. 212; *Platt v. Potts*, 33 N. C. 266, 53 Am. Dec. 412. Ohio.—*Moore v. Robison*, 6 Ohio St. 302; *Cavanaugh v. Bloom*, 10 Ohio Dec. 222, 8 Ohio N. P. 6. Pa.—*Marsteller v. Marsteller*, 132 Pa. 517, 19 Atl. 344, 19 Am. St. Rep. 604; *Nalen v. Burke*, 12 Pa. Co. Ct. 490; *Spoonhour v. Endler*, 8 Kulp 62. Tex.—*Foster v. Wells*, 4 Tex. 101. W. Va.—*Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849. Eng.—*Behrens v. Pauli*, 1 Keen 456, 48 Eng. Reprint 382; *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. Rep. N. S. 590, 25 Wkly. Rep. 647.

72. Del.—*Green v. Clawson*, 5 Houst. 159. Ill.—*Barrett v. Petry*, 148 Ill. App. 622. Ind.—*McCarty v. Kinsey*, 154 Ind. 447, 57 N. E. 108; *Newman v. Manning*,

89 Ind. 422. Mich.—*Clark v. Holmes*, 1 Doug. 390. N. Y.—*Gage v. Hill*, 43 Barb. 44; *Andrews v. Horton*, 66 Misc. 66, 120 N. Y. Supp. 431. N. C. *Springs v. Schenck*, 106 N. C. 153, 11 S. E. 646. Pa.—*Gobble v. Minnich*, 10 Pa. 488. P. R.—*Martinez y Martinez v. Cebollero*, 5 Porto Rico Fed. 417. Eng.—*Attorney-General v. Erliche*, A. C. 518, 63 L. J. P. C. 6, 1 Reports 440, 69 L. T. Rep. N. S. 505; *Reg. v. Hutchins*, 6 Q. B. D. 300, 45 J. P. 504, 50 L. J. M. C. 35, 44 L. T. Rep. N. S. 364, 29 Wkly. Rep. 724.

73. See the following: U. S.—*Tate v. Norton*, 94 U. S. 746, 24 L. ed. 222. Ill.—*Merrill v. Merrill*, 187 Ill. App. 589. Ia.—*Hart v. Jewett*, 11 Iowa 276. La.—*La's Succession*, 49 La. Ann. 1096, 22 So. 319; *Womaek v. Womaek*, 23 La. Ann. 351. Mo.—*Townsend v. Townsend*, 60 Mo. 246; *McKinney's Admr. v. Davis*, 6 Mo. 501. N. Y.—*Ungrich v. Ball*, 152 App. Div. 824, 137 N. Y. Supp. 722. Wis.—*Jameson v. Barber*, 56 Wis. 630, 14 N. W. 859. Eng.—*Priestman v. Thomas*, 9 P. D. 210, 53 L. J. P. & Adm. 109, 51 L. T. Rep. N. S. 843, 32 Wkly. Rep. 842.

See generally the title "Probate Courts."

74. D. C.—*Perry v. Sweeney*, 11 App. Cas. 404. Ia.—See *Gordon v. Kennedy*, 36 Iowa 167. N. Y.—*Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; *Neille v. Neille*, 89 N. Y. 352. S. C.—*Anderson v. Cave*, 49 S. C. 505, 27 S. E. 478. Tex.—*Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117. Wash.—*Reese v. Murnan*, 5 Wash. 373, 31 Pac. 1027.

74½. See *infra*, XVIII.

75. *Hefferman v. Porter*, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; *Walt v. Thomasson*, 10 Heisk. (Tenn.) 151.

So also, the decision of a special statutory tribunal upon a matter properly within its jurisdiction is conclusive of such question, but cannot be used for any other purpose.<sup>76</sup>

A decision rendered by an officer, or board of officers, in the proper exercise of judicial powers, which has under the law the force and effect of a judgment, will operate as a bar to any other action by the parties or their privies on the matters determined.<sup>77</sup> But if the law of the forum does not ascribe to the decision of such officer or board the force and effect of a judgment,<sup>78</sup> or if such officer or board act in a ministerial, instead of a judicial, capacity in the matter, further proceedings in relation thereto will not be thereby barred.<sup>79</sup>

b. *As Affected by Nature or Form of Action or Proceeding.*  
(I.) In General. — The rules herein stated as to former judgments as merger or bar are not dependent upon the nature or form of the action in which the judgment was rendered;<sup>80</sup> they apply in all classes and forms of actions and proceedings in which a final adjudication is had.<sup>81</sup> Thus a final recovery in an action at law will bar a suit in

76. *First National Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22; *Warner v. Scott*, 39 Pa. 274.

77. See the following: **U. S.**—*Puget Sound Electric Ry. v. Lee*, 207 Fed. 860. **Cal.**—*Sanders v. Whitesides*, 10 Cal. 88. **La.**—*Villar's Heirs v. Kennedy*, 5 La. Ann. 724. **N. Y.**—*Barber v. New Scotland*, 64 App. Div. 229, 71 N. Y. Supp. 1052. **R. I.**—*Burlingame v. Brown*, 5 R. I. 410. **Vt.**—*Connecticut, etc. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

[a] The decision of a referee upon a question properly referred to him, is a determination, which, when made an order of court without objection, is conclusive on the parties. *Demarest v. Daig*, 11 Abb. Pr. (N. Y.) 9, affirming 32 N. Y. 281, 29 How. Pr. 266.

[b] An auditor's decision as to the ownership of a judgment is a bar to an action between the claimants therefor for damages for refusal by one to assign it to the other. *Abington Bldg. Assn. v. Melcher*, 2 Walk. (Pa.) 499.

78. **Conn.**—*First National Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22. **Neb.**—*Custer County v. Chicago B.*, etc. R. Co., 62 Neb. 657, 87 N. W. 341. **Ohio.**—*Miller v. Longview Asylum*, 7 Ohio Dec. (Reprint) 650, 4 Cine. L. Bul. 690. **Pa.**—*Clark Bros. Coal Min. Co. v. Pennsylvania R. Co.*, 241 Pa. 515, 88 Atl. 754.

[a] An award of the Interstate Commerce Commission is not a judicial

decision, but is a prima facie finding of the facts therein stated only, and as such is subject to collateral attack. *Clark Bros. Coal Min. Co. v. Pennsylvania R. Co.*, 241 Pa. 515, 88 Atl. 754.

79. *Baldwin v. Shine*, 84 Ky. 502, 2 S. W. 164; *Koonce v. Butler*, 84 N. C. 221.

80. See the following: **U. S.**—*Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. **Del.**—*Capelle v. Baker*, 3 Houst. 344. **D. C.**—*United States v. Moore*, 3 MacArthur 226. **Ill.**—*O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124. **N. Y.**—*Matter of Roberts*, 59 How. Pr. 136. **S. C.**—*Connor v. Ashley*, 41 S. C. 67, 19 S. E. 201. **W. Va.**—*West Virginia Nat. Bank v. Spencer*, 71 W. Va. 678, 77 S. E. 269.

[a] The principle of estoppel by former adjudication applies to proceedings of a judicial nature in the patent office. *Horine v. Wende*, 29 App. Cas. (D. C.) 415.

81. **Cal.**—*Suisun Lumb. Co. v. Fairfield School District*, 19 Cal. App. 587, 127 Pac. 349. **Colo.**—*Denver v. Labenstein*, 3 Colo. 216. **Conn.**—*State v. Hartford St. Ry. Co.*, 76 Conn. 174, 56 Atl. 506. **Fla.**—*Manley v. Union Bank*, 1 Fla. 160. **Ill.**—*O'Connor v. Board of Trustees*, 247 Ill. 54, 93 N. E. 124. **Me.**—*Paul v. Thorndike*, 97 Me. 87, 53 Atl. 877; *Matthews v. Houghton*, 11 Me. 377. **Neb.**—*Nebraska L. & T. Co. v. Doman*, 4 Neb. (Unof.) 334, 93 N. W. 1022. **N. Y.**—*People v. White*, 11 Abb. Pr. 168. **Pa.**—*Miller v. Rohrer*, 127 Pa.

equity between the same parties upon the same matters;<sup>52</sup> and a final decree on the merits in a suit in equity operates as a bar to an action at law between the same parties or their privies upon the matters determined on the merits thereby.<sup>53</sup> But a former recovery at law will not bar a subsequent suit in equity as to matters exclusively within the

384, 18 Atl. 2. **W. Va.**—West Virginia Nat. Bank *v.* Spencer, 71 W. Va. 678, 77 S. E. 269.

32. **U. S.**—Blanchard *v.* Brown, 3 Wall. 245, 18 L. ed. 69; United States *v.* Price, 9 How. 83, 13 L. ed. 56; Cheatham Electric Switch Device Co. *v.* Transit Development Co., 203 Fed. 285; Price *v.* Dewey, 6 Sawy. 493, 11 Fed. 104; Reynolds *v.* Badger, 20 Fed. Cas. No. 11,726; Bryant *v.* Hunter, 3 Wash. 48, 4 Fed. Cas. No. 2,068. **Ala.** Waring *v.* Lewis, 53 Ala. 615; Cullum *v.* Bloodgood, 15 Ala. 34. **Cal.**—San Francisco *v.* Spring Valley Water Works, 39 Cal. 473; Suisun Lumb. Co. *v.* Fairfield School District, 19 Cal. App. 587, 127 Pac. 349. **Colo.**—Smith *v.* Cowell, 41 Colo. 178, 92 Pac. 20. **D. C.** Birdsall *v.* Welch, 6 D. C. 316. **Fla.** Moore *v.* Felkel, 7 Fla. 44. **Ga.**—Smith *v.* Smith, 125 Ga. 83, 54 S. E. 73; Grubb *v.* Kolb, 55 Ga. 630; Russel *v.* Slaton, 38 Ga. 195; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732. **Ill.**—Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Wayman *v.* Cochrane, 35 Ill. 152. **Ky.**—Sanson *v.* Connolly, 141 Ky. 120, 132 S. W. 159; Sharp *v.* Carlile, 5 Dana 487. **Me.**—Jordan *v.* Chase, 83 Me. 540, 22 Atl. 394; Alley *v.* Chase, 83 Me. 537, 22 Atl. 393; Lane *v.* Lane, 80 Me. 570, 16 Atl. 323. **Mich.**—Spoon *v.* Baxter, 31 Mich. 279. **Neb.**—Stocker *v.* Nemaha County, 72 Neb. 255, 100 N. W. 308. **N. J.**—West New York Silk Mill Co. *v.* Laubsch, 53 N. J. Eq. 65, 30 Atl. 814. **N. Y.**—Steinbach *v.* Relief Fire Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Orcutt *v.* Orns, 3 Paige 459; Southgate *v.* Montgomery, 1 Paige 41; Holmes *v.* Remsen, 7 Johns. Ch. 286; Gregory *v.* Burrall, 2 Edw. Ch. 417; Atwater *v.* Fowler, 1 Edw. Ch. 417. **Ore.** Wells Fargo & Co. *v.* Wall, 1 Ore. 295. **S. C.**—Tate's Exrs. *v.* Hunter, 3 Strab. Eq. 136; Henderson *v.* Mitchell, Bailey Eq. 113, 21 Am. Dec. 559. **Tenn.** Overton *v.* Searcy, Cooke 36, 5 Am. Dec. 665. **Vt.**—Hall *v.* Dana, 2 Ad. 281. **W. Va.**—Western Min. & Mfg. Co. *v.* Virginia Carmel Coal Co., 10 W. Va. 250. **Eng.**—Pitt *v.* Hill, Rep. Temp. Finch 70, 23 Eng. Reprint 37; Hellam

*v.* Grave, Rep. Temp. Finch 205, 23 Eng. Reprint 112.

[a] An equitable defense heard in a court of law, cannot be reheard on a bill in equity. Haneman *v.* Pile, 161 Pa. 599, 29 Atl. 113.

Necessity for identity of causes of action and parties, see *supra*, XVII, B, 2, e and f.

[b] "When the complainant's title is both legal and equitable, a trial in ejectment, which may be renewed, is no bar to the assertion of his claim in equity any more than to the prosecution of a new ejectment; . . ." Winchester *v.* Gleaves, 3 Hayw. (Tenn.) 213.

83. **U. S.**—Brown *v.* Fletcher, 182 Fed. 963, 105 C. C. A. 425; Robinson *v.* American Car & Foundry Co., 159 Fed. 131, 86 C. C. A. 321; Manhattan Trust Co. *v.* Trust Co. of North America, 107 Fed. 328, 46 C. C. A. 322. **Ala.**—Collier *v.* Alexander, 142 Ala. 422, 38 So. 244; Penny *v.* British, etc. Mortg. Co., 132 Ala. 357, 31 So. 96; Strang *v.* Moog, 72 Ala. 460; Tankersly *v.* Pettis, 71 Ala. 179. **Ark.**—Peay *v.* Duncan, 20 Ark. 85. **Cal.**—Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54. **Colo.** Smith *v.* Cowell, 41 Colo. 178, 92 Pac. 20; Denver *v.* Lobenstein, 3 Colo. 216; Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044. **D. C.**—Stevens *v.* DuBarry, 1 Mackey 294. **Fla.**—Sanford *v.* Cloud, 17 Fla. 532. **Ga.**—Baldwin *v.* McCrea, 38 Ga. 650. **Ill.**—Stickney *v.* Goudy, 132 Ill. 213, 23 N. E. 1034; Wayman *v.* Cochrane, 35 Ill. 152; Jones *v.* Smith, 13 Ill. 301; Black *v.* Thomson, 120 Ill. App. 424; Meyer *v.* Meyer, 40 Ill. App. 94; Laur *v.* People, 17 Ill. App. 448. **Ia.**—Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41. **Ky.**—Price *v.* Sthreshly, 2 Bibb 588. **Md.**—Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429; Martia *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218. **Mass.**—Corbett *v.* Craven, 193 Mass. 30, 78 N. E. 748; Foster *v.* The Richard Busted, 100 Mass. 409, 1 Am. Rep. 125; Bigelow *v.* Winsor, 1 Gray 299; Mills *v.* Gore, 20 Pick. 28. **Mich.** Hanchett *v.* Auditor General, 124 Mich.



jurisdiction of courts of equity.<sup>84</sup> Nor will such a recovery operate as a bar where equitable intervention is justified on account of fraud, or for other sufficient reason.<sup>85</sup>

(II.) Summary and Special Proceedings. — (A.) IN GENERAL. — Orders or rulings in special proceedings involving some contested right or claim operate as a bar to any other action or proceeding between the same parties or their privies on the matters determined thereby.<sup>86</sup> While a decision upon the issues raised in a summary proceeding operates as an estoppel in the same manner as would a judgment in a formal

424, 83 N. W. 103; *Sayers v. Auditor-Gen.*, 124 Mich. 259, 82 N. W. 1045. **Mo.**—*Barnett v. Smart*, 158 Mo. 167, 59 S. W. 235. **N. J.**—*Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381; *Manley v. Mickle*, 53 N. J. Eq. 155, 32 Atl. 210 (*affirming* 52 N. J. Eq. 712, 29 Atl. 434); *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756; *Putnam v. Clark*, 34 N. J. Eq. 532. **N. Y.**—*Young v. Farwell*, 165 N. Y. 341, 59 N. E. 143. **N. C.**—*Gibson v. Smith*, 63 N. C. 103. **Ohio**—*Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991; *Porter v. Wagner*, 36 Ohio St. 471; *Cramer v. Moore*, 36 Ohio St. 347; *Babcock & Co. v. Camp*, 12 Ohio St. 11. **Okla.**—*Pratt v. Ratliff*, 10 Okla. 168, 61 Pac. 523. **Pa.**—*Kelsey v. Murphy*, 26 Pa. 78. **Vt.**—*Pierson v. Catlin*, 18 Vt. 77; *Pelton v. Mott*, 11 Vt. 148, 34 Am. Dec. 678. **W. Va.**—*Gallaher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942. **Eng.**—*Tredegar v. Windus*, L. R. 19 Eq. 607, 44 L. J. Ch. 268; *Langmead v. Maple*, 18 C. B. N. S. 255, 11 Jur. N. S. 177, 12 L. T. Rep. N. S. 143, 13 Wkly. Rep. 469, 114 E. C. L. 255, 144 Eng. Reprint 441.

84. **U. S.**—*Cheatham Electric Switching Device Co. v. Transit Development Co.*, 203 Fed. 285. **Ala.**—*Wetumpka v. Wetumpka*, 63 Ala. 611. **Colo.**—*Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20. **Ga.**—*Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732. **Mass.**—*Weeks v. Edwards*, 176 Mass. 453, 57 N. E. 701. **Mich.**—*Nash v. Morrell*, 171 Mich. 658, 137 N. W. 516; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567. **Minn.**—*Major v. Owen*, 126 Minn. 1, 147 N. W. 662. **Neb.**—*Grand View Bldg. Assn. v. Northern Assur. Co.*, 102 N. W. 246, holding that a suit to reform a policy of fire insurance and to recover on it so reformed, may be maintained after an adverse judgment at law on the original policy. **N. J.**—*Metropolitan Sav.*

*& Loan Assn. v. Dughi* (N. J. Eq.), 49 Atl. 542. **N. C.**—*Gash v. Ledbetter*, 41 N. C. 183; *Blue v. Patterson*, 21 N. C. 457; *Blanchard v. Pasteur's Exrs.*, 3 N. C. 393. **Ohio**—*Elliott v. Lawhead*, 43 Ohio St. 171, 1 N. E. 577. **Ore.**—*Starr v. Stark*, 7 Ore. 500. **Tenn.**—*Danforth v. Lowry*, 3 Hayw. 61. **Vt.**—*Ordway v. Farrow*, 79 Vt. 192, 64 Atl. 1116. **Va.**—*Hawkins v. Depriest*, 4 Munf. (18 Va.) 469.

85. **U. S.**—*Gallaher v. Roberts*, 1 Wash. 320, 9 Fed. Cas. No. 5,194. **Pa.**—*See Schwan v. Kelly*, 173 Pa. 65, 33 Atl. 1107. **Tenn.**—*Robnett v. Howard* (Tenn. Ch.), 61 S. W. 1082. **Tex.**—*See Allen v. Stephanes*, 18 Tex. 658. **Va.**—*Isaac v. Johnson*, 5 Munf. (19 Va.) 95; *Hawkins v. Depriest*, 4 Munf. (18 Va.) 469.

86. See the following: **U. S.**—*Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. 361, *affirming* 122 Fed. 232, 58 C. C. A. 596; *Delano v. Scott*, Gilp. 489, 7 Fed. Cas. No. 3,753. **Ark.**—*Walker v. Fuller*, 29 Ark. 448. **Cal.**—*Sunkler v. McKenzie*, 127 Cal. 554, 59 Pac. 982, 78 Am. St. Rep. 86; *Societa di Mufuo Socorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659. **Colo.**—*Louden Irr. Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535. **D. C.**—*Slack v. Perrine*, 9 App. Cas. 128. **Ill.**—*Rich v. Chicago*, 187 Ill. 396, 58 N. E. 306. **Ind.**—*Baker v. State*, 109 Ind. 47, 9 N. E. 711. **Ky.**—*Southern Planing Mill v. Doerhoefer*, 25 Ky. L. Rep. 1834, 78 S. W. 882. **La.**—*Foss v. Brenzel*, 14 La. Ann. 798. **Mo.**—*State v. Boothe*, 68 Mo. 546. **N. J.**—*Cadwalader v. Durham*, 46 N. J. L. 53. **N. Y.**—*Matter of Smal*, 53 How. Pr. 432; *Schrauth v. Dry Dock Sav. Bank*, 8 Daly 106; *Carter v. Clarke*, 7 Robt. 43; *In re Roberts*, 10 Hun 253. **Pa.**—*Long v. Lebanon Nat. Bank*, 211 Pa. 165, 60 Atl. 556; *Importers' & T. Nat. Bank v. Lyons*, 209 Pa. 136, 58 Atl. 148. **Va.**—*Raub v. Otterback*, 92 Va.

action, where the parties have an opportunity to be heard thereon,<sup>87</sup> it is otherwise where the proceedings are purely *ex parte* in their nature.<sup>88</sup>

[B. **MOTIONS AND SUMMARY APPLICATIONS.**—Decisions or rulings upon motions or summary applications in a pending suit or action do not usually bar a subsequent determination of the same matter presented in another action,<sup>89</sup> although the courts have generally held that the denial of a motion or application for an interlocutory or incidental order is a bar to its renewal in the same proceeding,<sup>90</sup> except by leave

517, 23 S. E. 883. **Can.**—*Rex v. Robinson*, 14 Ont. L. Rep. 519, 10 Ont. W. R. 338.

*Compare, Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Burnes v. St. Louis, etc. R. Co.*, 71 Mo. 163.

**Necessity for identity of parties**, see *supra*, XVII, B, 2, c.

87. **D. C.**—*Slack v. Perrine*, 9 App. Cas. 128. **Ga.**—*Smith v. Kennedy*, 125 Ga. 830, 54 S. E. 731. **Ia.**—*Hawk v. Evans*, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247. **N. Y.**—*Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497; *Ombaga v. Briggs*, 2 Hill 135; *Kelsey v. Ward*, 16 Abb. Pr. 98 (*affirmed*, 38 N. Y. 83); *McCotter v. Flinn*, 30 Misc. 119, 61 N. Y. Supp. 786; *Lazarus v. Ludwig*, 18 Misc. 474, 41 N. Y. Supp. 999; *Lockwood v. Adolpho*, 123 N. Y. Supp. 367. **Pa.**—*Marsteller v. Marsteller*, 132 Pa. 517, 19 Atl. 344, 19 Am. St. Rep. 604. **S. C.**—*Hadwin v. Southern Ry.*, 67 S. C. 463, 45 S. E. 1019. **Wis.**—*State v. Whiteer*, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968. **Eng.**—*Wright v. London Gen. Omnibus Co.*, 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. Rep. N. S. 590, 25 Wkly. Rep. 647.

88. **Ga.**—*Craft v. Perkins*, 83 Ga. 760, 10 S. E. 357. **Ia.**—*In re Morgan*, 125 Iowa 247, 101 N. W. 127. **Kan.**—*Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. 610. **La.**—*Lampton's Succession*, 35 La. Ann. 418; *Dalton v. Wickliffe*, 35 La. Ann. 355.

89. See the following: **U. S.**—*Wills v. Chandler*, 1 McCrary 276, 2 Fed. 273. **Cal.**—*Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686. **Ia.**—*Ellis v. Soper*, 111 Iowa 631, 82 N. W. 1041. **Kan.**—*Dryden v. St. Joseph, etc. R. Co.*, 23 Kan. 725. **Ky.**—*Rockett v. Lashbrook*, 5 Mon. 530, 17 Am. Dec. 98. **Mass.**—*Marshall v. Beach R. Co. v. Ransom*, 117 Mass. 240, 17 N. E. 640. **Mich.**—*Bresler v. Wayne Probate Judge*, 152 Mich. 167, 115 N. W. 960. **Minn.**—*Kanne v.*

*Minneapolis & St. L. Ry. Co.*, 33 Minn. 419, 23 N. W. 854. **Neb.**—*Butler v. Secrist*, 92 Neb. 506, 138 N. W. 749. **N. J.**—*Felz v. Roseberger*, 10 N. J. L. J. 79. **N. Y.**—*Everett v. Everett*, 180 N. Y. 452, 73 N. E. 231; *Wing v. De La Rionda*, 125 N. Y. 678, 25 N. E. 1064; *Easton v. Pickersgill*, 75 N. Y. 599; *Acker v. Ledyard*, 8 Barb. 514; *Mack v. Patchin*, 29 How. Pr. 20; *Dickenson v. Gilliland*, 1 Cow. 481; *Simson v. Hart*, 14 Johns. 63; *Business Men's Realty Co. v. Comet Co.*, 152 App. Div. 941, 137 N. Y. Supp. 823; *Reilly v. Provost*, 98 App. Div. 208, 90 N. Y. Supp. 591; *Hahl v. Sugo*, 27 Misc. 1, 57 N. Y. Supp. 920. **Ore.**—*Burnett v. Marrs*, 62 Ore. 598, 125 Pac. 838. **Pa.**—*Ashton's Appeal*, 73 Pa. 153; *Wistar v. McManes*, 54 Pa. 318, 93 Am. Dec. 700. **S. C.**—*Sims v. Davis*, 70 S. C. 362, 49 S. E. 872. **Va.**—*News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140, 86 S. E. 874; *Dillard v. Jefferies*, 86 S. E. 844. **Wis.**—*Hart v. Godkin*, 122 Wis. 646, 100 N. W. 1057.

90. **Cal.**—*Wheeler v. Eldred*, 137 Cal. 37, 69 Pac. 619; *Ford v. Doyle*, 44 Cal. 635. **D. C.**—*Johnson v. Offutt*, 2 MacArthur 168. **Ga.**—*Obear v. Gray*, 73 Ga. 455. **Kan.**—*Sanford v. Weeks*, 50 Kan. 339, 31 Pac. 1088. **La.**—*Jacobs v. Augustin*, 3 La. Ann. 703. **Md.**—*Johnson v. Stockham*, 80 Md. 368, 43 Atl. 943. **Minn.**—*Griffin v. Jorgenson*, 22 Minn. 92. **Neb.**—*Oakes v. Ziemer*, 71 Neb. 65, 98 N. W. 443. **N. H.**—*Claggett v. Simes*, 25 N. H. 402. **N. Y.**—*Bangs v. Strong*, 4 N. Y. 315; *Hall v. Emmons*, 39 How. Pr. 187, 8 Abb. Pr. (N. S.) 451, 2 Sweeny 396; *Hoffman v. Livingston*, 1 Johns. Ch. 211; *Ray v. Connor*, 3 Edw. Ch. 478; *German Exch. Bank v. Kroder*, 14 Misc. 179, 35 N. Y. Supp. 380. **N. C.**—*Wingo v. Hooper*, 98 N. C. 482, 4 S. E. 463; *Roulhac v. Brown*, 87 N. C. 1; *Mabry v. Henry*, 83 N. C. 298. **R. I.**—*Curry v. Swett*, 13 R. I. 476. **Wis.**—*Dick v.*

of court under a new state of facts,<sup>91</sup> unless the former ruling of the court was due to irregularity or insufficiency of the application or motion.<sup>92</sup> But if the motion or application goes to the substantial rights of the parties, and vitally affects the result of their litigation, so that an appeal will lie, and no appeal is taken from the ruling thereon, the party is estopped from further proceedings in the matter.<sup>93</sup>

Applying these rules, it has been held that the overruling of a motion to set aside a verdict and entry of judgment thereon,<sup>94</sup> or the overruling of a motion to open a default or vacate a judgment,<sup>95</sup> or for a

Williams, 87 Wis. 651, 58 N. W. 1029, 1037. But see *Turner v. Nachtsheim*, 71 Wis. 16, 36 N. W. 637; *Schattschneider v. Johnson*, 39 Wis. 387.

91. Cal.—*Ford v. Doyle*, 44 Cal. 625. Mont.—*Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592. N. Y.—*Easton v. Pickersgill*, 75 N. Y. 599; *Port Jervis Nat. Bank v. Hansee*, 15 Abb. N. C. 488; *Chichester v. Cande*, 3 Cow. 39, 15 Am. Dec. 238; *People v. Dalton*, 52 App. Div. 371, 65 N. Y. Supp. 342. N. C.—*Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338. S. D.—*Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201. Wis.—*Iego v. Shaw*, 38 Wis. 401.

92. Mass.—*Soper v. Manning*, 158 Mass. 381, 33 N. E. 516. Miss.—*Hope v. Hurt*, 59 Miss. 174. Neb.—*Oakes v. Ziener*, 71 Neb. 65, 98 N. W. 443. S. D.—*Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638. Wis.—*Corwith v. State Bank*, 15 Wis. 289.

As to necessity for judgment on merits, see *infra*, XVII, B, 3, d, (I).

93. U. S.—*Spencer v. Watkins*, 169 Fed. 379, 94 C. C. A. 659; *McDonald v. Seligman*, 81 Fed. 753; *Buckles v. Chicago, etc. R. Co.*, 53 Fed. 566; *Spitley v. Frost*, 5 McCrary 43, 15 Fed. 299. Ala.—*Walker v. Carroll*, 65 Ala. 61; *Lee v. State*, 49 Ala. 43; *Langdon v. Raiford*, 20 Ala. 532. Ill.—*Parrott v. Hodgson*, 46 Ill. App. 232; *Kaufman v. Schneider*, 35 Ill. App. 256. Ia.—*Second Nat. Bank of Dubuque v. Haerling*, 106 Iowa 505, 76 N. W. 826. Kan.—*Wilson County Comrs. v. McIntosh*, 30 Kan. 234, 1 Pac. 572. Minn.—*Robitshek v. Swedish-American Nat. Bank*, 72 Minn. 319, 75 N. W. 231. N. C.—*Wilson v. Craige*, 113 N. C. 463, 18 S. E. 715; *Sanderson v. Daily*, 83 N. C. 67. Ohio.—*Ewing v. McNairy*, 20 Ohio St. 315. Ore.—*White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732. Pa.—*Long v. Lebanon Nat. Bank*,

211 Pa. 165, 60 Atl. 556; *Straw v. Smith*, 179 Pa. 376, 36 Atl. 162; *Com. v. Comrey*, 174 Pa. 355, 34 Atl. 581; *Haneman v. Pile*, 161 Pa. 599, 29 Atl. 113; *Gordinier's Appeal*, 89 Pa. 528. R. I.—*Curry v. Swett*, 13 R. I. 476. W. Va.—*Burner v. Hevener*, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

[a] Where no review of the order, by appeal or writ of error, is provided by law, a subsequent application or motion is not barred. *Rockwell v. Lake County Dist. Ct.*, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265.

94. *Grier v. Jones*, 54 Ga. 154; *Page v. Esty*, 54 Me. 319.

95. Ga.—*Grier v. Jones*, 54 Ga. 154. Idaho.—*Bernhard v. Idaho Bank & Trust Co.*, 21 Idaho 598, 123 Pac. 481. Ind.—*Moore v. Horner*, 146 Ind. 287, 45 N. E. 341. Mich.—*Steele v. Bliss*, 170 Mich. 175, 134 N. W. 1013, 135 N. W. 931. Minn.—*Carlson v. Carlson*, 49 Minn. 555, 52 N. W. 214. Neb.—*Oakes v. Zierner*, 71 Neb. 65, 98 N. W. 443. Ore.—*Thompson v. Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. Rep. 818. Pa.—*Keystone Brew. Co. v. Schermer*, 241 Pa. 361, 88 Atl. 657; *Haneman v. Pile*, 161 Pa. 599, 29 Atl. 113; *Heilman v. Kroh*, 155 Pa. 1, 25 Atl. 751 (holding that the denial of a petition to open a judgment entered on a bond giving power of attorney to confess judgment thereon was res judicata as to those questions). S. D.—*Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201. Wash.—*Newell v. Young*, 59 Wash. 286, 109 Pac. 801; *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119; *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955. Wis.—*Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029. But see *Thompson v. Thompson*, 73 Wis. 84, 40 N. W. 671, holding that the modification of a judgment after term is void, and is not res judicata.



new trial,<sup>86</sup> or to quash an execution,<sup>87</sup> or for leave to issue one,<sup>88</sup> and an order setting aside or confirming a sale,<sup>89</sup> bar further proceedings based upon the same grounds underlying the prior motions, though it is otherwise as to jurisdictional grounds.<sup>1</sup> On the other hand, it has been held, in pursuance of the same general rules, that a decision upon a motion for the appointment of a receiver,<sup>2</sup> or the decision upon a motion to vacate or discharge an attachment,<sup>3</sup> or to set off a judgment,<sup>4</sup> or of an application by stockholders to be made parties to a suit against their corporation,<sup>5</sup> does not bar a further application of the same nature in another suit.

c. *As Affected by Validity of Judgment.* — (I.) *In General.* — To operate as a bar to a subsequent suit based upon the same cause of action, a judgment must be a valid and subsisting one, rendered after the parties have had ample opportunity to be heard.<sup>6</sup> It must be

[a] **Erroneous denial of a motion to vacate a judgment will operate as a bar to any subsequent proceeding, either by motion or action for the same relief.** *Kelley v. Sakai*, 72 Wash. 364, 130 Pac. 503.

96. *Cal.*—*Collins v. Butler*, 14 Cal. 223. *Ga.*—*Obear v. Gray*, 73 Ga. 455. *R. I.*—*Curry v. Swett*, 13 R. I. 476. *Tex.*—*Metzger v. Wendler*, 35 Tex. 378.

97. *Ala.*—*Saint v. Ledyard*, 14 Ala. 244. *Cal.*—*Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54. *Conn.*—*Rogers v. Hendrick*, 85 Conn. 260, 82 Atl. 586. *Del.*—*Solomon v. Loper*, 4 Harr. 187. *Fla.*—*Thornton v. Eppes*, 6 Fla. 546. *Ga.*—*Kelly v. Strouse & Bros.*, 116 Ga. 872, 43 S. E. 280; *Pritchett v. Bartow County Comrs.*, 93 Ga. 736, 19 S. E. 896; *Girardey v. Bessman*, 77 Ga. 483; *Crutchfield v. State*, 24 Ga. 335. *Ill.*—*Frew v. Taylor*, 106 Ill. 159; *Andrews v. Scott*, 113 Ill. App. 581 (*affirmed* in 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215). *Ind.*—*Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Phillips v. Lewis*, 109 Ind. 62, 9 N. E. 395.

98. *Parker v. Wright*, 62 Ind. 398; *Reeves v. Plough*, 46 Ind. 350.

99. *Berkley v. Lamb*, 8 Neb. 392, 1 N. W. 320.

1. The denial of a motion to open a judgment, did not estop defendant from moving to set it aside on the ground that he had not been served with process of the action on which the judgment was founded. *Crim v. Crawford*, 47 Ga. 628.

2. *Anderson v. Powell*, 44 Iowa 20.

3. *Ia.*—*Cox v. Allen*, 91 Iowa 462, 59 N. W. 335. *Kan.*—*Bishop v. Smith*, 66 Kan. 621, 72 Pac. 220; *Miami Coun-*

*ty Nat. Bank v. Barkalow*, 53 Kan. 68, 35 Pac. 796; *Frazer v. Barry*, 4 Kan. App. 33, 45 Pac. 724. *Minn.*—*Bennett v. Denny*, 33 Minn. 530, 24 N. W. 193 (*affirmed* in 128 U. S. 489, 9 Sup. Ct. 134, 32 L. ed. 491). *Mo.*—*State v. Bierwirth*, 47 Mo. App. 551. *Neb.*—*Quigley v. McEwony*, 41 Neb. 73, 59 N. W. 767. *Okla.*—*Brunson v. Merrill*, 17 Okla. 44, 86 Pac. 431. *Ore.*—*But see White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

[a] Since a motion to quash a levy is not an appropriate method of trying questions of exemptions, the denial of such a motion does not bar a subsequent suit against the officer for levying on exempt property. *State v. Bierwirth*, 47 Mo. App. 551.

4. *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264.

5. *Tazewell v. Farmers' L. & T. Co.*, 12 Fed. 752. But see *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260, 48 N. W. 1124.

6. See the following: *U. S.*—*Straits of Dover S. S. Co. v. Munson*, 100 Fed. 1005, 41 C. C. A. 156; *Ramsey v. Herndon*, 1 McLean 450, 20 Fed. Cas. No. 11,546. *Conn.*—*Holbrook v. Brooks*, 33 Conn. 347. *Ga.*—*Chattanooga R., etc. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109. *Ill.*—*School Directors v. Newman*, 47 Ill. App. 364. *Kan.*—*Cackley v. Smith*, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311. *La.*—*Canachs v. Dugue*, 113 La. 261 36 So. 960; *Ferguson v. Chastant*, 35 La. Ann. 485. *Mass.*—*Hooker v. Hubbard*, 102 Mass. 239, 245; *Wells v. Dench*, 1 Mass. 232. *Mo.*—*Cody v. Vaughan*, 53 Mo. App. 169. *N. Y.*—*McLean v. Hugarin*, 13

susceptible of enforcement,<sup>7</sup> though it is not objectionable that the time within which it could be enforced has lapsed by reason of laches.<sup>8</sup> The judgment must be in form sufficiently specific and definite to show conclusively what was the cause of action merged therein.<sup>9</sup> But its operation as a bar is not affected by its payment, satisfaction or release,<sup>10</sup> or by the fact that by reason of the insufficiency of the amount involved,<sup>11</sup> or other peculiar circumstance,<sup>12</sup> the judgment is not appealable; nor is the scope of a judgment as a bar de-

Johns. 184; *Lawrence v. Houghton*, 5 Johns. 129. **N. C.**—*Ladd v. Byrd*, 113 N. C. 466, 18 S. E. 666; *Winslow & Cannon v. Stokes*, 48 N. C. 285, 67 Am. Dec. 242. **Ohio**.—*Moore v. Robinson*, 6 Ohio St. 302; *La Grange's Lessee v. Ward*, 11 Ohio 257; *Berry v. Greenfield*, Wright 348. **Ore.**—*Lovejoy v. Willamette Falls Elec. Co.*, 31 Ore. 181, 51 Pac. 197.

**7. Conn.**—*Pinney v. Barnes*, 17 Conn. 420. **Ia.**—*Kirkhart v. Roberts*, 123 Iowa 137, 98 N. W. 562. **Mass.** *Pond v. Makepeace*, 2 Metc. 114. **Mich.** *Wixom v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205. **R. I.**—*Watson Company v. Citizens' Concrete Co.*, 28 R. I. 472, 68 Atl. 310, 125 Am. St. Rep. 749; *Smith v. Borden*, 17 R. I. 220, 21 Atl. 351, 33 Am. St. Rep. 867, 11 L. R. A. 585. **S. C.**—*Sovereign Camp of Woodmen of the World v. Means*, 87 S. C. 127, 69 S. E. 85. **Tenn.**—*McNairy v. Nashville*, 2 Baxt. 251; *Kelley v. Mize*, 3 Sneed 59. **Tex.**—*Cook v. Burnley*, 45 Tex. 97; *Rankin v. Hooks* (Tex. Civ. App.), 81 S. W. 1005; *Powell v. Heckerman*, 6 Tex. Civ. App. 304, 25 S. W. 166. **Va.**—*Howison v. Weeden*, 77 Va. 704. **W. Va.**—*Lee v. Smith*, 54 W. Va. 89, 46 S. E. 352; *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; *Sayre's Admr. v. Harpold*, 33 W. Va. 553, 11 S. E. 16. **Wis.**—*Heath v. Frackleton*, 20 Wis. 320, 91 Am. Dec. 405; *Gale v. Best*, 20 Wis. 44. **Wyo.** *Price v. Bonfield*, 2 Wyo. 80. **Eng.** *Clanmorris v. Clanmorris*, 4 Ir. Ch. 420. But see *Jenks v. Howland*, 3 Gray (Mass.) 536; *Hamilton v. Fleming*, 26 Neb. 240, 41 N. W. 1002 (holding, upon statutory grounds, that the order of a justice of the peace for the sale of exempt property, under final judgment, is not conclusive upon the defendant in the action).

**8. Bazille v. Murray**, 40 Minn. 48, 41 N. W. 238.

**9. U. S.**—*Ramsey v. Herndon*, 1 McLean 450, 20 Fed. Cas. No. 11,546.

**Ill.**—*Walker v. Ogden*, 192 Ill. 314, 61 N. E. 403. **Ind.**—*Watson v. Lecklider*, 147 Ind. 395, 45 N. E. 72. **Ia.**—*Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa 211, 82 N. W. 464. **La.** *Minor's Heirs v. New Orleans*, 115 La. 301, 38 So. 999. **Md.**—*Streeks v. Dyer*, 39 Md. 424; *Gray v. Swan*, 1 Harr. & J. 142. **Mich.**—*Tucker v. Rohrback*, 13 Mich. 73. **Mo.**—*Weese v. Brown*, 28 Mo. App. 521. **Neb.**—*Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894. **N. Y.** *Shaw v. Broadbent*, 129 N. Y. 114, 29 N. E. 238; *Bowne v. Joy*, 9 Johns. 221; *Knapp v. Crane*, 14 App. Div. 120, 43 N. Y. Supp. 513. **Tenn.**—*Union & Planters' Bank v. Memphis*, 107 Tenn. 66, 64 S. W. 13. **Tex.**—*Cow Bayou Canal Co. v. Orange County* (Tex. Civ. App.), 158 S. W. 173. **W. Va.**—*Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

[a] A mere notation by the trial judge on his docket forms no part of the record of the case, and is not sufficient as a judgment to support the doctrine of *res judicata*. *Cow Bayou Canal Co. v. Orange County* (Tex. Civ. App.), 158 S. W. 173.

[b] But a judgment on the merits is a bar notwithstanding demurrable defects of the declaration. *Hughes v. Blake*, 1 Mason 515, 12 Fed. Cas. No. 6,845, *affirming* 6 Wheat. 453, 5 L. ed. 303.

Form and sufficiency of judgments generally, see *supra*, XI.

**10. Ind.**—*Ferris v. Udell*, 139 Ind. 579, 38 N. E. 180. **Me.**—*Fogg v. Sanborn*, 48 Me. 432. **Pa.**—*Hopkins v. West*, 83 Pa. 109.

But see *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43.

**11. U. S.**—*Johnson Co. v. Wharton*, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. ed. 429. **Del.**—*Green v. Clawson*, 5 Houst. 159. **D. C.**—*Perry v. Sweeny*, 11 App. Cas. 404.

**12. Jungnitsch v. Michigan Mal-**

pendent upon the reasoning of the court, except for interpretation of the decretal part of the judgment.<sup>13</sup>

An erroneous or irregular judgment is none the less conclusive upon the parties until set aside in a direct proceeding instituted for that purpose, when rendered by a court having jurisdiction of the subject-matter and the person.<sup>14</sup>

Leadbale Iron Co., 121 Mich. 460, 80 N. W. 215.

13. **U. S.**—*Abraham v. Casey*, 179 U. S. 209, 21 Sup. Ct. 88, 45 L. ed. 156. **Ga.**—*Muller v. Rhuman*, 62 Ga. 232; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351. **Ill.**—*Lusk v. Chicago*, 211 Ill. 183, 71 N. E. 878; *Richardson v. Aiken*, 84 Ill. 221; *Johnson v. Logan*, 68 Ill. 313. **Ind.**—*McCarty v. Kinsey*, 154 Ind. 447, 57 N. E. 108; *Joyce v. Whitney*, 57 Ind. 550; *Rhoades v. Dehoney*, 50 Ind. 468. **Ia.**—*Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 70 N. W. 187, 71 N. W. 433. **Kan.**—*Powell v. Geisendorff*, 23 Kan. 538. **Ky.**—*Reading v. Price*, 3 J. J. Marsh. 61, 19 Am. Dec. 162. **La.**—*Labauve v. Slack*, 31 La. Ann. 134; *Wamsley v. Robinson*, 28 La. Ann. 793. **Md.**—*Offutt's Admrs. v. Offutt*, 2 Harr. & G. 178. **Mass.**—*Bartlett v. Slater*, 182 Mass. 208, 65 N. E. 73. **Mich.**—*Wilson v. Van Buren County Farmers' Mut. Fire Ins. Co.*, 184 Mich. 530, 151 N. W. 752; *Shurte v. Fletcher*, 111 Mich. 84, 69 N. W. 233; *Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194; *Basom v. Taylor*, 39 Mich. 682; *Wixom v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205. **Minn.**—*Plummer v. Hutton*, 51 Minn. 181, 53 N. W. 460. **Miss.**—*Fort v. Battle*, 13 Smed. & M. 133. **Mo.**—*Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; *Horn v. Mississippi River, etc. R. Co.*, 88 Mo. App. 469; *Dailey v. Sharkey*, 29 Mo. App. 518. **Mont.**—*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517. **Neb.**—*Colby v. Parker*, 34 Neb. 510, 52 N. W. 693. **N. J.**—*Richman v. Baldwin*, 21 N. J. L. 395. **N. M.**—*Board of Trustees, etc Grant v. Board of Trustees Belen Land Grant*, 20 N. M. 145, 146 Pac. 959. **N. Y.**—*Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; *Neilley v. Neilley*, 89 N. Y. 352; *Kintz v. McNeal*, 1 Denio 436; *Blin v. Campbell*, 14 Johns. 432; *Quattrone v. Simon*, 82 Misc. 610, 144 N. Y. Supp. 1094; *Page v. Cohen*, 76 Misc. 567, 137 N. Y. Supp. 116; *Hancock v. Flynn*, 5 Silv. 122, 8 N. Y. Supp. 133; *Hoehstein v. James W. Hill Co.*, 153 N. Y. Supp. 899. **N. C.**—*Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **Ohio.**—*Oil Well Supply Co. v. Koen*, 64 Ohio St. 422, 60 N. E. 603. **Okla.**—*First State Bank v. Latimer*, 149 Pac. 1099. **Pa.**—*Hinds v. Willis*, 13 Serg. & R. 213; *Enterline v. Comrey*, 15 Pa. Co. Ct. 627. **R. I.**—*Westerly Prob. Ct. v. Potter*, 26 R. I. 202, 58 Atl. 661. **S. C.**—*Anderson v. Cave*, 49 S. C. 505, 27 S. E. 478. **Tenn.**—*McCadden v. Slausen*, 96 Tenn. 586, 36 S. W. 378; *Clark v. Stroud*, 1 Swan 274; *Johnston v. Ditty*, 7 Yerg. 85. **Tex.**—*Missouri Pac. R. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605; *Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117; *Vance v. Southern Kansas Ry. Co.* (Tex. Civ. App.), 173 S. W. 264. **Va.**—*Linn v. Carson's Admr.*, 32 Gratt. (73 Va.) 170. **Wash.**—*Reese v. Murnan*, 5 Wash. 373, 31 Pac. 1027. **Eng.**—*Reg. v. Hutchins*, 6 Q. B. D. 300, 45 J. P. 504, 50 L. J. M. C. 35, 44 L. T. Rep. N. S. 364, 29 Wkly. Rep. 724; *Briscoe v. Stephens*, 2 Bing. 213, 3 L. J. C. P. O. S. 257, 9 Moore 413, 27 Rev. Rep. 597, 9 E. C. L. 550, 130 Eng. Reprint 288; *Toronto R. Co. v. Toronto, A. C.* 809, 91 L. T. Rep. N. S. 541, 20 T. L. R. 774; *Atty.-Gen. v. Eriehie*, A. C. 518, 63 L. J. P. C. 6; 69 L. T. Rep. N. S. 505, 1 Repts. 440. **Can.**—*Jack v. Bonnell*, 35 N. Bruns. 323.
14. See the following: **U. S.**—*Milne v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. ed. 980; *United States v. Board of Auditors*, 28 Fed. 407; *Seat v. United States*, 18 Ct. Cl. 458; *Osborn v. United States*, 9 Ct. Cl. 153. **Ala.**—*Penny v. British, etc. Mortgage Co.*, 132 Ala. 357, 31 So. 96; *Tankersly v. Pettis*, 71 Ala. 179; *Hopkinson v. Shelton*, 37 Ala. 306; *Cole v. Conolly*, 16 Ala. 271. **Ark.**—*Janes v. Williams*, 31 Ark. 175. **Ind.**—*Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 869. **Kan.**—*Mills v. Pettigrew*, 45 Kan. 573, 26 Pac. 33. **Ky.**—*Reed v. Whitlow*, 19 Ky. L. Rep. 1538, 43 S. W. 686. **La.**—*Trescott v. Lewis*, 12 La. Ann. 197. **Mo.**—*Johnson v. Latta*, 84



A judgment which is void for want of jurisdiction, of either the subject-matter or the person of the defendant, does not merge the cause of action, and therefore cannot operate as a bar to a subsequent recovery upon the same cause of action.<sup>15</sup>

(II.) Effect of Fraud or Collusion. — The fact that a judgment was procured by fraud does not of itself defeat the operation of the rule that a judgment or decree of a court of competent jurisdiction is

Mo. 139. **Mont.**—Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592. **N. Y.**—Sherman v. Grinnell, 159 N. Y. 50, 53 N. E. 674; Monroe v. Monroe, 66 Hun 635, 21 N. Y. Supp. 655; Bush v. O'Brien, 47 App. Div. 581, 62 N. Y. Supp. 685; Dutton v. Smith, 10 App. Div. 566, 42 N. Y. Supp. 80, 4 N. Y. Ann. Cas. 25. **S. C.**—Rhoad v. Patrick, 37 S. C. 517, 16 S. E. 536.

*Contra.*—Rockwell v. Lake County Dist. Ct., 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265 (because no appeal or writ of error lies from the order); Carrio v. Tarwater, 103 Ind. 86, 2 N. E. 227.

*Compare.* Kansas City Southern R. Co. v. King, 74 Ark. 366, 85 S. W. 1131.

But see **U. S.**—Steers v. Daniel, 2 Flap. 310, 4 Fed. 587. **Fla.**—Sanford v. Cloud, 17 Fla. 532, holding that the failure of the court to award damages and that the decree cannot be enforced, is not a sufficient reply to a plea of *res judicata*. **Ind.**—Pressler v. Turner, 57 Ind. 56. **Ia.**—Iowa Union Tel. Co. v. Boylan, 48 N. W. 730; McCrillis v. Harrison County, 63 Iowa 592, 19 N. W. 679. **Kan.**—Santa Fe Bank v. Haskell County Bank, 51 Kan. 50, 32 Pac. 627. **Ky.**—Stum's Admr. v. Stum, 116 Ky. 534, 76 S. W. 500; Breckinridge v. Quertemus, 4 Dana 493; Wallace v. Usher, 4 Bibb 508; Holliday v. Field's Heirs, 24 Ky. L. Rep. 413, 68 S. W. 624; Scott v. Louisville Banking Co., 23 Ky. L. Rep. 123, 62 S. W. 713; Davis v. Young, 5 J. J. Marsh. 165. **La.**—Heroman v. Louisiana Deaf, etc. Inst., 34 La. Ann. 805; Fluker v. Herbert, 27 La. Ann. 284. **Md.**—Thomas v. Malster, 14 Md. 382; Beall v. Pearre, 12 Md. 550. **Mich.**—Carr v. Brick, 113 Mich. 664, 71 N. W. 1103; Town v. Smith, 14 Mich. 348. **Miss.**—Perry v. Lewis, 49 Miss. 443; Wall v. Wall, 28 Miss. 409. **Mo.**—Barnett v. Smart, 158 Mo. 167, 59 S. W. 235; Asbury v. Odell, 83 Mo. 264; Jones v. Silver, 97 Mo. App. 231, 70 S. W. 1109; Eyermann v. Scollay, 16 Mo. App. 498. **Nev.**—Gulling v. Washoe

County Bank, 24 Nev. 477, 56 Pac. 580. **N. J.**—Manley v. Mickle, 53 N. J. Eq. 155, 32 Atl. 210, *affirming* 52 N. J. Eq. 712, 29 Atl. 434. **N. Y.**—Griffin v. Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Colburn v. Woodworth, 31 Barb. 381; Hecht v. Mothner, 4 Misc. 536, 24 N. Y. Supp. 826; Spoor v. Cornell, 12 Civ. Proc. 319; Matter of Phyfe, 5 Leg. Obs. 331. **Ore.**—Crabill v. Crabill, 22 Ore. 588, 30 Pac. 320. **Pa.**—Bolton v. Hey, 168 Pa. 418, 31 Atl. 1097; Kase v. Best, 15 Pa. 101, 53 Am. Dec. 573; Emery v. Nelson, 9 Serg. & R. 12; Dunlevy's Estate, 10 Pa. Co. Ct. 454. **P. I.**—Bowler v. Estate of Alvarez, 23 Phil. Isl. 561. **Tex.**—Cow Bayou Canal Co. v. Orange County (Tex. Civ. App.), 158 S. W. 173; Holland v. Western Bank & Trust Co., 56 Tex. Civ. App. 324, 118 S. W. 218, 119 S. W. 694. **Vt.**—Ferguson v. Sheffield, 52 Vt. 77; Dixon v. Sinclear, 4 Vt. 354, 24 Am. Dec. 610. **Wash.**—Lloyd v. Lloyd, 34 Wash. 84, 74 Pac. 1061. **W. Va.**—Davis v. Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849. As to the right to collaterally attack a merely erroneous or irregular judgment see *supra*, XVII, A.

15. See the following: **U. S.**—Brown v. Fletcher, 182 Fed. 963, 105 C. C. A. 425; Missouri v. Tiedermann, 3 McCrary 399, 10 Fed. 20; Semple v. British Columbia Bank, 5 Sawy. 394, 21 Fed. Cas. No. 12,660. **Ark.**—Kansas City, P. & G. Ry. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; McLain v. Taylor, 9 Ark. 358. **Conn.**—Miles v. Strong, 68 Conn. 273, 36 Atl. 55; Blakeslee v. Murphy, 44 Conn. 188. **Ga.**—Griffin v. Collins, 122 Ga. 102, 49 S. E. 827; Yan v. Baldwin, 76 Ga. 769. **La.**—Fulton's Heirs v. Welsh, 7 Mart. N. S. 256; Legendre v. McDonough, 6 Mart. N. S. 513; Harrison v. Godbold, McGloin 178. **N. Y.**—Denike v. Denike, 167 N. Y. 585, 60 N. E. 1110; Griffin v. Long Island R. Co., 102 N. Y. 449, 7 N. E. 735. **Wash.**—Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

usually a bar to a further recovery upon the same cause of action,<sup>16</sup> though this is not true where the fraud renders the judgment void or the proceedings in the subsequent suit amount to a direct attack upon the judgment for fraud.<sup>17</sup> And where because of collusion, it is permissible to attack the judgment in the subsequent proceedings, it is not a conclusive bar.<sup>18</sup>

d. *Judgment Must Be on Merits.*—(I.) *General Rule Stated.*—In order that a judgment in one suit or action may operate as a bar to another suit, it must not only be rendered in a proceeding between the same parties or their privies,<sup>19</sup> upon an identical cause of action,<sup>20</sup> but it must be a determination on the merits of the controversy.<sup>21</sup>

As to right to collaterally attack a void judgment, see *supra*, XVII, A.

16. See the following: **U. S.**—Peninsular Iron Co. v. Eells, 68 Fed. 24, 15 C. C. A. 189. **Del.**—Solomon v. Loper, 4 Harr. 187. **La.**—Gusman v. Hearsey, 28 La. Ann. 709, 26 Am. Rep. 104. **Nev.**—Gulling v. Washoe County Bank, 24 Nev. 477, 56 Pac. 580. **N. Y.**—Whitaker & Moore v. Merrill, 28 Barb. 526; Verplanck v. Van Buren, 11 Hun 328; Ross v. Wood, 8 Hun 185 (*affirmed* in 70 N. Y. 8). **Tenn.**—Kelley v. Mize, 3 Sneed 305. **Can.**—Johnston v. Davider, 10 Ont. L. R. 724, 6 Ont. W. R. 549, 4 Ont. W. R. 453.

17. See the following: **Colo.**—Hallack v. Loft, 19 Colo. 74, 34 Pac. 568, holding that by statute equitable as well as legal relief may be had in the same action, and that a reply alleging to be fraudulent a judgment pleaded in bar, is sufficient. **Ill.**—Mount v. Scholes, 120 Ill. 394, 11 N. E. 401. **Ky.**—Campbell v. Sherley, 25 Ky. L. Rep. 904, 76 S. W. 540, holding that where a subsequent suit between the same parties directly attacks the judgment in a former suit for fraud practiced in obtaining it the former judgment is not a bar to such suit.

See also *Hanser v. W. R. Damsel & Co.*, 149 N. C. 51, 62 S. E. 776, holding that where in an action in the superior court for personal injury defendant pleaded in bar a judgment of a justice of the peace, and plaintiff alleged that such judgment was obtained by fraud, and all the parties were before the court, the judgment was assailed in a direct proceeding, requiring the court to submit the issue to a jury.

18. **U. S.**—Andes v. Ely, 158 U. S. 212, 15 Sup. Ct. 954, 39 L. ed. 996. **Ala.**—Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98. **Ky.**

**B. F. Johnson Pub. Co. v. Commonwealth**, 30 Ky. L. Rep. 148, 97 S. W. 749; *May v. Vaughn*, 28 Ky. L. Rep. 1088, 91 S. W. 273. **N. Y.**—*Kerr v. Blodgett*, 25 How. Pr. 303, 48 N. Y. 62, 16 Abb. Pr. 137; *Gray v. Richmond Bicycle Co.*, 40 App. Div. 506, 58 N. Y. Supp. 182. **S. C.**—*Kerr v. Webb*, 9 Rich. Eq. 369. **Tex.**—*De Garcia v. San Antonio, etc. R. Co.* (Tex. Civ. App.), 77 S. W. 275. **Eng.**—*Girdlestone v. Brighton Aquarium Co.*, 4 Ex. D. 107, 48 L. J. Exch. 373, 27 Wkly. Rep. 523.

As to the right to collaterally attack a judgment for collusion, see *supra*, XVII, A.

19. *Necessity for identity of parties*, see *supra*, XVII, B, 2, f.

20. *Necessity for identity of causes*, see *supra*, XVII, B, 2, e.

21. See the following: **U. S.**—*Gould v. Evansville, etc. R. Co.*, 91 U. S. 526, 23 L. ed. 416; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425; *Robinson v. American Car, etc. Co.*, 135 Fed. 693, 68 C. C. A. 331 (*affirming* 132 Fed. 165); *Billing v. Gilmer*, 62 Fed. 661, 10 C. C. A. 579. **Ala.**—*Moody v. Atkinson*, 165 Ala. 299, 51 So. 621; *Perkins v. Moore*, 16 Ala. 9; *Pace v. Dossey*, 1 Stew. 20. **Ariz.**—*Reilly v. Perkins*, 6 Ariz. 188, 56 Pac. 734. **Ark.**—*Cooper v. McCoy*, 116 Ark. 501, 173 S. W. 412; *Cannon v. State*, 17 Ark. 365; *Moss v. Ashbrooks*, 12 Ark. 369. **Cal.**—*Nevills v. Sherridge*, 146 Cal. 277, 79 Pac. 972; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 Pac. 277; *Waterman v. Morrill*, 72 Cal. 48, 13 Pac. 52; *Gray v. Noon*, 66 Cal. 186, 4 Pac. 1191. **Conn.**—*Allis v. Hall*, 76 Conn. 322, 56 Atl. 637. **Fla.**—*Armstrong v. Manatee County*, 49 Fla. 273, 37 So. 938. **Ga.**—*Callaway v. Irvin*,

(II.) What Constitutes. — (A.) IN GENERAL. — A decision as to the rights of the parties, based upon the showing thereof as set forth in

- 123 Ga. 344, 51 S. E. 477. **Ill.**—Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815; Lundy v. Mason, 174 Ill. 505, 51 N. E. 611; Vanlandingham v. Ryan, 17 Ill. 25; Carson v. Clark, 2 Ill. 113, 25 Am. Dec. 79; Greenwald v. Ruby, 178 Ill. App. 415; Siegel v. Fish, 129 Ill. App. 319; MacDowell v. Jones, 116 Ill. App. 13. **Ia.**—Randolph v. Cottage Hospital, 103 N. W. 157; The Telegraph v. Lee, 125 Iowa 17, 98 N. W. 364; Corwin v. Wallace, 17 Iowa 374; Griffin v. Seymour, 15 Iowa 30, 83 Am. Dec. 396; Delany v. Reade, 4 Iowa 292. **Kan.**—Myers v. Coonratt, 28 Kan. 211. **Ky.**—Birch v. Funk, 2 Mete. 544; Thomas v. Hite, 5 B. Mon. 590; Kendal v. Talbot, 1 A. K. Marsh. 321; Cecil's Trustee v. Robertson & Bro., 32 Ky. L. Rep. 357, 105 S. W. 926. **Me.**—Damren v. American Light, etc. Co., 95 Me. 278, 49 Atl. 1092. **Md.**—Johnson v. Stockham, 89 Md. 368, 43 Atl. 943; Field v. Malster, 88 Md. 691, 41 Atl. 1087. **Mass.** Hutchins v. Nickerson, 212 Mass. 118, 98 N. E. 791; Corbett v. Craven, 196 Mass. 319, 82 N. E. 37; Stone v. Addy, 168 Mass. 26, 46 N. E. 431; Foster v. The Richard Busted, 100 Mass. 409, 1 Am. Rep. 125; Morton v. Sweetser, 12 Allen 134. **Mich.**—Steel v. Bliss, 135 N. W. 931; Tucker v. Rohrback, 13 Mich. 73. **Minn.**—Terryll v. Bailly, 27 Minn. 304, 7 N. W. 261; Gerrish & Brewster v. Pratt, 6 Minn. 53. **Miss.** Sudberry v. Meridian Fertilizer Factory, 106 Miss. 744, 64 So. 723; Johnson v. White, 13 Smed. & M. 584; Agnew v. McElroy, 10 Smed. & M. 552, 43 Am. Dec. 772. **Mo.**—Johnson v. United Rys. Co., 243 Mo. 278, 147 S. W. 1077; Couch v. Harp, 201 Mo. 457, 100 S. W. 9; Barnett v. Smart, 158 Mo. 167, 59 S. W. 235; Verhein v. Schultz, 57 Mo. 326; O'Malley v. Musick, 191 Mo. App. 405, 177 S. W. 719; Swing v. Karges Furniture Co., 150 Mo. App. 574, 131 S. W. 153; State ex inf. Rosenberger v. Town of Bellflower, 129 Mo. App. 138, 108 S. W. 117; Carp v. National Assurance Co. (Mo. App.), 99 S. W. 523. **Mont.**—Pullen v. City of Butte, 45 Mont. 46, 121 Pac. 878; Peterson v. City of Butte, 44 Mont. 129, 120 Pac. 231. **Neb.**—Burkholder v. Hallicheek, 4 Neb. (Unof.) 655, 95 N. W. 860; Walsh v. Walsh, 1 Neb. (Unof.) 719, 95 N. W. 1024. **N. C.**—Brackett v. Hoitt, 20 N. H. 257. **N. J.**—Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449. **N. Y.** Stowell v. Chamberlain, 60 N. Y. 272; Reynolds v. Garner, 66 Barb. 310, 319; Vaughn v. O'Brien, 39 How. P. 515; Miller v. McGuckin, 15 Abb. N. C. 204; Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286; People v. Barrett, 1 Johns. 66; Van Wagner v. Tilly, 146 App. Div. 920, 131 N. Y. Supp. 1148; Ladew v. Hart, 8 App. Div. 150, 40 N. Y. Supp. 509; Steel v. Holtzer, 144 N. Y. Supp. 643. **N. C.**—Brick v. Atlantic Coast Line R. Co., 145 N. C. 203, 58 S. E. 1073; Coleman v. Howell, 131 N. C. 125, 42 S. E. 555. **Ohio.**—Porter v. Wagner, 36 Ohio St. 471; Cramer v. Moore, 36 Ohio St. 347; Mahaffey v. Rogers, 10 Ohio Cir. Ct. 24, 6 Ohio Cir. Dec. 88, affirmed, 56 Ohio St. 767, 49 N. E. 1112. **Ore.**—Spence v. Hull, 75 Ore. 267, 146 Pac. 95. **Pa.**—Buchanan v. Banks, 203 Pa. 599, 53 Atl. 500; Haws v. Tiernan, 53 Pa. 192; Heikes v. Com., 26 Pa. 513; Carmony v. Hooper, 5 Pa. 305; Levison v. Blumenthal, 25 Pa. Super. 55. **R. I.**—Sayles v. Tibbitts, 5 R. I. 79. **S. C.**—Roberts v. Jones, 71 S. C. 404, 51 S. E. 240; Duke v. Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675. **Tenn.**—Harris & Cole Bros. v. Columbia Water, etc. Co., 114 Tenn. 328, 85 S. W. 897. **Tex.**—Philipowski v. Spencer, 63 Tex. 604; Cook v. Burnley, 45 Tex. 97; Houston v. Musgrove, 35 Tex. 594; Weathered v. Mays, 4 Tex. 387; Foster v. Wells, 4 Tex. 101; Kruegel v. Daniels, 50 Tex. Civ. App. 215, 109 S. W. 1108. **Vt.** Derosia v. Ferland, 86 Vt. 15, 83 Atl. 271; Dunklee v. Goodenough, 63 Vt. 459, 21 Atl. 494; Swift v. Hamblin, Brayt. 189. **Wash.**—Bartelt v. Seehorn, 25 Wash. 261, 65 Pac. 185. **W. Va.** Iguano Land & Min. Co. v. Jones, 65 W. Va. 59, 64 S. E. 640. **Wis.**—State ex rel. Faber v. Hinkel, 131 Wis. 103, 111 N. W. 217. **Eng.**—Brandlyn v. Ord, 1 Atk. 571, 26 Eng. Reprint 359; Massam v. Thornley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. N. S. 851, 28 Wkly. Rep. 966; Reg. v. May, 5 Q. B. D. 382, 49 L. J. M. C. 67, 42 L. T. N. S. 772, 28 Wkly. Rep. 918; Jenkins v. Merthyr Tydvil Urban Dist. Council,



the pleadings and evidence, or either, constitutes a judgment on the merits;<sup>22</sup> whether the controversy at issue be heard upon evidence introduced and decided by the verdict or findings thereon,<sup>23</sup> or decided upon the pleadings presenting the same, after a waiver of the right to such trial or hearing, by agreement of the parties, or the mistake or failure of either.<sup>24</sup> The particular form or name given the judgment is not of vital importance, provided it imparts a determination of the case on its merits;<sup>25</sup> but if the case is terminated by a ruling on a mere technical plea or objection, or one subsidiary or preliminary to a determination of the real issues, it is not a judgment on the merits.<sup>26</sup>

(B.) JUDGMENTS BY CONFESSION. — While a judgment by confession, entered without the knowledge or consent of the creditor in whose favor it is given, does not operate as a merger of the demand or an estoppel to further proceedings thereon, unless ratified by such cred-

80 L. T. N. S. 600. **Can.**—Chisholm v. Morse, 11 U. C. C. P. 589; McPherson v. Lusher, 3 U. C. Q. B. (O. S.) 602; Baker v. Booth, 2 U. C. Q. B. (O. S.) 373; Leger v. Fournier, 14 Can. Sup. Ct. 314; Creelman v. Stewart, 28 Nova Scotia 185.

See also 7 ENCY. OF EV. 789.

22. **U. S.**—Fourniquet v. Perkins, 7 How. 160, 12 L. ed. 650; Spencer v. Watkins, 169 Fed. 379, 94 C. C. A. 659; *In re* Reynolds, 133 Fed. 585. **Cal.**—People v. Skidmore, 27 Cal. 287. **Conn.**—Johnson v. Sanford, 13 Conn. 461. **Ia.**—Trescott v. Barnes, 51 Iowa 409, 1 N. W. 660. **Md.**—Fledderman v. Fledderman, 112 Md. 266, 76 Atl. 85; Williams v. Annapolis, 6 Har. & J. 529. **Mo.**—*In re* Boutelle, 124 Mo. App. 450, 101 S. W. 1096. **Mont.**—Dunseth v. Butte Electric Ry. Co., 41 Mont. 14, 108 Pac. 567. **N. Y.**—Young v. Overacker, 2 Johns. 191; Clark v. Scovill, 133 App. Div. 821, 118 N. Y. Supp. 235; Ruegamer v. Cieslinskie, 104 App. Div. 135, 93 N. Y. Supp. 599. **N. C.**—Davie v. Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71. **Pa.**—Besecher v. Flory, 176 Pa. 23, 34 Atl. 926; Brazier v. Banning, 20 Pa. 345. **R. I.**—H. F. Watson Co. v. Citizens' Concrete Co., 28 R. I. 472, 68 Atl. 310, 125 Am. St. Rep. 749. **Tenn.**—Parkes v. Clift, 9 Lea 524. **Tex.**—Horton v. Hamilton, 20 Tex. 606. **Utah.**—Smalley v. Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311. **Va.**—Supervisors v. Catlett's Exrs., 86 Va. 158, 9 S. E. 999. **Wash.**—McKim v. Porter, 60 Wash. 270, 110 Pac. 1073, 114 Pac. 456.

23. **Ill.**—Zimmerman v. Zimmerman, 15 Ill. 84. **Ind.**—Landers v. George, 49

Ind. 309. **Mont.**—Dunseth v. Butte Electric Ry. Co., 41 Mont. 14, 108 Pac. 567. **N. Y.**—Hamilton Bldg. Assn. v. Reynolds, 5 Duer 671. **R. I.**—H. F. Watson Co. v. Citizens' Concrete Co., 28 R. I. 472, 68 Atl. 310, 125 Am. St. Rep. 749. **Utah.**—Smalley v. Rio Grande Western R. Co., 34 Utah 423, 98 Pac. 311.

24. **U. S.**—Worrell v. Kemmerer, 192 Fed. 911, 114 C. C. A. 351; *In re* Reynolds, 133 Fed. 585. **Cal.**—People v. Skidmore, 27 Cal. 287. **Fla.**—State v. Padgett, 19 Fla. 518. **Md.**—Fledderman v. Fledderman, 112 Md. 266, 76 Atl. 85. **Me.**—Buck v. Collins, 69 Me. 445. **N. Y.**—Ruegamer v. Cieslinskie, 104 App. Div. 135, 93 N. Y. Supp. 599. **Ore.**—Glenn v. Savage, 14 Ore. 567, 13 Pac. 442.

25. **Ga.**—Gallaway v. Irvin, 123 Ga. 344, 51 S. E. 477. **La.**—Wells v. Hunter, 5 Mart. (N. S.) 119. **Me.**—Buck v. Spofford, 35 Me. 526. **Mass.**—Roach v. Roach, 190 Mass. 253, 76 N. E. 651. **N. Y.**—Elwell v. McQueen, 10 Wend. 519. **Vt.**—Dixon v. Sinclair, 4 Vt. 354, 24 Am. Dec. 610.

26. **Ga.**—Callaway v. Irvin, 123 Ga. 344, 51 S. E. 477. **Ia.**—Procter v. Cole, 104 Iowa 373, 3 N. E. 106, 4 N. E. 303. **La.**—Surget v. Newman, 43 La. Ann. 873, 9 So. 561; Wells v. Hunter, 5 Mart. N. S. 119. **Mo.**—Couch v. Harp, 201 Mo. 457, 100 S. W. 9; Carp v. National Assurance Co. (Mo. App.), 99 S. W. 523. **N. Y.**—Mertz v. Press, 99 App. Div. 443, 91 N. Y. Supp. 264 (*affirmed*, 184 N. Y. 530, 76 N. E. 1100); German Exch. Bank v. Kroder, 14 Misc. 179, 35 N. Y. Supp. 380. **Tenn.**—Witcher v. Oldham, 4 Suedd 220.

itor;<sup>27</sup> ordinarily a cause of action is as effectually merged in a judgment entered upon confession as in the case of any other judgment, and therefore such judgment is as conclusive as any other as a bar to another action on the same cause of action.<sup>28</sup> But a confessed judgment does not bar an action on a counter-claim not presented in the first suit.<sup>29</sup>

**By One of Several Joint Obligors.**—In the absence of a statute otherwise providing, in an action against two or more joint obligors, a confession of judgment by one of them and the acceptance thereof by the plaintiff is a bar to a suit against the others by the same plaintiff.<sup>30</sup> A judgment confessed against a firm by one of its members, without authority from the others, bars another action against the firm on the same cause, though it binds only the member by whom it was confessed.<sup>31</sup>

(C.) **JUDGMENTS BY DEFAULT.**—Where the court has jurisdiction of the subject-matter and the parties, a judgment by default operates as a bar to a further suit between the same parties upon the same cause

27. *Haggerty v. Juday*, 58 Ind. 154.

28. See the following: **U. S.**—Whitaker v. Bramson, 2 Paine 209, 29 Fed. Cas. No. 17,526. **Ark.**—Jeffries v. Morgan, 1 Ark. 169. **Del.**—Solomon v. Loper, 4 Harr. 187. **Ill.**—Hall v. Jones, 32 Ill. 38; Lagerquist v. Williams, 74 Ill. App. 17. **Ind.**—Chapin v. McLaren, 105 Ind. 563, 5 N. E. 688; Hopper v. Lucas, 86 Ind. 43; Mavity v. Eastridge, 67 Ind. 211; Kennard v. Carter, 64 Ind. 31. **Ia.**—Twogood v. Pence, 22 Iowa 543. **Mich.**—Town v. Smith, 14 Mich. 348. **N. J.**—Dean v. Thatcher, 32 N. J. L. 470. **N. Y.**—Davies v. New York, 93 N. Y. 250, 4 Civ. Proc. 290; Kirby v. Fitzgerald, 31 N. Y. 417; Neusbaum v. Keim, 24 N. Y. 325; Stone v. Williams, 40 Barb. 322. **N. C.**—State v. Mangum, 28 N. C. 369. **Pa.**—Orr v. Mercer County Mut. F. Ins. Co., 114 Pa. 387, 6 Atl. 696; Weikel v. Long, 55 Pa. 238; Wistar v. McManes, 54 Pa. 318, 93 Am. Dec. 700; Davenport v. Wright, 51 Pa. 292; Work v. Prall, 26 Pa. Super. 104; Dixon v. Miller, 20 Pa. Co. Ct. 335; Dwyer v. Wright, 14 Pa. Co. Ct. 406. **S. D.**—Culhane v. Etting, 35 S. D. 544, 153 N. W. 301; Howard v. Huron, 6 S. D. 180, 60 N. W. 803. **Tenn.**—Goff v. Dabbs, 4 Baxt. 300. **Vt.**—Barnes v. Lapham, 28 Vt. 307. **Eng.**—Newington v. Levy, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. N. S. 70, 18 Wkly. Rep. 1198 (*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. N. S. 595, 19 Wkly. Rep. 473).

See also 7 ENCY. OF EV. 793.

[a] **Judgment confessed by a third person**, for a debt due from defendant, is not a merger or payment of the debt, however. *Wolf v. Wyeth*, 11 Serg. & R. (Pa.) 149.

29. *Kauff v. Messner*, 4 Brewst. (Pa.) 98.

As to merger or bar of counter-claims, see *supra*, XVII, B, 2, h, (II).

30. See the following: **D. C.**—Hutchinson v. Brown, 8 Mackey 136; Harris v. Leonardt, 2 App. Cas. 318. **Fla.**—Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293. **Ind.**—Maghee v. Collins, 27 Ind. 83; Shimer v. Isaac, Smith 377. **Ia.**—Sherman v. Christy, 17 Iowa 322. **Mich.**—Beals v. Clinton County Cir. Judge, 91 Mich. 146, 51 N. W. 885. **N. Y.**—Harbeck v. Pupin, 123 N. Y. 115, 25 N. E. 311; Heckemann v. Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655; Candee v. Smith, 93 N. Y. 349; Robinson v. Marks, 19 Hun 325; Kantrowitz v. Kulla, 20 Abb. N. C. 321, 13 Civ. Proc. 74. **Pa.**—Wallace v. Fairman, 4 Watts 378; Beltzhoover v. Com., 1 Watts 126; Miller v. Reed, 3 Grant's Cas. 51; Welsh v. Hirst, 1 Phila. 50. **Va.**—Cahoon v. McCulloch, 92 Va. 177, 23 S. E. 225; Beazley's Admr. v. Sims' Admr., 81 Va. 644. **W. Va.**—Snyder v. Snyder, 9 W. Va. 415.

31. **Ia.**—North v. Mudge & Co., 13 Iowa 496, 81 Am. Dec. 441. **Ohio.**—Sloo v. Lea, 18 Ohio 279. **Eng.**—Goucher v. Clayton, 11 Jur. N. S. 107, 34 L. J. Ch. 239, 13 Wkly. Rep. 336.

of action the same as any other judgment upon the merits.<sup>32</sup> But the judgment rendered must be final and not merely an interlocutory one,<sup>33</sup> and if the proceeding is in personam, a judgment rendered without jurisdiction of the defendant would not bind him in a subsequent proceeding.<sup>34</sup> The default of one joint defendant, will not operate to merge the cause of action as to another.<sup>35</sup>

As to defenses, a default judgment concludes and bars further use of all such which might have been pleaded in the action,<sup>36</sup> except such

32. See the following: **U. S.**—Philadelphia Third Nat. Bank *v.* Atlantic City, 130 Fed. 751, 65 C. C. A. 177; Grotton Bridge, etc. Co. *v.* Clark Pressed Brick Co., 126 Fed. 552 (*affirmed*, 136 Fed. 27, 68 C. C. A. 577); Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; Garner *v.* Second Nat. Bank, 89 Fed. 636; Derby *v.* Jacques, 1 Cliff. 425, 7 Fed. Cas. No. 3,817. **Cal.**—Morenhout *v.* Higuera, 32 Cal. 289; Kittridge *v.* Stevens, 16 Cal. 381; Stearns *v.* Aguirre, 6 Cal. 176. **D. C.**—Horine *v.* Wende, 29 App. Cas. 415. **Ga.**—Harbig *v.* Freund & Co., 69 Ga. 180. **Ind.**—Lawrence *v.* Beecher, 116 Ind. 312, 19 N. E. 143; Irwin *v.* Helgenberg, 21 Ind. 106; Patterson *v.* State, 12 Ind. 86. **Ind. Ter.**—Tootle *v.* McClellan, 7 Ind. Ter. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941. **Kan.**—Johnson *v.* Jones, 58 Kan. 745, 51 Pac. 224. **Ky.**—Ligon *v.* Triplett, 12 B. Mon. 283. **La.**—Searey *v.* Creditors, 46 La. Ann. 376, 14 So. 910; Waddell *v.* Judson, 12 La. Ann. 13; Gilman *v.* Horseley, 5 Mart. N. S. 661. **Me.**—White *v.* Savage, 94 Me. 138, 47 Atl. 138. **Mass.**—Reid *v.* Holmes, 127 Mass. 326; Gaskill *v.* Dudley, 6 Mete. 546, 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor *v.* Walter, 17 Mass. 237; Thatcher *v.* Gammon, 12 Mass. 268. **Minn.**—Northern Trust Co. *v.* Crystal Lake Cemetery Assn., 67 Minn. 131, 69 N. W. 708; Davison *v.* Harmon, 65 Minn. 402, 67 N. W. 1015; Doyle *v.* Hallam, 21 Minn. 515. **Miss.**—Sudberry *v.* Meridian Fertilizer Factory, 106 Miss. 744, 64 So. 723. **Mo.**—St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54. **N. Y.**—Argall *v.* Pitts, 73 N. Y. 239; Jarvis *v.* Driggs, 69 N. Y. 143; Brown *v.* New York, 66 N. Y. 385; O'Hanlon *v.* Scott, 89 Hun 44, 35 N. Y. Supp. 31, 69 N. Y. St. 227; Brown *v.* Epstein, 166 App. Div. 611, 151 N. Y. Supp. 527; Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. 653, 51 N. Y. Supp. 133. **N. C.**—Brown *v.* McKee,

108 N. C. 387, 13 S. E. 8. **Ohio.**—McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93. **Okl.**—Crawford *v.* Noble County, 8 Okla. 450, 58 Pac. 616. **S. D.**—Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803. **Tex.**—Ellis *v.* Mills, 28 Tex. 584. **Vt.**—Evarfs *v.* Gove, 10 Vt. 161. **Wis.**—Van Valkenburgh *v.* Milwaukee, 43 Wis. 574. **Eng.**—Leonard *v.* Simpson, 2 Bing. N. Cas. 176, 1 Hodges 251, 4 L. J. C. P. 302, 2 Scott 335, 29 E. C. L. 489, 132 Eng. Reprint 69. **Can.**—Cochrane *v.* The Hamilton Provident Loan Society, 15 Ont. 128.

[a] A default judgment, agreed on before suit, which is not on the merits, and so small as to raise suspicion of collusion, will not bar other interested parties from suing. *Sudberry v. Meridian Fertilizer Factory*, 106 Miss. 744, 64 So. 723.

33. **U. S.**—Whitaker *v.* Bramson, 2 Paine 209, 29 Fed. Cas. No. 17,526. **Conn.**—Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239. **N. C.**—Gerrard *v.* Dollar, 49 N. C. 175, 67 Am. Dec. 271.

**Necessity for finality of determination**, see *infra*, XVII, B, 3, e.

34. *Clark v. Hammett*, 27 Fed. 339; *Smith v. Curtiss*, 38 Mich. 393.

35. **Fla.**—Netso & Bohlen *v.* Foss & Schneider, 21 Fla. 143. **Ind.**—Johnson *v.* Vutrick, 14 Ind. 216. **Ia.**—McPhail & Co. *v.* Hyatt, 29 Iowa 137. **Can.**—Edborg *v.* Imperial Timber and Trading Company, Limited, and The Royal Bank of Canada, 19 B. C. 514.

36. **Ala.**—McCalley *v.* Wilburn & Co., 77 Ala. 549. **Mass.**—Fuller *v.* Shattuck, 13 Gray 70, 74 Am. Dec. 622. **N. Y.**—Binck *v.* Wood, 43 Barb. 315. **S. D.**—Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

[a] But see *State ex rel. Tracy v. Cooley*, 65 Minn. 406, 68 N. W. 66, 58 Minn. 514, 60 N. W. 338 (holding that a former judgment is conclusive of the question actually determined, and not what might have been); *Howlett v.*



affirmative defenses as might serve as the basis of an independent action, and the facts supporting which are not determined in the action,<sup>37</sup> or which apply to two or more causes of action.<sup>38</sup>

(D.) JUDGMENTS BY CONSENT.—Consent judgments or decrees pro confesso usually operate to bar further proceedings based upon the same cause of action or defense as fully as judgments rendered in contested suits or proceedings.<sup>39</sup> This is true even where the pleadings would not authorize entry of judgment in a contested case,<sup>40</sup> and where by compromise the judgment is entered for a less sum than the whole claim.<sup>41</sup> But an interest acquired subsequent to the entry of a

**Tarte**, 10 C. B. N. S. 813, 31 L. J. C. P. 146, 9 Wkly. Rep. 868, 100 E. C. L. 813, 142 Eng. Reprint 673.

37. **Ill.**—*Litch v. Clinch*, 35 Ill. App. 654, *affirmed*, 136 Ill. 410, 26 N. E. 579. **Mass.**—*Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Hanham v. Sherman*, 114 Mass. 19; *Rowe v. Smith*, 16 Mass. 306; *Fowler v. Shearer*, 7 Mass. 14; *Bodurtha v. Phelon*, 13 Gray 413. **Minn.**—*State ex rel. Tracy v. Cooley*, 58 Minn. 514, 60 N. W. 338. **Mo.**—*Wright v. Salisbury*, 46 Mo. 26. **N. H.**—*Bascom v. Manning*, 52 N. H. 132. **N. Y.**—*Smith v. Weeks*, 26 Barb. 463. **Vt.**—*Kezar v. Elkins*, 52 Vt. 119. **Wis.**—*Woodward v. Hill*, 6 Wis. 143. **Can.**—*Johnson v. Henry*, 21 Man. 347.

See *supra*, XVII, B, 2, h, (I).

38. Where the same defense applies to two causes of action, a default in one is not conclusive as to the other. *Hughes v. Alexander*, 5 Duer (N. Y.) 488.

39. See the following: **U. S.**—*Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066 (*reversing* 140 Cal. 690, 74 Pac. 284); *Derby v. Jacques*, 1 Cliff. 425, 7 Fed. Cas. No. 3,817. **Ala.**—*Adler v. Van Kirk Land & Construction Co.*, 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133; *Bank of Mobile v. Mobile*, etc. R. Co., 69 Ala. 305. **Cal.**—*McCreery v. Fuller*, 63 Cal. 30, *affirmed*, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. ed. 408. **Ga.**—*Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430. **Ill.**—*Dintleman v. Gilbert*, 140 Ill. 597, 30 N. E. 766; *Illinois Cent. R. Co. v. Allen*, 39 Ill. 205. **Ind.**—*Louisville*, etc. R. Co. v. Terrell, 12 Ind. App. 328, 39 N. E. 295. **Ky.**—*Com. v. Churchill*, 131 Ky. 251, 115 S. W. 189. **La.**—*Dunn v. Pipes*, 20 La. Ann. 276; *Greenwood v. New Orleans*, 12 La. Ann. 426; *Girod's Legatees v. Pargoud*, 11 La. Ann. 329. **Mass.**—*Chamberlain v. Preble*, 11 Allen

370; *Hanscom v. Hewes*, 12 Gray 334; *Sargent v. Fitzpatrick*, 4 Gray 511. **Mich.**—*Raye v. Hammond's Est.*, 100 Mich. 140, 58 N. W. 654. **Miss.**—*Blackburn v. Senatobia Educational Assn.*, 74 Miss. 852, 21 So. 798. **N. J.**—*Gifford v. Thorn*, 9 N. J. Eq. 702. **N. Y.**—*Brown v. Sprague*, 5 Denio 545; *French v. Shotwell*, 5 Johns. Ch. 555. *Compare*, *Metropolitan El. Ry. Co. v. Manhattan Ry. Co.*, 11 Daly 373, 14 Abb. N. C. 103. **N. C.**—*Donnelly v. Wilcox*, 113 N. C. 408, 18 S. E. 339. **Ohio.**—*Weaver v. Canahan*, 37 Ohio St. 363. **Pa.**—*Powell v. Shank*, 3 Watts 235. **S. C.**—*Weathersbee v. Weathersbee*, 82 S. C. 4, 62 S. E. 838. **Tenn.**—*Fry v. Taylor*, 1 Head 594; *Wynne v. Spiers*, 7 Humph. 394. **Tex.**—*Patrick v. Roach*, 21 Tex. 251; *Robbins v. Hubbard* (Tex. Civ. App.), 108 S. W. 773. **W. Va.**—*Lockwood v. Holliday*, 16 W. Va. 651. **Eng.** *In re South American*, etc. Co., 1 Ch. 37, 71 L. T. N. S. 594, 12 Reports 1, 43 Wkly. Rep. 131; *Serrao v. Noel*, 15 Q. B. D. 549; *Parker v. Simpson*, 18 Wkly. Rep. 204.

[a] But see *Lockett v. Canadian & A. Mortg. & T. Co.*, 47 La. Ann. 1259, 17 So. 836, holding that a judgment rendered in a suit between a mortgage creditor of the husband and his wife, based upon a compromise of her rights and an abandonment of her title without consideration will not support a plea of *res judicata* or *estoppel* in a subsequent suit on the same subject-matter.

[b] Where the judgment agreed on is not on the merits, it will not bind interested parties who had no knowledge of the agreement, however. *Sudberry v. Meridian Fertilizer Factory*, 106 Miss. 744, 64 So. 723.

40. *Fletcher v. Holmes*, 25 Ind. 458.

41. *Davis v. New York*, 93 N. Y. 250, 4 Civ. Proc. 290; *Duncan v. Ainslie*,

consent judgment is not merged in or concluded thereby,<sup>42</sup> and after such a judgment is vacated by consent of the parties it ceases to operate as a bar.<sup>43</sup> A court of equity may decline to recognize a consent judgment which it finds to be erroneous and contrary to the right of the matter.<sup>44</sup>

(E.) JUDGMENTS ON PLEAS IN ABATEMENT AND BAR.—A judgment sustaining a plea in abatement does not go to the merits of the controversy, and therefore does not operate as a bar to another action based on the same cause.<sup>45</sup> Where matter in bar is pleaded in connection with matter in abatement, however, and a general finding of the jury or court in favor of defendant is had, without limitation or restriction, the judgment rendered thereon will be presumed to have been rendered on the merits, and will operate as a bar to another suit on the same cause,<sup>46</sup> unless it is clearly shown by the record that the judgment was based solely on the plea in abatement.<sup>47</sup>

26 Barb. (N. Y.) 199; *Freundenheim v. Raduziner*, 15 Misc. 124, 36 N. Y. Supp. 815 (*reversing* 12 Misc. [N. Y.] 654, *affirming* 10 Misc. 500, 31 Supp. 194); *Powers v. McBride*, 1 N. Y. City Ct. 481; *Blydenstein v. Haseltine*, 140 Pa. 120, 21 Atl. 306; *Stedman v. Poterie*, 139 Pa. 100, 21 Atl. 219; *Dodds v. Blackstock*, 1 Pittsb. (Pa.) 46.

42. *Peyton v. Enos*, 16 La. Ann. 135.

43. *Minor's Heirs v. New Orleans*, 115 La. 301, 38 So. 999.

44. See the following: **U. S.**—*Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. ed. 1005; *Texas & P. Ry. Co. v. Southern Pac. R. Co.*, 137 U. S. 48, 11 Sup. Ct. 10, 34 L. ed. 614; *Comrs. of Taxing Dist. v. Laague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. ed. 780; *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256; *Bean v. Smith*, 2 Mason 252, 2 Fed. Cas. No. 1,174. **N. C.**—*Lamb v. Gatlin*, 22 N. C. 37. **S. C.**—*Edgerton v. Muse*, 2 Hill Eq. 51. **Eng.**—*O'Connell v. MacNamara*, 3 Dr. & War. 411, 2 C. & L. 266, note; *Hamilton v. Houghton*, 2 Bligh. 169, 4 Eng. Reprint 290.

[a] If the former decree is not equitable and just, the court may refuse to carry it into execution. *Wadhams v. Gay*, 73 Ill. 415.

As to equitable relief from consent judgments, see generally *supra*, XV, D, 2.

45. **U. S.**—*Clark v. Young*, 1 Cranch 181, 2 L. ed. 74; *Graham v. Spencer*, 14 Fed. 603. **Ia.**—*Atkins v. Anderson*, 63 Iowa 739, 19 N. W. 323; *Griffin v. Seymour*, 15 Iowa 30, 83 Am. Dec. 396. See also *Tyler v. Bowen*,

124 Iowa 452, 100 N. W. 505. **Ky.** *Birch v. Funk*, 2 Metc. 544. **Mo.** *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441 (*overruling* 79 Mo. 524); *Caruthers v. Williams*, 53 Mo. App. 181. **Tenn.**—*Stuber v. Louisville & N. R. Co.*, 113 Tenn. 305, 87 S. W. 411. **Vt.** *Jericho v. Underhill*, 67 Vt. 85, 30 Atl. 690, 48 Am. St. Rep. 804; *Dunklee v. Goodenough*, 65 Vt. 257, 26 Atl. 988; *Hilliker v. Loop*, 5 Vt. 116, 26 Am. Dec. 286.

[a] Judgment by consent on a plea in abatement rendered in favor of defendant, without answer or issue on the merits, is no bar to another action. *Jordan v. Siefert*, 126 Mass. 25.

46. **U. S.**—*Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Sawy. 634, 9 Fed. Cas. No. 4,989. **Ia.**—*Reeves & Co. v. Lamm Bros.*, 135 Iowa 201, 112 N. W. 642; *Garretson v. Ferrall*, 92 Iowa 728, 61 N. W. 251. **Mont.** *Peterson v. City of Butte*, 44 Mont. 129, 120 Pac. 231. **N. Y.**—*Sheldon v. Edwards*, 35 N. Y. 279; *Maldonado & Co. v. Yglesias*, 162 App. Div. 1, 147 N. Y. Supp. 2; *Gundlin v. Hamburg-American Packet Co.*, 31 Abb. N. C. 437, 8 Misc. 291, 28 N. Y. Supp. 572.

47. *Harrison v. Hartford Fire Ins. Co.*, 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709; *Garretson v. Ferrall*, 92 Iowa 728, 61 N. W. 251; *Barnett v. Marrs*, 62 Ore. 598, 125 Pac. 838.

[a] A code provision that, "where matter in abatement is pleaded in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar," is liberally con-

(F.) JUDGMENT ON DEMURRER.—(1.) *In General*.<sup>48</sup>—A judgment rendered upon the sustaining or overruling of a demurrer may or may not be a judgment upon the merits, depending upon whether the demurrer required a determination of the substance of the claim, right, or title involved in the action or was based upon some defect in the method by which such claim, right, or title was presented in the pleadings. If the substance or merits of the matter at issue was passed upon, the judgment is as conclusive a bar to the relitigation of such matter as any other judgment on the merits, both as to the grounds of action or defense actually relied upon and those which might have been but were not presented.<sup>49</sup> Thus where a general demurrer goes to the

strued, and if it appears that there was no trial on the merits, it is treated as in abatement. *Harrison v. Hartford Fire Ins. Co.*, 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709.

48. Effect of dismissal after ruling on demurrer but before entry of judgment, see *infra*, XVII, B, 3, d, (II), (G), (1).

49. See the following: **U. S.**—*Northwestern Pacific Ry. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. ed. 738; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411; *Gould v. Evansville, etc. R. Co.*, 91 U. S. 526, 23 L. ed. 416; *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 120 C. C. A. 354 (*affirming* 199 Fed. 853); *Old Dominion Copper Min. & Smelt. Co. v. Lewisohn*, 202 Fed. 178, 120 C. C. A. 392; *Spencer v. Watkins*, 169 Fed. 379, 94 C. C. A. 659; *Dennison Mfg. Co. v. Scharf Tag, etc. Co.*, 121 Fed. 313, 57 C. C. A. 9; *Billing v. Gilmer*, 60 Fed. 332, 8 C. C. A. 645; *Bowdoin College v. Merritt*, 63 Fed. 213; *Edwards v. Bates*, 55 Fed. 436; *United States v. Leverich*, 9 Fed. 481; *Brown v. District of Columbia*, 19 Ct. Cl. 445. **Ala.**—*Perkins v. Moore*, 16 Ala. 17. **Ariz.**—*Wilson v. Lowry*, 5 Ariz. 335, 52 Pac. 777. **Ark.**—*Barrentine v. Henry Wrape Co.*, 113 Ark. 196, 167 S. W. 1115; *Luttrell v. Reynolds*, 63 Ark. 254, 37 S. W. 1051. **Cal.**—*Peterson v. Weissbein*, 75 Cal. 174, 16 Pac. 769; *Terry v. Hammonds*, 47 Cal. 32; *Robinson v. Howard*, 5 Cal. 428. **Colo.**—*Schroers v. Fisk*, 10 Colo. 599, 16 Pac. 285. **Conn.**—*Brennan v. Berlin Iron-Bridge Co.*, 71 Conn. 479, 42 Atl. 625. **Fla.**—*Prall v. Prall*, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. **Ga.**—*Gunn v. James*, 120 Ga. 482, 48 S. E. 148; *Fain v. Hughes*, 108 Ga. 537, 33 S. E. 1012; *Sharman v. Town Council of Thomaston*, 67 Ga. 246;

*Kimbro & Morgan v. The Virginia, etc. Ry. Co.*, 56 Ga. 185; *Gray v. Gray*, 34 Ga. 499; *Jordan v. Faircloth*, 34 Ga. 47; *Carey v. Giles*, 10 Ga. 9. **Ill.**—*Nispel v. Laparle*, 74 Ill. 306; *Vanlandingham v. Ryan*, 17 Ill. 25. **Ind.**—*Nickless v. Pearson*, 126 Ind. 477, 26 N. E. 478; *Wilson v. Ray*, 24 Ind. 156; *Estep v. Larsh*, 21 Ind. 190; *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342. **Ia.**—*Wapello State Sav. Bank v. Colton*, 143 Iowa 359, 122 N. W. 149; *Dillavou v. Dillavou*, 142 Iowa 291, 120 N. W. 628; *Felt v. Turnure*, 48 Iowa 397; *Keater & Skinner v. Hock*, 16 Iowa 23; *Coffin v. Knott*, 2 G. Gr. 582, 52 Am. Dec. 537. **Kan.**—*Hyatt v. Challis*, 59 Kan. 422, 53 Pac. 467; *McLaughlin v. Doane*, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210. **Ky.**—*McDowell v. Chesapeake, etc. R. Co.*, 90 Ky. 346, 14 S. W. 338, 12 Ky. L. Rep. 331; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Francis v. Wood*, 81 Ky. 16. **La.**—*City Bank v. Walden*, 1 La. Ann. 46. **Minn.**—*Carlin v. Brackett*, 38 Minn. 307, 37 N. W. 342. **Miss.**—*Shaw v. Laurel Oil & Fertilizer Co.*, 92 Miss. 340, 45 So. 878; *Straw v. Illinois Cent. R. Co.*, 73 Miss. 446, 18 So. 847. **Mo.**—*Johnson v. United Rys. Co. of St. Louis*, 243 Mo. 278, 147 S. W. 1077; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; *Freeman & Snowden v. Camden*, 7 Mo. 298; *Coleman v. Dalton*, 71 Mo. App. 14. **Neb.**—*Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821, 139 N. W. 666; *Parratte v. Dryden*, 73 Neb. 291, 102 N. W. 610. **N. J.**—*Van Horn v. Van Horn*, 53 N. J. L. 514, 21 Atl. 1069; *Hale v. Lawrence*, 22 N. J. L. 72. **N. M.**—*Lockhart v. Leeds*, 12 N. M. 156, 76 Pac. 312. **N. Y.**—*Rogers v. Niagara Ins. Co. of New York*, 2 Hall 599; *Bouchaud v. Dias*, 3 Denio 238.



right of the plaintiff to recover on his alleged cause of action when fully and sufficiently pleaded, and not to the method by which he has pleaded the same, it is a judgment on the merits, and is, therefore, a bar to a subsequent suit on the same cause of action.<sup>50</sup> The rule applies to a judgment upon overruling a demurrer to a defense as well as to one upon the sustaining of a demurrer to a complaint on the merits of the case.<sup>51</sup> But a judgment upon a demurrer which raises

**N. C.**—Willoughby v. Stephens, 132 N. C. 254, 43 S. E. 636; Johnson v. Pate, 90 N. C. 334. **Okla.**—Pettis v. McLain, 21 Okla. 521, 98 Pac. 927. **Tenn.** Logan & Maphet Lumber Co. v. Cross, 126 Tenn. 695, 151 S. W. 51; Parkes v. Clift, 9 Lea 524. **Tex.**—Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Bomar v. Parker, 68 Tex. 435, 4 S. W. 599; Parker v. Spencer, 61 Tex. 155; Dixon v. Zadek, 59 Tex. 529; Cameron v. Hinton (Tex. Civ. App.), 48 S. W. 24 (affirmed, 92 Tex. 492, 49 S. W. 1047); Cameron v. Hinton (Tex. Civ. App.), 48 S. W. 616; Kansas & G. S. L. R. Co. v. Patrons' Co-operative Assn., 2 Wills. Civ. Cas., §502. **Vt.**—St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt. 294, 7 Atl. 277. **Wash.**—Brechlin v. Night Hawk Mining Co., 49 Wash. 198, 94 Pac. 928, 126 Am. St. Rep. 863; State v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373. **W. Va.**—South Branch R. Co. v. Long, 26 W. Va. 692; Corrothers v. Sargent, 20 W. Va. 351. **Wis.**—Ellis v. Northern Pac. R. Co., 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44. **Can.**—McKean v. Jones, 19 Can. Sup. Ct. 489.

[a] See also Horine v. Wende, 29 App. Cas. (D. C.) 415, 425, wherein the court said: "To determine, then, what has been adjudicated in the former litigation on which the claim of estoppel is founded, resort is had to the material facts alleged with certainty in the declaration or bill on which the plaintiff's right to recover is founded; and a general judgment thereon is conclusive of such facts. Hence a final judgment by default or upon demurrer is as efficacious as one rendered after contest between the parties."

[b] If, in an action on a judgment, a demurrer is sustained on the ground that the court had no jurisdiction to render the judgment sued on, and no appeal is taken therefrom, it is a bar to another action on the same judgment. McLaughlin v. Doane, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210.

[c] The judgment of a state court, sustaining a demurrer to a bill to enforce enforcement of a state statute, is as conclusive as one rendered on proof, and is a bar to a subsequent action in a federal court to have the statute declared invalid upon any ground which might have been litigated in the prior suit. Sperry & Hutchinson Co. v. Blue, 202 Fed. 82, 120 C. C. A. 354. See generally *infra*, XVIII, C.

[d] A judgment erroneously sustaining a demurrer to a petition on the ground that it was barred by the statute of limitations, will bar another action on the same cause, even though the petition shows that the suit is not barred by the statute of limitations. Price v. Bonfield, 2 Wyo. 80.

50. **U. S.**—Old Dominion Cop. Min. & Smelt. Co. v. Lewisohn, 202 Fed. 178, 120 C. C. A. 392; Sperry & Hutchinson Co. v. Blue, 202 Fed. 82, 120 C. C. A. 354; Oregonian R. Co. v. Oregon R. Co., 27 Fed. 277. **Ala.**—Perkins v. Moore, 16 Ala. 17. **Colo.**—Smith v. Cowell, 41 Colo. 178, 92 Pac. 20. **Ga.**—Dodson v. Southern R. Co., 137 Ga. 583, 73 S. E. 834. But compare, Satterfield v. Spier, 114 Ga. 127, 39 S. E. 930. **Ill.**—Farmers' & Mechanics' Life Assn. v. Caine, 224 Ill. 599, 79 N. E. 956. **Kan.**—Brown v. Kirkbride, 19 Kan. 588. **Minn.**—Carlin v. Brackett, 38 Minn. 307, 37 N. W. 342. **Miss.**—Weathersby v. Pearl River Lumb. Co., 88 Miss. 535, 41 So. 65. **N. C.**—Marsh v. Atlantic Coast Line R. Co., 151 N. C. 160, 65 S. E. 911. **Okla.**—City of El Reno v. Cleveland-Trinidad Pav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Tex.**—Bornar v. Parker, 68 Tex. 435, 4 S. W. 599.

[a] The dismissal of a defective declaration upon general demurrer is a bar to a new action in which the declaration is amended so as to state the case more completely. Dodson v. Southern R. Co., 137 Ga. 583, 73 S. E. 834.

51. **U. S.**—Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31

the question of the insufficiency of the plaintiff's pleading, whether due to the omission of a material averment,<sup>52</sup> or to other errors or defects of a technical or formal nature, will not operate as a bar to another suit on the same cause of action,<sup>53</sup> where the omission is supplied

L. ed. 411. **Ind.**—Wilson v. Ray, 24 Ind. 156. **Can.**—Stinson v. Branigan, 10 U. C. Q. B. 210.

52. **U. S.**—Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. ed. 774; Gould v. Evansville, etc. R. Co., 91 U. S. 526, 23 L. ed. 416; Miller v. Margerie, 170 Fed. 710, 96 C. C. A. 30; City of North Muskegon v. Clark, 62 Fed. 694, 10 C. C. A. 591; United States v. Dwight Mfg. Co., 213 Fed. 522; Gilmer v. Morris, 46 Fed. 333; Woodland v. Newhall's Admr., 31 Fed. 434; Spicer v. United States, 5 Ct. Cl. 34. **Ariz.**—Wilson v. Lowry, 5 Ariz. 333, 52 Pac. 777. **Ark.**—Barrentine v. Henry Wrape Co., 113 Ark. 196, 167 S. W. 1115; State v. Roth, 47 Ark. 222, 1 S. W. 98; Pritchard v. Woodruff, 36 Ark. 196. **Cal.**—Los Angeles v. Mellus, 59 Cal. 444; Terry v. Hammonds, 47 Cal. 32; Melvin v. Melvin, 8 Cal. App. 684, 97 Pac. 696. **Colo.**—Gallup v. Lichter, 4 Colo. App. 296, 35 Pac. 985. **Fla.**—Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512. **Haw.**—Areher v. Naka, 19 Hawaii 547. **Idaho.**—Lockett v. Lindsay, 1 Idaho 324. **Ill.**—Parker v. Smith, 6 Ill. 411. **Ind.**—Griffin v. Wallace, 66 Ind. 410. **Ia.**—Wapello State Sav. Bank v. Colton, 143 Iowa 359, 122 N. W. 149. **Compare**, Hanson v. Hammell, 107 Iowa 171, 77 N. W. 839. **Kan.**—McClung v. Hohl, 10 Kan. App. 93, 61 Pac. 507. **Ky.**—Pope v. Pope, 148 Ky. 30, 146 S. W. 410; Fairbanks, Morse & Co. v. S. W. Heltsley, 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441, 10 Ky. L. Rep. 140; Alexander v. De Kernel, 81 Ky. 345; Kendal v. Talbot, 1 A. K. Marsh. 321; Potter v. Benge, 24 Ky. L. Rep. 24, 67 S. W. 1005; Covington v. Taffee, 24 Ky. L. Rep. 373, 68 S. W. 629. **Mass.**—Wilbur v. Gilmore, 21 Pick. 250. **Mich.**—Rodman v. Michigan Cent. R. Co., 59 Mich. 395, 26 N. W. 651. **Minn.**—Swanson v. Great Northern Ry. Co., 73 Minn. 103, 75 N. W. 1033; Gerrish v. Pratt, 6 Minn. 53. **Miss.**—Alabama & V. Ry.

Co. v. McCarren, 75 Miss. 687, 23 So. 423, 876. **Mo.**—Wells v. Moore, 49 Mo. 229. **Mont.**—Glass v. Basin & Bay State Min. Co., 35 Mont. 567, 90 Pac. 753. **Neb.**—Welsh v. Sarpy County, 87 Neb. 562, 127 N. W. 868; State v. Cornell, 52 Neb. 25, 71 N. W. 961; Garneau v. Moore, 39 Neb. 791, 58 N. W. 438. **N. Y.**—Stowell v. Chamberlain, 3 Thomp. & C. 374, affirmed, 60 N. Y. 272. **Ohio.**—Moore v. Dunn, 41 Ohio St. 62; Rafferty v. Toledo Traction Co., 25 Ohio Cir. Ct. 411. **Ore.**—Burnett v. Marrs, 62 Ore. 598, 125 Pac. 838; O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **S. C.**—Duke v. Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Whaley v. Lawton, 57 S. C. 198, 35 S. E. 741. **S. D.**—Connor v. Corson, 13 S. D. 550, 83 N. W. 588. **Tenn.**—Grotenkemper v. Carver, 4 Lea 375. **Wis.**—Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829.

[a] Judgment on a third demurrer to a second amended petition will not bar another action on a sufficient petition. Bennett v. Southern Bank, 61 Mo. App. 297.

53. **U. S.**—Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. ed. 1055; Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. ed. 114; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Gilman v. Rives, 10 Pet. 298, 9 L. ed. 432; Miller v. Margerie, 170 Fed. 710, 96 C. C. A. 30; United States v. Coos Bay Wagon Road Co., 110 Fed. 864; Gilmer v. Morris, 30 Fed. 476; Spicer v. United States, 5 Ct. Cl. 34. **Ala.**—Crumpton & Walker v. State, 43 Ala. 31. **Cal.**—Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164. **Colo.**—Smith v. Cowell, 41 Colo. 178, 92 Pac. 20. **Conn.**—Chapin v. Curtis, 23 Conn. 388. **Dak.**—Pearson v. Post, 2 Dak. 220, 9 N. W. 684, affirmed in 108 U. S. 418, 2 Sup. Ct. 799, 27 L. ed. 774. **Fla.**—Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512. **Ga.**—Papworth v. Fitzgerald, 111 Ga. 54, 36 S. E. 311. See Butler v. Tifton, T. & G. R. Co., 121 Ga. 817, 49 S. E. 763, holding that a judgment dismissing a suit on demurrer which raises the objection that an amendment to the petition "sets up a new and distinct cause of action," will

or the defect is cured in the complaint of the second suit.<sup>54</sup> Though it has been held that a demurrer to a complaint or bill on the ground that it does not state facts sufficient to constitute a cause of action or show equities, goes to the merits of the case, and a judgment sustaining it on such ground will bar another action or suit on the cause of action attempted to be set forth.<sup>55</sup>

When a demurrer to a complaint raises several objections against the plaintiff's right of recovery, some upon technical or formal grounds and others upon the merits, it will be presumed that the court only passed upon those of a technical nature which prevented a determina-

not bar an action on the new matter set up by such amendment, which could not have been determined in the first suit. **Ill.**—Walker v. Doane, 131 Ill. 27, 22 N. E. 1006. **Ind.**—Terre Haute & I. R. Co. v. State *ex rel.* Ketcham, 159 Ind. 438, 65 N. E. 401; Campbell v. Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; Sherry v. Foreman, 6 Blackf. 56; Stevens v. Dunbar, 1 Blackf. 56. **Ia.**—Wapello State Sav. Bank v. Colton, 143 Iowa 359, 122 N. W. 149; Griffin v. Seymour, 15 Iowa 30, 83 Am. Dec. 396. **Kan.**—King v. Molloyhan, 61 Kan. 683, 60 Pac. 731. **Ky.**—Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; Birch v. Funk, 2 Mete. 544; Weisenborn v. Evans, 30 Ky. L. Rep. 781, 99 S. W. 629. **La.**—Culverhouse v. Marx, 38 La. Ann. 667; Levy v. Wise, 15 La. Ann. 38. **Mass.**—Calder v. Haynes, 7 Allen 387. **Miss.**—Alabama, etc. R. Co. v. McCarren, 75 Miss. 687, 23 So. 423, 876. **Mo.**—Swing v. Karges Furniture Co., 150 Mo. App. 574, 131 S. W. 153. **Neb.**—Trainor v. Maverick Loan & Trust Co., 92 Neb. 821, 139 N. W. 666. **N. Y.**—Hoag v. Greenwich, 133 N. Y. 152, 30 N. E. 842; Porter v. Kingsbury, 77 N. Y. 164; Stowell v. Chamberlain, 60 N. Y. 272; Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286. **Ohio.**—Lore's Lessee v. Truman, 10 Ohio St. 45. **Okla.**—Goldsborough v. Hewitt, 23 Okla. 66, 99 Pac. 907. **Ore.**—Burnett v. Marrs, 62 Ore. 598, 125 Pac. 838; O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **Pa.**—Detrick v. Sharrar, 95 Pa. 521; Foster v. Com., 8 Watts & S. 77; Birch v. Andrews' Mill Co., 52 Pa. Super. 193; Bischoff v. Du Bree & Loper, 27 Pa. Co. Ct. 190, 18 Montg. Co. Rep. 20. **Tex.**—Nickelson v. Ingram, 24 Tex. 630; Jackson v. Finlay (Tex. Civ. App.), 40 S. W. 427, 1032; Gray v. Edwards, 3 Tex. Civ. App. 361, 22 S. W.

537. **W. Va.**—Poole v. Dilworth, 26 W. Va. 583. **Wis.**—Docter v. Furch, 76 Wis. 153, 44 N. W. 648, 826; Watson v. Appleton, 62 Wis. 267, 22 N. W. 475. **Wyo.**—Bonnifield v. Price, 1 Wyo. 223, holding that the sustaining of a demurrer to a petition because it showed on its face that the cause of action was barred by the statute of limitations is not a bar to another petition cured of this defect. **Can.**—Baker v. Booth, 2 U. C. Q. B. (O. S.) 373.

54. **U. S.**—Gilmer v. Morris, 30 Fed. 476. **Ariz.**—Wilson v. Lowry, 5 Ariz. 335, 52 Pac. 777. **Cal.**—Terry v. Hammonds, 47 Cal. 32. **Fla.**—Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 So. 512. **Ind.**—Griffin v. Wallace, 66 Ind. 410. **Ky.**—Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; Birch v. Funk, 2 Mete. 544. **La.**—Culverhouse v. Marx, 38 La. Ann. 667. **Mass.**—Calder v. Haynes, 7 Allen 387. **Miss.**—Alabama & V. Ry. Co. v. McCarren, 75 Miss. 687, 23 So. 423, 876. **Mo.**—Bennett v. Southern Bank, 61 Mo. App. 297. **Neb.**—State v. Cornell, 52 Neb. 25, 71 N. W. 961. **N. Y.**—Stowell v. Chamberlain, 60 N. Y. 272; Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286. **Ore.**—O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **Pa.**—Detrick v. Sharrar, 95 Pa. 521. **Tex.**—Nickelson v. Ingram, 24 Tex. 630. **Wis.**—Docter v. Furch, 76 Wis. 153, 44 N. W. 648, 826; Watson v. Appleton, 62 Wis. 267, 22 N. W. 475.

55. **U. S.**—Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. ed. 491; Lindsley v. Union Silver Star Min. Co., 115 Fed. 46, 52 C. C. A. 640; Haug v. Great Northern R. Co., 102 Fed. 74, 42 C. C. A. 167; Messinger v. New England Mut. L. Ins. Co., 59 Fed. 416. See Bissell v. Spring Val. Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411. **Ariz.**—Gould v. Soto, 14 Ariz. 558, 133



tion of the controversy on the merits, where the record shows that the demurrer was sustained without stating upon what grounds.<sup>56</sup> But where the record shows that the demurrer was sustained upon all issues presented by it, the judgment constitutes a complete estoppel.<sup>57</sup>

A trial court is not bound by an interlocutory order overruling a general demurrer to a complaint, and may change its ruling when convinced that it was erroneous; and such order, being interlocutory only, does not operate as an estoppel.<sup>58</sup> And a decision overruling a demurrer to a defense does not bar the plaintiff from controverting or avoiding the effect thereof.<sup>59</sup> It has been held, however, that an order overruling a demurrer to a complaint, to which no exception is taken, conclusively determines the fact that a cause of action existed as stated by such complaint.<sup>60</sup>

(2.) *Demurrer to Evidence.* — A judgment on a demurrer to the evidence, in favor of the demurrant, operates as a bar to a subsequent action at law or suit in chancery on the same cause of action.<sup>61</sup>

(G.) JUDGMENTS ON DISMISSAL OR DISCONTINUANCE. — (1.) *In General.*<sup>62</sup> A judgment entered upon the dismissal of a declaration or complaint in an action at law on some ground whereby the merits of the cause of action are neither considered or determined does not bar a subsequent suit on the same cause of action.<sup>63</sup> Thus where an action is

Pac. 410. Cal.—Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Los Angeles v. Mellus, 58 Cal. 16. Conn.—Brennan v. Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625. Haw.—Archer v. Naka, 19 Hawaii 547. Ill.—Vanlandingham v. Ryan, 17 Ill. 25. Ind.—Porter v. Fraleigh, 19 Ind. App. 562, 49 N. E. 863. Ia.—Lamb v. McConkey, 76 Iowa 47, 40 N. W. 77. La.—Baker v. Frellsen, 32 La. Ann. 822, 828. Miss. Weathersby v. Pearl River Lumb. Co., 88 Miss. 535, 41 So. 65. S. C.—Means v. McPhail, 90 S. C. 329, 71 S. E. 1009. Tenn.—Logan & Maphet Lumb. Co. v. Cross, 126 Tenn. 695, 151 S. W. 51. Wash.—Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107.

56. U. S.—Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411. Ariz.—Motes v. Gila Valley, Globe & N. Ry. Co., 11 Ariz. 39, 89 Pac. 410. Fla.—Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. Ia.—Griffin v. Seymour, 15 Iowa 30, 83 Am. Dec. 396. Va.—Chrisman's Admx. v. Harman, 29 Gratt. (70 Va.) 494, 26 Am. Rep. 387.

57. Merrill v. Board of Comrs., 7 Kan. App. 717, 52 Pac. 109; People v. Stephens, 51 How. Pr. (N. Y.) 235, affirmed, 71 N. Y. 527.

58. Ariz.—Reilly v. Perkins, 6 Ariz. 188, 56 Pac. 734. Cal.—Lawrence v.

Ballou, 37 Cal. 518. Neb.—Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469. N. Y.—McCullough v. Pence, 85 Hun 271, 32 N. Y. Supp. 936.

See the title "Res Judicata."

Necessity that judgment be final, see generally *infra*, XVII, B, 3, e.

Effect of dismissal after demurrer sustained, see *infra*, XVII, B, 3, d, (II), (G), (I).

59. Probate Court v. Potter, 26 R. I. 202, 58 Atl. 661, holding that a decision overruling a demurrer to a plea of release may not after an appeal therefrom, be set up as an adjudication of the fact of release, so as to bar a replication of fraud in the release.

60. Sims v. Georgia Ry. & Elec. Co., 123 Ga. 643, 51 S. E. 573; Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290. See also Logan & Maphet Lumb. Co. v. Cross, 126 Tenn. 695, 151 S. W. 51, demurrer to bill in equity.

61. Hunt v. Terril's Heirs, 7 J. J. Marsh. (Ky.) 67.

As to demurrer to evidence see generally the title "Demurrer to Evidence."

62. Effect of judgment on demurrer, see *supra*, XVII, B, 3, d, (II), (F), (1).

63. See the following: U. S.—Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 37

dismissed on motion of the plaintiff, or by him voluntarily discontinued without a determination on the merits, it will not operate as a bar to another suit on the same cause of action;<sup>134</sup> this is true where

- (*affirmed*, 143 U. S. 203, 12 Sup. Ct. 417, 36 L. ed. 125); *Hukill v. Maysville, etc. R. Co.*, 72 Fed. 745. **Ala.**—*McLaughlin v. Beyer*, 181 Ala. 427, 61 So. 62 (dismissal for failure to answer interrogatories); *Burgess v. American Mortg. Co.*, 119 Ala. 669, 24 So. 727. **Ark.**—*Smith v. Pinnell*, 107 Ark. 185, 154 S. W. 497. **Cal.**—*Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916. **Colo.**—*Charles v. People's Ins. Co.*, 3 Colo. 419; *Fairbanks v. Kent*, 16 Colo. App. 35, 63 Pac. 707. **Ga.**—*Lewis v. Lewis*, 132 Ga. 348, 63 S. E. 1114; *Herndon v. Black*, 97 Ga. 327, 22 S. E. 924; *Rudolph v. Underwood*, 88 Ga. 664, 16 S. E. 55. **Ill.**—*McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Gerber v. Gerber*, 155 Ill. 219, 40 N. E. 581; *Durham v. Stubbings*, 111 Ill. App. 10; *Mobile & O. R. Co. v. Healy*, 100 Ill. App. 586; *Jones v. Hunter*, 32 Ill. App. 445. **Ind.**—*Crews v. Cleghorn*, 13 Ind. 438; *McWhorter v. Norris*, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21. **Ky.**—*Sanson v. Connolly*, 141 Ky. 120, 132 S. W. 159; *Standard Lumb. Co. v. Coldwell*, 118 S. W. 999; *City of Covington v. Chesapeake & O. R. Co.*, 112 S. W. 862; *Hibler v. Shipp*, 78 Ky. 64. **La.**—*Bourg v. Gerding*, 33 La. Ann. 1369; *Fisk v. Parker*, 14 La. Ann. 491. **Me.**—*Tuck v. Moses*, 58 Me. 461. **Minn.**—*Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N. W. 930, 1136; *Andrews v. School District*, 35 Minn. 70, 27 N. W. 303; *Craver v. Christian*, 34 Minn. 397, 26 N. W. 8. **Mo.**—*Murphy v. Creath*, 26 Mo. App. 581. **Mont.**—*Dahler v. Steele*, 1 Mont. 206. **Neb.**—*Maywood Bank v. McAllister*, 56 Neb. 188, 76 N. W. 552; *Philpott v. Brown*, 16 Neb. 387, 20 N. W. 288. **N. Y.**—*Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937; *People v. Kingston*, 101 N. Y. 82, 4 N. E. 348; *Wheeler v. Ruckman*, 51 N. Y. 391; *Dexter v. Clark*, 35 Barb. 271; *Coit v. Beard*, 33 Barb. 357, 12 Abb. Pr. 462, 22 How. Pr. 2; *Mechanics' Banking Assn. v. Mariposa Co.*, 7 Rob. 225; *Harrison v. Wood*, 2 Duer 50; *Smith v. Ferris*, 1 Daly 18; *Miller v. McGuekin*, 15 Abb. N. C. 204, 216 (dismissal because of plaintiff's failure to appear); *Coit v. Bland*, 12 Abb. Pr. 462, 33 Barb. 357, 22 How. Pr. 2; *Lightbody v. Potter*, 10 Wend. 534; *Gould v. Chicago, etc. R. Co.*, 61 Hun 625, 15 N. Y. Supp. 895, 40 N. Y. St. 921; *Hopedale Electric Co. v. Electric Storage Battery Co.*, 132 App. Div. 348, 116 N. Y. Supp. 859; *MacArdell v. Olcott*, 62 App. Div. 127, 70 N. Y. Supp. 930; *Epstein v. Soskin*, 86 Misc. 194, 148 N. Y. Supp. 323; *Nudelman v. Borden's Condensed Milk Co.*, 77 Misc. 49, 136 N. Y. Supp. 49; *Mossler Co. v. Cesare*, 65 Misc. 40, 119 N. Y. Supp. 274. **N. C.**—*Campbell v. Potts*, 119 N. C. 530, 26 S. E. 50; *Bond v. McNider*, 25 N. C. 440. **Ohio.**—*Lent v. Curtis*, 24 Ohio Cir. Ct. 592. **Ore.**—*O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004; *Hughes v. Walker*, 14 Ore. 481, 13 Pac. 450. **Pa.**—*New York, etc. Land Co. v. Weidner*, 169 Pa. 359, 32 Atl. 557. **R. I.**—*Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639. **Tenn.**—*Henderson v. King*, 4 Hayw. 94. **Tex.**—*Jackson v. Elliott*, 49 Tex. 62; *Bailey v. Knight*, 8 Tex. 58; *Kopf v. Huckins*, 11 Tex. Civ. App. 86, 32 S. W. 41. **Va.**—*Tate v. Bank of State of New York*, 96 Va. 765, 32 S. E. 476. **Wis.**—*State ex rel. Faber v. Hinkel*, 131 Wis. 103, 111 N. W. 217; *Gowan v. Hanson*, 55 Wis. 341, 13 N. W. 238; *Hackett v. Bonnell*, 16 Wis. 471.
- See 7 STANDARD PROC. 684.
- Dismissal and retraxit distinguished,** see 7 STANDARD PROC. 652.
- [a] **The recital in a judgment dismissing a complaint because the plaintiff had no witnesses in court and had not subpoenaed any that judgment is given against plaintiff "upon the merits" does not alter the rule.** "Notwithstanding the recital that said dismissal was upon the merits, it is evident that it was not." *Nudelman v. Borden's Condensed Milk Co.*, 77 Misc. 49, 136 N. Y. Supp. 49. See also *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800; and 7 STANDARD PROC. 685.
- Ground of dismissal as affecting merger or bar,** see *infra*, XVII, B, 3, d, (II), (4), (23).
64. **U. S.**—*Baer Bros. Merc. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 34 Sup. Ct. 641, 58 L. ed. 1055; *Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct.

an appeal is taken from a judgment of an inferior court to a court where a trial de novo is to be had and before a hearing the plaintiff dismisses the suit,<sup>45</sup> as well as when a verdict is rendered and a new

- 794, 44 L. ed. 926; *Walden v. Bodley*, 14 Pet. 156, 10 L. ed. 398; *Harrison v. Foley*, 206 Fed. 57, 124 C. C. A. 191; *Woodward v. Davidson*, 150 Fed. 840; *Thompson v. Jewett*, 23 Fed. Cas. No. 13,961; *Holmes v. The Lodemia*, *Crabbe* 434, 12 Fed. Cas. No. 6,642; *Grubb v. Clayton*, *Brunn*. Col. Cas. 30, 11 Fed. Cas. No. 5,849a; *Bingham v. Wilkins*, *Crabbe* 50, 3 Fed. Cas. No. 1,416; *Badger v. Badger*, 1 Cliff. 237, 2 Fed. Cas. No. 717. **Ala.**—*Burgess v. American Mortg. Co.*, 119 Ala. 669, 24 So. 727; *Strang v. Moog*, 72 Ala. 460; *Wise v. Falkner*, 45 Ala. 471. **Ark.** *Martin v. Hodge*, 47 Ark. 378, 1 S. W. 694, 58 Am. Rep. 763. **Cal.**—*Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595; *Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916. **Colo.**—*Martin v. McCarthy*, 3 Colo. App. 37, 32 Pac. 551. **Conn.**—*Anderson v. Gregory*, 43 Conn. 61. **Ga.**—*Alabama Great Southern R. Co. v. Blivins*, 92 Ga. 522, 17 S. E. 836; *Rudolph v. Underwood*, 88 Ga. 664, 16 S. E. 55; *Walker v. Bivins*, 57 Ga. 322. **Ill.**—*Fischheimer v. Kupersmith*, 258 Ill. 392, 101 N. E. 572; *Sheldon v. Van Vleck*, 106 Ill. 45; *Mey v. Gulliman*, 105 Ill. 272. **Ind.**—*Walker v. Heller*, 73 Ind. 46; *Milner v. Mans*, 28 Ind. 194; *Zuelly v. Casper*, 37 Ind. App. 186, 76 N. E. 646; *McWhorter v. Norris*, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21. **Ia.**—*Woodward v. Jackson*, 85 Iowa 432, 52 N. W. 358; *Smith v. Swan*, 69 Iowa 412, 29 N. W. 402; *Dalhoff & Co. v. Coffman*, 37 Iowa 283; *Delaney v. Reade*, 4 Iowa 292. **Ky.**—*Maddox v. Graham*, 2 Mete. 56; *Harris v. Tiffany*, 8 B. Mon. 225; *Griffin v. Griffin*, 8 B. Mon. 120; *Seiver v. Bowling*, 30 Ky. L. Rep. 217, 97 S. W. 806; *Weingartner v. Missouri Lumb. & M. Co.*, 19 Ky. L. Rep. 1941, 44 S. W. 355. **Mass.**—*White v. New Bedford Cotton Waste Corp.*, 178 Mass. 20, 59 N. E. 642. **Mich.**—*Shank v. Woodworth*, 111 Mich. 642, 70 N. W. 140. **Minn.**—*Phelps v. Winona*, etc. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867. **Miss.**—*Coffman v. Brown*, 7 Smed. & M. 125, 45 Am. Dec. 299. **Mo.**—*Mumma v. Staudte*, 36 Mo. App. 695. **Neb.**—*Glavin v. Lansing*, 48 Neb. 338, 67 N. W. 195. **N. H.**—*Cook v. Lee*, 72 N. H. 569, 38 Atl. 511. **N. Y.** *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177; *White v. Whiting*, 8 Daly 23; *Jones v. Underwood*, 13 Abb. Pr. 393, 35 Barb. 211; *Gillilan v. Spratt*, 41 How. Pr. 27; *Conrow v. Branscom*, 41 Hun 395, 3 N. Y. St. 129. **Pa.**—*Blair v. McLean*, 25 Pa. 77; *Gibson v. Gibson*, 20 Pa. 9; *Lowry v. McMillan*, 8 Pa. 157, 49 Am. Dec. 501. **R. I.**—*Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639. **S. C.**—*Dunham v. Carson*, 37 S. C. 269, 15 S. E. 960; *Wadsworthville Poor School v. Meetze*, 4 Rich. L. 50. **Tenn.**—*Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171; *Jones v. Walker*, 5 Yerg. 427. **Tex.**—*Logan v. Stephens County*, 98 Tex. 283, 83 S. W. 365; *Scherff v. Missouri Pac. Ry. Co.*, 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828; *Foster v. Wells*, 4 Tex. 101; *Kopf v. Huckins*, 11 Tex. Civ. App. 86, 32 S. W. 41. **Va.**—*Portsmouth Cotton Oil Ref. Corp. v. Oliver Ref. Co.*, 111 Va. 745, 69 S. E. 958; *Muse v. Farmers' Bank*, 27 Gratt. (68 Va.) 252; *Coffman v. Russell*, 4 Munf. (18 Va.) 207. **W. Va.** *Seabright v. Seabright*, 28 W. Va. 412.
- [a] Where plaintiff moved to dismiss without prejudice, and the court dismissed "with prejudice," such dismissal was not a bar to another action. *Vaneman v. Fairbrother*, 7 Blackf. (Ind.) 541.
- [b] The dismissal of one count of a petition is not a bar to a subsequent action on such count. *Lemon v. Sigourney Sav. Bank*, 131 Iowa 79, 108 N. W. 104.
- [c] **Dismissal After Judgment Set Aside.**—But the voluntary dismissal of an action in ejectment, after the judgment therein has been set aside under the statute allowing a second trial as a matter of right is equivalent to a permanent abandonment of the plaintiff's claim, and will bar another action by him. *Bank of Topeka v. Sadler*, 89 Kan. 321, 131 Pac. 585; *Deming v. Douglass*, 60 Kan. 738, 57 Pac. 954. 65. **Ky.**—*Murphy's Exr. v. Hoagland*, 32 Ky. L. Rep. 839, 107 S. W. 303. **Mich.**—*Franks v. Fecheimer*, 44 Mich. 177, 6 N. W. 215. **Mo.**—*Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598; *Integrity Min. & Mill. Co. v. Moon*, 130 Mo. App. 627, 109 S. W. 1057. **Neb.**



trial granted," or where a judgment is reversed and the cause remanded for further proceedings," and the plaintiff in the trial court then dismisses his suit. So also, the dismissal of a cause of action by the plaintiff, after a demurrer to his complaint has been sustained, will not operate as a bar to bringing the suit again, where no formal judgment has been entered in favor of the defendant.<sup>68</sup> This rule applies with equal force to the dismissal of a bill in equity without a hearing on or consideration of the merits of the case.<sup>69</sup> It is other-

Home Fire Ins. Co. of Omaha v. Deets, 51 Neb. 620, 74 N. W. 1088. Pa.—See Williamson v. Yarnall, 12 Phila. 198. Tenn.—Dosssett v. Miller, 3 Sneed 72. Tex.—Harter v. Curry, 101 Tex. 187, 105 S. W. 988. Vt.—Small v. Haskins, 26 Vt. 209.

As to effect of a dismissal on appeal from the justice court, see the title "Justices of the Peace."

66. U. S.—Harrison v. Foley, 206 Fed. 57, 124 C. C. A. 191; Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369. Ill.—Sheldon v. Van Vleck, 106 Ill. 45. Minn.—Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867. Va.—Coffman v. Russell, 4 Munf. (18 Va.) 207.

[a] But see Ferris v. Udell, 139 Ind. 579, 38 N. E. 180; Cunningham v. City of Milwaukee, 13 Wis. 120, holding that, where a new trial is granted as a statutory right it means a new trial of the same cause, and the plaintiff cannot dismiss his suit and bring another one on the same cause.

[b] Where a new trial is granted in a state court in an action in ejectment by special provision of statute, the plaintiff cannot abandon his special remedy under the statute and bring an action in a federal court. Fraser v. Weller, 6 McLean 11, 9 Fed. Cas. No. 5,064.

67. Norton v. Bohart, 105 Mo. 615, 16 S. W. 598; Holland v. Hatch, 15 Ohio St. 464.

[a] But where a decree against the plaintiff, upon appeal, has been affirmed and the cause remanded to the trial court for further proceedings, a dismissal by plaintiff before final decision will bar another suit, unless defendant consent thereto. Croft v. Johnson, 8 Baxt. (Tenn.) 390.

68. Cal.—Sivars v. Sivars, 97 Cal. 518, 32 Pac. 571. Colo.—Gallup v. Lichter, 4 Colo. App. 296, 35 Pac. 985. Ia.—Harrison v. Hartford Fire Ins.

Co., 80 N. W. 309. Md.—State v. Staylor, 70 Md. 472, 17 Atl. 392. Tex. Scherff v. Missouri Pac. Ry. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828.

69. U. S.—Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; Clark v. Bernhard Mattress Co., 82 Fed. 339; Wright v. Deklyne, Pet. C. C. 199, 30 Fed. Cas. No. 18,076; Sarchet v. The General Isaac Davis, Crabbe 185, 21 Fed. Cas. No. 12,357; Jenkins v. Eldredge, 3 Story 299, 13 Fed. Cas. No. 7,267; Grubb v. Clayton, Brunn. Col. Cas. 30, 11 Fed. Cas. No. 5,849a. Ala.—Burgess v. American Mortg. Co., 119 Ala. 669, 24 So. 727; Fitzpatrick v. Featherstone, 3 Ala. 40. Ga.—Justices Morgan County Inferior Ct. v. Selman, 6 Ga. 432. Ill.—Gage v. Ewing, 114 Ill. 15, 28 N. E. 379; McKinney v. Finch, 2 Ill. 152; Luckey v. Yeoman of America, 141 Ill. App. 332; Follett v. Brown, 114 Ill. App. 14. Ind.—Estep v. Larsh, 21 Ind. 190. Ia.—Clay v. His Creditors, 9 Mart. (O. S.) 519. Mich.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471. Miss.—Nevill v. Matthews, Walk. 377. Mo.—Barnett v. Smart, 158 Mo. 167, 59 S. W. 235. N. J.—Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449; Eastwood v. Worral (N. J. Eq.), 5 Atl. 180. Ohio. Porter v. Wagner, 36 Ohio St. 471; Cramer v. Moore, 36 Ohio St. 347; Loudonback v. Collins, 4 Ohio St. 251. Pa.—Tutton v. Addams, 45 Pa. 67; Yost v. Cowden, 7 Montg. Co. L. Rep. 73. Tenn.—Wallace v. Goodlet, 104 Tenn. 670, 58 S. W. 343; Mabry v. Churchwell, 1 Lea 416. Tex.—Cook v. Burnley, 45 Tex. 97. W. Va.—Hudson v. Iguano Land & Mining Co., 71 W. Va. 402, 76 S. E. 797. Wis.—State v. Larabee, 3 Pin. 166, 3 Chand. 179. Eng. Jones v. Nixon, Younge 359; Beere v. Fleming, 13 Ir. C. L. 506.

[a] The dismissal of a bill in equity because the plaintiff should have proceeded at law is not a bar to a sub-

wise, however, where the bill or complaint is dismissed by the court without qualifying words after proofs have been taken and the case is in readiness for a hearing, or after a hearing has been granted or had; in such case a dismissal usually operates as a decision on the merits barring a subsequent suit on the same matters between the same parties.<sup>79</sup> In order to constitute a technical bar, however, the

sequent legal action. *Costello v. Grant County Mut. F. & L. Ins. Co.*, 133 Wis. 361, 113 N. W. 639.

70. See the following: U. S.—Swift v. McPherson, 222 U. S. 51, 34 Sup. Ct. 239, 58 L. ed. 499; Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. ed. 776; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. ed. 136; Albright v. Oyster, 140 U. S. 439, 11 Sup. Ct. 916, 35 L. ed. 534; Lyon v. Perin, etc. Mfg. Co., 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. ed. 839; Case v. Beauregard, 101 U. S. 688, 25 L. ed. 1069; Barent v. Breen Co., 7 Wall. 107, 19 L. ed. 154; Parrish v. Ferris, 2 Black 606, 17 L. ed. 317; Hepburn & Dunda's Heirs v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Worrell v. Kemmerer, 192 Fed. 911, 114 C. C. A. 351; Indian Land, etc. Co. v. Shoenfelt, 135 Fed. 444, 83 C. C. A. 186; Worrell v. Whitney, 192 Fed. 1002; Clark v. Bernhard Mattress Co., 82 Fed. 339. Compare Tyler v. Hyde, 2 Blatchf. 308, 24 Fed. Cas. No. 14,309, holding that the former dismissal was not conclusively conclusive of the merits of the question at issue, and therefore not a bar to the subsequent suit. Ala.—Warrior River Coal & Land Co. v. Alabama State Land Co., 154 Ala. 135, 45 So. 53; Penny v. British, etc. Mortg. Co., 132 Ala. 357, 31 So. 96; Hale v. Goodbar, 81 Ala. 108, 2 So. 467; Strong v. Moog, 72 Ala. 460; Tankersly v. Pettis, 71 Ala. 179. Ark.—Moss v. Ashbrooks, 12 Ark. 369. Colo.—Best v. Hoppie, 3 Colo. 137. Conn.—Rogers v. Hendrick, 85 Conn. 260, 82 Atl. 590; Munson v. Munson, 30 Conn. 425. Del.—Cochran v. Couper, 2 Del. Ch. 27. D. C.—Waghurst v. Wineland, 22 App. Cas. 356. Ga.—Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Kimbro v. Virginia, etc. Air Line R. Co., 56 Ga. 185; Black v. Black, 27 Ga. 40. Ill.—McChesney v. Chicago, 161 Ill. 110, 43 N. E. 702; Bradish v. Grant, 119 Ill. 606, 11 N. E. 258, modifying 9 N. E. 332; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Gage v. Ewing, 114 Ill. 15, 28 N. E. 379; Tilley v. Bridges, 105 Ill. 336;

Garrick v. Chamberlain, 97 Ill. 620; Armstead v. Blickman, 51 Ill. App. 470. Ind.—Stults v. Forst, 135 Ind. 297, 34 N. E. 1125. Ia.—Black v. Miller, 158 Iowa 293, 138 N. W. 535; Scully v. Chicago, B. & Q. R. Co., 46 Iowa 528; Campbell v. Ayres, 18 Iowa 252. Kan.—Goodman v. Malachuk, 5 Kan. App. 285, 48 Pac. 439. Ky.—San-son v. Connolly, 141 Ky. 120, 132 S. W. 159; Roberts v. Moss, 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280; Brothers v. Higgins, 5 J. J. Marsh. 658; Thompson v. Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108. La.—Bledsoe v. Erwin, 33 La. Ann. 615; Granger v. Singleton, 32 La. Ann. 898; Keene v. McDonough, 8 La. 145. Md.—Tifel v. Jenkins, 95 Md. 665, 53 Atl. 429; Martin v. Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; Barrick v. Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; Royston v. Horner, 75 Md. 537, 24 Atl. 25. Mass.—Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; Flanders v. Hall, 159 Mass. 95, 34 N. E. 178; Blackinton v. Blackinton, 113 Mass. 231; Lewis v. Lewis, 106 Mass. 309; Durant v. Essex Co., 8 Allen 103, 85 Am. Dec. 685; Foote v. Gibbs, 1 Gray 412; Bigelow v. Winsor, 1 Gray 299. Mich.—In re Ward's Estate, 152 Mich. 218, 116 N. W. 23; Schulmeister v. Blendon Tp., 126 Mich. 488, 86 N. W. 237; Sayers v. Auditor General, 124 Mich. 259, 82 N. W. 1045; Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471. Minn.—Day v. Mountin, 89 Minn. 297, 94 N. W. 887; State v. Hard, 25 Minn. 460. Miss.—Hodge v. Mitchell, 27 Miss. 560, 61 Am. Dec. 524; Pugh v. Holt & Wheless, 27 Miss. 461. Mo.—McReynolds v. Kansas City, etc. R. Co., 34 Mo. App. 581. Neb.—Carroll v. Patrick, 23 Neb. 834, 37 N. W. 671. N. H.—Forist v. Bellows, 59 N. H. 229. N. Y.—Maeder v. Wexler, 182 N. Y. 519, 74 N. E. 1120 (affirming 98 App. Div. 68, 90 N. Y. Supp. 598); Genet v. Delaware, etc. Canal Co., 163 N. Y. 173, 57 N. E. 297; Ogsbury v. La Farge, 2 N. Y. 113; Bostwick v. Ab-

Dismissal of the former suit must have been an absolute decision upon the same matter and between the same parties or their privies.<sup>71</sup>

1844, 10 Barb. 331, 10 Abb. Pr. 417; *Passing v. Ross*, 13 Barb. 510; *Hamm v. Benson*, 7 Johns. Ch. 280; *Neafie v. Neafie*, 7 Johns. Ch. 1, 11 Am. Dec. 380; *Perine v. Dunn*, 4 Johns. Ch. 140; *Stokes v. Stokes*, 49 App. Div. 302, 63 N. Y. Supp. 887; *Nudelman v. Borden's Condensed Milk Co.*, 77 Misc. 49, 136 N. Y. Supp. 49; *Strodl v. Farish Stafford Co.*, 65 Misc. 625, 122 N. Y. Supp. 93; *Hirshbach v. Ketchum*, 40 Misc. 101, 81 N. Y. Supp. 957; *Nicoll v. Karrick*, 28 Misc. 199, 58 N. Y. Supp. 1018, 29 Civ. Proc. 367; *Vowell v. Twenty-Third St. Ry. Co.*, 14 Misc. 538, 35 N. Y. Supp. 1082, 2 N. Y. Ann. Cas. 368, 70 N. Y. St. 700; *Prinstein v. De Rosa*, 69 Misc. 619, 126 N. Y. Supp. 97. N. C.—*Jenkins v. Johnston*, 57 N. C. 149; *Massey v. Lemon*, 27 N. C. 577. Ohio.—*Wheeler v. Balger*, 6 Ohio 400. Pa.—*Kelley v. Murphy*, 26 Pa. 78; *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717. S. C.—*State v. Chester & L. N. G. R. Co.*, 13 S. C. 290. Tenn.—*Williams v. Hollingsworth*, 5 Lea 358. Vt.—*Pelton v. Mott*, 11 Vt. 148, 34 Am. Dec. 678. Va.—*Taylor v. Yarbrough*, 11 Gratt. (54 Va.) 183; *Holliday v. Coleman*, 2 Munf. (16 Va.) 162. Wash.—*Michel v. White*, 64 Wash. 341, 116 Pac. 860; *Zonig v. Boehme*, 60 Wash. 500, 111 Pac. 566; *Bartelt v. Seehorn*, 25 Wash. 261, 65 Pac. 185. W. Va.—*Staley v. Big Sandy, E. L. & G. R. Co.*, 63 W. Va. 119, 59 S. E. 946; *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939; *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. 66. Wis.—*Schultz v. Schultz*, 118 Wis. 228, 95 N. W. 151; *Amory v. Amory*, 26 Wis. 152. Eng.—*Lockyear v. Ferryman*, 2 App. Cas. 519; *In re May*, 28 Ch. D. 518, 54 L. J. Ch. 338, 52 L. T. N. S. 78, 33 Wkly. Rep. 917; *Tredegar v. Windus*, L. R. 19 Eq. 607, 44 L. J. Ch. 268, 32 L. T. N. S. 596, 23 Wkly. Rep. 511; *Bushby v. Ellis*, 17 Beav. 279, 51 Eng. Reprint 1041; *Jones v. Nixon*, Younge 359; *Peterborough v. Germaine*, 6 Bro. P. C. 1, 2 Eng. Reprint 302.

[i.] The dismissal of a bill in equity after the cause has been set down for final hearing operates as a dismissal on the merits unless otherwise ordered by the court. *Boon v. Riley*, 171 Ala. 657, 54 So. 997; *Phillips v. Wormley*, 58 Miss. 398.

[b] Dismissal "with prejudice," on plaintiff's motion, is a bar to another suit, unless reversed on appeal. *Hargis v. Robinson*, 70 Kan. 589, 79 Pac. 119.

[c] An unauthorized judgment on the merits, from which an appeal is taken, will bar another suit. *Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

[d] A judgment of dismissal for failure of plaintiff to answer interrogatories is an adjudication on the merits, and a bar to another action. *Cedar Rapids Nat. Bank v. Murray*, 98 Miss. 123, 53 So. 393. Compare, *McLoughlin v. Beyer*, 181 Ala. 427, 61 So. 62.

[e] Where the point relied on was not put in issue, or facts were insufficient because immature, in the former case, the dismissal will not bar a subsequent suit. *Neville v. Litchfield Carriage Co.*, 47 Conn. 167; *Abbe v. Goodwin*, 7 Conn. 377.

[f] A judgment of dismissal based on findings of the court as to matters of fact and matter of law, that the subject-matter of the suit has been adjusted and settled by the parties, and that no cause of action exists, is a judgment on the merits, and a bar to a subsequent action. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601.

[g] The dismissal (1) of a bill for the specific performance of an agreement, without any reservation of the plaintiff's rights, will not operate as a bar to an action at law on the agreement. *Porter v. Wagner*, 36 Ohio St. 471; *Cramer v. Moore*, 36 Ohio St. 347; *Beere v. Fleming*, 13 Ir. C. L. 506. (2) But see *Carberry v. West Virginia & P. R. Co.*, 44 W. Va. 260, 28 S. E. 694, holding where a court of equity dismisses a bill merely because there is an adequate remedy at law, it should so state, or insert a clause, "without prejudice to the plaintiff to sue at law," or its equivalent, and that it is error not to do so.

Dismissal without prejudice or with reservation of rights, see *infra*, XVII, B, 3, d, (II), (G), (2).

71. Ark.—*Town of Daylanelle v. Gillespie*, 116 Ark. 390, 172 S. W. 1036. Ky.—*Sanson v. Connolly*, 141 Ky. 120, 132 S. W. 159. Mass.—*Ballou v. Billings*, 136 Mass. 307. Miss.—*Pugh v.*



**Presumption as to Merits.** — In some jurisdictions a judgment or decree of dismissal is presumed to have been rendered on the merits in the absence of a contrary showing from the pleadings and the judgment roll;<sup>72</sup> but a contrary rule obtains in some states.<sup>73</sup>

**Dismissal as to Part of Claims.** — Where a plaintiff, suing for several distinct counts or claims in one action, dismisses as to one of them, and proceeds to judgment on the others, the count dismissed stands as a claim not sued on, and there is no bar to a subsequent suit on the claim so withdrawn.<sup>74</sup>

**Dismissal as to One of the Defendants.** — A judgment of dismissal or discontinuance as to one of several defendants, upon motion of plaintiff, where the cause of action is joint and several, or defendants' interests or obligations therein are independent or severable, will not

Holt & Wheless, 27 Miss. 461. **N. Y.** Neafie v. Neafie, 7 Johns. Ch. 1, 11 Am. Dec. 380; *In re Townshend*, 64 Hun 636, 18 N. Y. Supp. 905.

**Necessity for identity of causes of action and parties generally**, see *supra*, XVII, B, 2, c and f.

72. **U. S.**—Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. ed. 136; *Durant v. Essex Co.*, 7 Wall. 107, 19 L. ed. 154; *Indian Lands, etc. Co. v. Shoenfelt*, 135 Fed. 484, 68 C. C. A. 196; *Equitable Trust Co. v. Smith*, 77 Fed. 677, 23 C. C. A. 394. **Del.** *Cochran v. Couper*, 2 Del. Ch. 27. **Ia.** *Scully v. Chicago, B. & Q. R. Co.*, 46 Iowa 528. **Ky.**—*Curts v. Bardstown*, 6 J. J. Marsh. 536; *Carlisle v. Howes*, 19 Ky. L. Rep. 1238, 43 S. W. 191. **Md.** *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218. **Mass.**—*Thurston v. Thurston*, 99 Mass. 39; *Borrowseale v. Tuttle*, 5 Allen 377; *Foote v. Gibbs*, 1 Gray 412; *Bigelow v. Winsor*, 1 Gray 299. **Mich.** *In re Ward's Estate*, 152 Mich. 218, 116 N. W. 23; *Edgar v. Buck*, 65 Mich. 356, 32 N. W. 644; *Adams v. Cameron*, 40 Mich. 506. **N. H.**—*Gove v. Lyford*, 44 N. H. 525. **Pa.**—*Kelsey v. Murphy*, 26 Pa. 78. **Tenn.**—*Williams v. Hollingsworth*, 5 Lea 358. **Va.**—*Taylor v. Yarbrough*, 13 Gratt. (54 Va.) 183. **W. Va.**—*Carberry v. West Virginia & P. R. Co.*, 44 W. Va. 260, 28 S. E. 694.

[a] The presumption of finality of the decree of dismissal may be overcome by a record showing that the court did not pass upon the merits. *Swift v. McPherson*, 232 U. S. 51, 34 Sup. Ct. 239, 58 L. ed. 499.

[b] Where the record shows that

the dismissal was not on the merits, the judgment is not a bar to another suit. *Fowlkes v. State*, 14 Lea (Tenn.) 14.

73. See the following: **Ark.**—*Jones v. Graham*, 36 Ark. 383. **Ga.**—*Callaway v. Irvin*, 123 Ga. 344, 51 S. E. 477. **Ill.**—*Gerber v. Gerber*, 155 Ill. 219, 40 N. E. 581. **N. Y.**—*Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25; *Staley v. Murray*, 166 App. Div. 328, 152 N. Y. Supp. 163; *Fritzuskie v. Wauroski*, 83 App. Div. 150, 82 N. Y. Supp. 543; *Nicoll v. Karriek*, 28 Misc. 199, 58 N. Y. Supp. 1018, 29 Civ. Proc. 367. **Ohio.** *Lore's Lessee v. Truman*, 10 Ohio St. 45; *Laudenback v. Collins*, 4 Ohio St. 251. **Ore.**—*Pruitt v. Muldrick*, 39 Ore. 353, 65 Pac. 20.

[a] Under the New York Code, (1) a judgment of dismissal will not bar another suit unless the judgment declares, or the judgment roll shows it to have been on the merits. *Genet v. Delaware, etc. Canal Co.*, 170 N. Y. 278, 63 N. E. 350. (2) The judgment roll is the primary guide as to whether the judgment dismissing the complaint was on the merits, and when it appears therefrom that it might have been rendered either on the merits or other ground, the presumption is that it was not on the merits, and the burden is upon the pleader to show the contrary. *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800. See *Domingo Cigar Co. v. Moore*, 125 N. Y. Supp. 468.

74. **Mich.**—*Busch v. Jones*, 94 Mich. 223, 53 N. W. 1051. **Neb.**—*Runge v. Brown*, 203 Neb. 817, 37 N. W. 660. **N. Y.**—*Watson v. Cowdrey*, 23 Hun 169. **Pa.**—*Killian v. Wright*, 34 Pa.

operate as a bar to a subsequent suit against the defendant, as to whom the action was dismissed.<sup>75</sup>

A judgment of dismissal entered by an agreement of the parties in the nature of a compromise or settlement, is usually held to be in effect a retraxit, and a bar to another suit on the same cause of action, however,<sup>76</sup> though upon this proposition there are authorities to the contrary.<sup>77</sup> But if the former suit was based upon a different cause of action, requiring a different set of facts, the judgment of dismissal will not operate as a bar to a subsequent action.<sup>78</sup> Nor will a judg-

91. Tex.—*Johnson v. Murphy's Adams*, 17 Tex. 216.

75. U. S.—*Hukill v. Maysville, etc. R. Co.*, 72 Fed. 745. Cal.—*Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916; *Alt-schul v. Polaek*, 55 Cal. 633. Colo.—*Hamill v. Ward*, 14 Colo. 277, 23 Pac. 330. Ind.—*West v. Asher*, 38 Ind. 291. Mass.—*Cameron v. Kanrich*, 201 Mass. 451, 87 N. E. 605. Neb.—*Runge v. Brown*, 23 Neb. 817, 37 N. W. 660. Nev.—*James v. Leport*, 19 Nev. 174, 8 Pac. 47. N. C.—*Crawford's Admr. v. Class*, 33 N. C. 118. Tex.—*Wooters v. Smith*, 56 Tex. 198.

[a] A judgment rendered against one of two defendants in a case which had been dismissed as to the other, will not support a plea of res judicata in a subsequent suit against the defendant who had been dismissed from the prior action. *Alderman v. Alderman*, 141 Ga. 600, 81 S. E. 899.

76. U. S.—*United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 20 L. ed. 601; *Nashville Ry. Co. v. United States*, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. ed. 971; *Haldeman v. United States*, 91 U. S. 584, 23 L. ed. 433. Cal.—*Crossman v. Davis*, 79 Cal. 603, 21 Pac. 963; *Merritt v. Campbell*, 47 Cal. 542. Colo.—*Ford v. Roberts*, 14 Colo. 291, 23 Pac. 322. Ill.—*Ruehl Bros. Brew. Co. v. Atlas Brew. Co.*, 187 Ill. App. 392. Ia.—*Bowen v. Duffie*, 66 Iowa 88, 23 N. W. 277; *Heironymus v. Heironymus*, 64 Iowa 81, 19 N. W. 855. Kan.—*Robinson v. Chicago, R. I. & P. Ry. Co.*, 96 Kan. 137, 150 Pac. 636. Ky.—*Jarboe v. Smith*, 10 B. Mon. 257, 52 Am. Dec. 541; *Bank of the Commonwealth v. Hopkins*, 2 Dana 395. Md.—*Tabler v. Castle*, 22 Md. 94. Mich.—*In re Ward's Estate*, 152 Mich. 218, 116 N. W. 23. Minn.—*Cameron v. Chicago, M. & St. P. Ry. Co.*, 51 Minn. 153, 53 N. W. 199. Nev.—*Philpotts v. Blasdel*, 10 Nev. 19. N. H.—*Ball v. New England*

*Malt Co.*, 65 N. H. 25, 17 Atl. 1059. N. Y.—*Brooks v. New York*, 57 Hun 104, 10 N. Y. Supp. 773; *Murray v. Jibson*, 22 Hun 386. Okla.—*Turner v. Fleming*, 37 Okla. 75, 130 Pac. 551. Tex.—*Townsend v. Scurlock*, 44 Tex. Civ. App. 141, 99 S. W. 123; *Gee v. Burt* (Tex. Civ. App.), 33 S. W. 553. Vt.—*Pelton v. Mott*, 11 Vt. 148, 34 Am. Dec. 678. Va.—*Wohlford v. Compton*, 79 Va. 333; *Hoover v. Mitchell*, 25 Gratt. (66 Va.) 387. W. Va.—*Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199.

[a] Dismissal upon an unauthorized settlement, is a bar to another action, so long as it is allowed to stand. *Woodford v. Rasback*, 6 N. Y. Civ. Proc. 515.

[b] But a dismissal based upon a compromise involving the compounding of a felony, being illegal, will not bar another action. *Allison v. Hess*, 28 Iowa 388.

Judgment on a retraxit as bar, see *infra*, XVII, B, 3, d, (11), (H).

77. Me.—*Knox v. Waldoborough*, 5 Greenl. 185. Mass.—*Butchers' Slaughtering, etc. Assn. v. Boston*, 137 Mass. 186; *Jordan v. Siefert*, 126 Mass. 25. N. C.—*Stewart v. Register*, 108 N. C. 588, 13 S. E. 234. S. C.—*Lowndes v. Fishburne*, 69 S. C. 308, 48 S. E. 264. Tenn.—*Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171. Wis.—*Bishop v. McGillis*, 82 Wis. 120, 51 N. W. 1075.

See also *Woffen v. Potter*, 2 Brock. 156, 12 Fed. Cas. No. 6577, holding that the dismissal of a suit agreed does not amount to a retraxit, and is no bar to a subsequent suit for the same cause of action.

78. *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886.

Necessity for identity of causes of action, see generally *supra*, XVII, B, 2, e.

ment of dismissal by consent or agreement operate as a bar to another suit on the same cause of action where it shows on its face that it is not the result of an adjustment of the controversy.<sup>79</sup>

(2.) *Dismissal Without Prejudice or With Reservation of Rights.*—A judgment entered on the dismissal of a bill or complaint will not operate as a bar to a subsequent suit on the same cause of action, where the dismissal is "without prejudice" to the right of the plaintiff to further prosecute his claim.<sup>80</sup> So where the judgment or decree expressly

79. **U. S.**—Marshall *v.* Otto, 59 Fed. 249; Jenkins *v.* Eldredge, 3 Story 181, 13 Fed. Cas. No. 7,266. **Mo.**—Couch *v.* Harp, 201 Mo. 457, 100 S. W. 9. **Wash.** State Medical Board *v.* Stewart, 46 Wash. 79, 89 Pac. 475, 11 L. R. A. (N. S.) 557.

80. **U. S.**—Shepherd *v.* Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. ed. 706; Durant *v.* Essex Co., 7 Wall. 107, 19 L. ed. 154; Colusa Parrot Min. & Smelt. Co. *v.* Monahan, 162 Fed. 276, 89 C. C. A. 256; Robinson *v.* American Car. etc. Co., 135 Fed. 693, 68 C. C. A. 331 (*affirming* 132 Fed. 165); Southern Pac. R. Co. *v.* United States, 133 Fed. 651, 66 C. C. A. 581; Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211. **Ala.**—Collins *v.* Smith, 155 Ala. 607, 46 So. 986; Broek *v.* South, etc. Alabama R. Co., 65 Ala. 79; Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533. **Cal.**—Hibernia Sav., etc. Soc. *v.* Portener, 139 Cal. 90, 72 Pac. 716; Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; Wolf & Co. *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825; Dollar *v.* International Banking Corp., 13 Cal. App. 331, 109 Pac. 499. **Colo.**—Cupples *v.* Cupples, 33 Colo. 449, 80 Pac. 1039. **Fla.**—Epstein *v.* Perst, 35 Fla. 498, 17 So. 414; State *v.* Anderson, 26 Fla. 240, 8 So. 1. **Ill.** Parlin, etc. Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93. **Ind.**—Elkhart Car-Works Co. *v.* Ellis, 135 Ind. 205, 34 N. E. 11; Carmikel *v.* Cox, 58 Ind. 133; Crews *v.* Cleghorn, 13 Ind. 438; Louisville, etc. R. Co. *v.* Wylie, 1 Ind. App. 136, 27 N. E. 122. **Ia.**—Wells *v.* Western U. Tel. Co., 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045; Harrison *v.* Hartford F. Ins. Co., 80 N. W. 309. **Kan.**—Missouri, etc. R. Co. *v.* McWerther, 59 Kan. 345, 53 Pac. 135. **Ky.**—Farris *v.* Matthews, 149 Ky. 455, 149 S. W. 896; Covington *v.* Chesapeake & O. R. Co., 112 S. W. 862; O'Daniel *v.* O'Daniel, 88 Ky. 185, 188, 10 S. W. 638; Magill *v.* Mercantile Trust Co.,

81 Ky. 129; Royalty *v.* Shirley, 21 Ky. L. Rep. 1015, 53 S. W. 1044. **La.**—Fisk *v.* Parker, 14 La. Ann. 491. **Me.**—Kittery Water Dist. *v.* Agamenticus Water Dist. Co., 103 Me. 25, 67 Atl. 631. **Md.** O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428. **Mass.**—Thurston *v.* Thurston, 99 Mass. 39. **Miss.** Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898; Ragsdale *v.* Vicksburg, etc. R. Co., 62 Miss. 480; Mobile, etc. R. Co. *v.* Davis, 62 Miss. 271; Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609. **Mo.** Long *v.* Long, 141 Mo. 352, 44 S. W. 341; Sursa *v.* Cash, 171 Mo. App. 396, 156 S. W. 779; McReynolds *v.* Kansas City, etc. R. Co., 34 Mo. App. 581. **Neb.**—Thornhill *v.* Hargreaves, 76 Neb. 582, 107 N. W. 847; Agnew *v.* Omaha Nat. Bank, 69 Neb. 654, 96 N. W. 189; Cinfel *v.* Malena, 67 Neb. 95, 93 N. W. 165; Kendall *v.* Selby, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697. **N. J.** English *v.* English, 27 N. J. Eq. 579. **N. Y.**—Hawkins *v.* Mapes-Reeve Const. Co., 82 App. Div. 72, 81 N. Y. Supp. 794; Buchholz-Hill Transp. Co. *v.* Baxter, 142 App. Div. 25, 126 N. Y. Supp. 514; Asbestos Products Co. *v.* Little, 121 N. Y. Supp. 232. **N. D.**—Prondinski *v.* Garbut, 10 N. D. 300, 86 N. W. 969. **Ohio.**—Wanzer *v.* Self, 30 Ohio St. 378; Eaton *v.* French, 23 Ohio St. 560; Calvert *v.* Newberger, 20 Ohio Cir. Ct. 353, 11 Ohio Cir. Dec. 184. **Pa.** Ballentine *v.* Ballentine, 15 Atl. 859. **R. I.**—Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639. **S. C.** Bush *v.* Bush, 1 Strobb. 377. **Tenn.** Young *v.* Cavitt, 7 Heisk. 18; Condon *v.* Knoxville, etc. R. Co. (Tenn. Ch.), 35 S. W. 781. **Tex.**—Freidenbloom *v.* McAfee (Tex. Civ. App.), 167 S. W. 28; Smith *v.* Burgher (Tex. Civ. App.), 136 S. W. 75; Jecker *v.* Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129. **Va.**—Adams *v.* Pugh's Admr., 116 Va. 797, 83 S. E. 370; Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733; Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41



reserves the right to any party to further litigate any matter in controversy in the suit, or excludes from its operation some specified right or interest, it will not operate to bar further suit based thereon.<sup>81</sup> But the judgment or decree should clearly express the intended reservation of rights by the insertion of a proper saving clause,<sup>82</sup> since it will operate as an estoppel as to all rights or interests not specifically reserved therein.<sup>83</sup>

(3.) *As Affected by Ground of Dismissal.*—(a.) *For Technical Defects Generally.*—A judgment of dismissal, entered because of a failure to comply with some condition, or to perform some act, precedent or preliminary to the right to institute or maintain the suit,<sup>84</sup> or on the

Atl. 1046, 67 Am. St. Rep. 680. Wash. Bates v. Drake, 28 Wash. 447, 68 Pac. 961. W. Va.—Staley v. Big Sandy, E. L. & G. R. Co., 63 W. Va. 119, 59 S. E. 946. Eng.—Langmead v. Maple, 18 C. B. N. S. 255, 12 L. T. N. S. 143, 13 Wkly. Rep. 469, 114 E. C. L. 266; Seymour v. Neworthy, 1 Ch. Cas. 155.

See 7 STANDARD PROC. 685.

[a] This is true even though the words "without prejudice to another action" were improperly attached. Minn.—Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661. Ohio.—Wanzer v. Self, 30 Ohio St. 378. Tex.—Freidenbloom v. McAfee (Tex. Civ. App.), 167 S. W. 28. Eng. But see Rochester v. Lee, 1 Mac. & G. 467, 41 Eng. Reprint 1346.

[b] The dismissal without prejudice, of a cross-bill, is not a bar to an action at law on the same subject-matter. Dose v. Beatie, 62 Ore. 308, 123 Pac. 383, 125 Pac. 277.

[c] But the words "without prejudice," in a judgment dissolving an injunction, will not give it the effect of a mere nonsuit. Porter v. Morere, 30 La. Ann. 230.

81. Colo.—Smith v. Cowell, 41 Colo. 178, 92 Pac. 20. Ia.—Hart v. Nonpareil Print. Co., 109 Iowa 82, 80 N. W. 217. Ky.—Kentonia Corporation v. Boreing Land & Mining Co., 159 Ky. 61, 166 S. W. 780; Harrow v. Johnson, 3 Meffe. 578. La.—Police Jury v. Smith's Syndies, 14 La. 68; Kemper v. Smith, 3 Mart. (O. S.) 622. Mass. Low v. Low, 177 Mass. 306, 59 N. E. 57. N. Y.—Stannard v. Hubbard, 56 Hun 450, 10 N. Y. Supp. 254. Ohio. Upjohn v. Ewing, 2 Ohio St. 13. Pa. Moser v. Philadelphia, H. & P. R. Co., 233 Pa. 259, 82 Atl. 362. R. I.—Glidden v. Whipple, 23 R. I. 304, 40 Atl.

997. S. D.—Hardin v. Hardin, 26 S. D. 601, 129 N. W. 108. Tenn.—Wolfe v. Potts (Tenn. Ch.), 42 S. W. 188. Tex. Haralson v. St. Louis S. W. Ry. Co. (Tex. Civ. App.), 62 S. W. 788.

[a] When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and if no appeal is taken, such reservation becomes res adjudicata, and cannot be called in question by any party in any other suit or proceeding Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154.

82. Keown v. Murdock, 10 Ohio Dec. (Reprint) 606, 22 Wkly. L. Bul. 197; Carberry v. West Virginia, etc. R. Co., 44 W. Va. 260, 28 S. E. 634.

[a] The omission of a saving clause in a judgment or order cannot be supplied in a bill of exceptions. Rogers v. Hoenig, 46 Wis. 361, 1 N. W. 17.

83. U. S.—Albright v. Oyster, 140 U. S. 493, 11 Sup. Ct. 916, 35 L. ed. 534; Baltimore, etc. R. Co. v. Pittsburgh, etc. R. Co., 55 Fed. 701; Central Trust Co. v. Iowa Cent. R. Co., 40 Fed. 851. Colo.—Smith v. Cowell, 41 Colo. 178, 92 Pac. 20. Ia.—Goldsmith v. J. Goldsmith & Bro., 140 Iowa 12, 117 N. W. 1077. Mass.—Roach v. Roach, 190 Mass. 253, 76 N. E. 651. Tex. Freidenbloom v. McAfee (Tex. Civ. App.), 167 S. W. 28. Va.—Innis v. Roane, 4 Call 379.

84. See the following: U. S.—Glen-cove Granite Co. v. City Trust, etc. Co., 118 Fed. 386, 55 C. C. A. 212; Pundt v. Pendleton, Jailer, 167 Fed. 997; Myers v. D'Meza, 2 Woods 160, 17 Fed. Cas. No. 9,987. Cal.—Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121; Riverdale Min. Co. v. Wicks, 14 Cal. App. 526, 112 Pac. 896. Ga.—Sweeney

ground that the suit was brought before a right of action had accrued,<sup>55</sup> or any technical objection arising during the course of the

- v. Sweeney*, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159. **Ind.**—*Roberts v. Norris*, 67 Ind. 386; *Stockwell v. Byrne*, 22 Ind. 6. **Ia.**—*Randolph v. Des Moines Cottage Hospital*, 193 N. W. 157; *Kern v. Wilson*, 52 Iowa 407, 48 N. W. 919; *Care v. Woleben*, 52 Iowa 389, 3 N. W. 486. **Kan.**—*State v. Kansas Ins. Co.*, 32 Kan. 649, 5 Pac. 187. **Ky.**—*Lebanon v. Knott*, 24 Ky. L. Rep. 1992, 72 S. W. 790; *Anderson v. Trimble*, 18 Ky. L. Rep. 507, 37 S. W. 71. **Me.**—*Brown v. Whitmore*, 71 Me. 65. **Mass.**—*Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534; *Maxwell v. Clarke*, 139 Mass. 112, 29 N. E. 224; *Tracy v. Merrill*, 103 Mass. 280; *Morton v. Sweetser*, 12 Allen 134; *Crosby v. Baker*, 6 Allen 295; *Walbridge v. Shaw*, 7 Cush. 560; *New England Bank v. Lewis*, 8 Pick. 113. **Mich.**—*Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682. **Minn.**—*Kerrigan v. Chicago*, etc. R. Co., 86 Minn. 407, 90 N. W. 976. **Miss.**—*Shaw & Laurel Oil & Fertilizer Co.*, 92 Miss. 340, 45 So. 878; *Dean v. Ridgway*, 6 So. 236. **Mo.**—*Whitlock v. Appleby*, 49 Mo. App. 295. **N. Y.**—*Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335; *Rose v. Hawley*, 133 N. Y. 315, 31 N. E. 236; *People v. Hall*, 104 N. Y. 170, 10 N. E. 135; *Porter v. Kingsbury*, 77 N. Y. 164; *Canandaigua v. Benedict*, 24 App. Div. 348, 48 N. Y. Supp. 679. **N. D.**—*Stewart v. Dwyer*, 22 N. D. 356, 133 N. W. 990. **Pa.**—*Pittsburg Constr. Co. v. West Side Belt R. Co.*, 227 Pa. 90, 75 Atl. 1029; *McLaughlin v. McGee*, 79 Pa. 217; *Carmony v. Hooper*, 5 Pa. 305. **S. D.**—*Taylor v. Neys*, 11 S. D. 605, 79 N. W. 998. **Wis.**—*Taylor v. Matteson*, 86 Wis. 113, 56 N. W. 829; *Oleson v. Merrihew*, 45 Wis. 397.
85. **U. S.**—*Clark v. Young & Co.*, 1 Cranch 181, 2 L. ed. 74. **Cal.**—*Nevills v. Shortridge*, 146 Cal. 277, 79 Pac. 972; *Hardin v. Dickey*, 123 Cal. 513, 56 Pac. 258; *Gray v. Dougherty*, 25 Cal. 266. **Conn.**—*Peck v. Easton*, 74 Conn. 456, 51 Atl. 134. **Ga.**—*Ezzell v. Maltbie*, 6 Ga. 495. **Ill.**—*Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123; *Brackett v. People*, 115 Ill. 29, 3 N. E. 723; *Crabtree v. Welles*, 19 Ill. 55; *Peninsular Stone Co. v. Bagby*, 158 Ill. App. 302; *Farber v. National Forge*, etc. Co., 50 Ill. App. 503. **Ind.**—*Chicago*, etc. R. Co. *v. State*, 153 Ind. 134, 51 N. E. 924; *Kirkpatrick v. Stingley*, 2 Ind. 269; *Fordice v. Beeman*, 10 Ind. App. 295, 36 N. E. 937. **Ia.**—*Rivers v. Rivers*, 65 Iowa 568, 22 N. W. 679; *Boyer v. Austin*, 54 Iowa 402, 6 N. W. 585. **Kan.**—*Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22; *Krapp v. Eldridge*, 33 Kan. 106, 5 Pac. 372. **Ky.**—*Yankey v. Sweeney*, 85 Ky. 55, 2 S. W. 559; *Barker v. Tennessee Pav. Brick Co.*, 24 Ky. L. Rep. 1524, 71 S. W. 877. **La.**—*Hewitt v. Williams*, 48 La. Ann. 686, 19 So. 604; *Pasley v. McConnell*, 40 La. Ann. 609, 4 So. 501. **Mass.**—*Waterhouse v. Levine*, 182 Mass. 407, 65 N. E. 822; *Foster v. The Richard Busted*, 100 Mass. 409, 1 Am. Rep. 125; *New England Bank v. Lewis*, 8 Pick. 113. **Mich.**—*Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735. **Minn.**—*Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453. **Mo.**—*Dillinger v. Kelley*, 84 Mo. 561; *Lawlor v. Vette* (Mo. App.), 149 S. W. 43; *McNees v. Southern Ins. Co.*, 69 Mo. App. 232; *Shanklin v. Francis*, 67 Mo. App. 457. **Mont.**—*Gassert v. Black*, 18 Mont. 35, 44 Pac. 401. **Neb.**—*Currier v. Teske*, 84 Neb. 60, 120 N. W. 1015; *Hart v. Bank of Commerce*, 51 Neb. 486, 71 N. W. 40. **N. Y.**—*Moloney v. Nelson*, 158 N. Y. 351, 53 N. E. 31; *Converse v. Sickles*, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; *Van Keuren v. Miller*, 144 N. Y. 636, 39 N. E. 495; *Marcellus v. Countryman*, 65 Barb. 201; *Quackenbush v. Ehle*, 5 Barb. 469; *Wilcox v. Lee*, 1 Abb. Pr. (N. S.) 250, 26 How. Pr. 418, 1 Rob. 355; *Bull v. Hopkins*, 7 Johns. 22; *Halsey v. Reed*, 9 Paige 446; *Eden v. Hartt*, 25 Misc. 493, 54 N. Y. Supp. 1040. **Ohio.**—*Lauer v. Smith*, 24 Ohio Cir. Ct. 47. **Pa.**—*Kane v. Fisher*, 2 Watts 246. **R. I.**—*Slocum v. Wilbour*, 23 R. I. 97, 49 Atl. 489; *Jepson v. International Fraternal Alliance*, 17 R. I. 471, 23 Atl. 15. **S. C.**—*Timmons v. Turner*, 55 S. C. 490, 33 S. E. 571; *McClavy v. Noble*, 13 Rich. L. 330. **Tenn.**—*Hurst v. Means*, 2 Sneed 546; *Estill v. Taul*, 2 Yerg. 467, 24 Am. Dec. 498. **Vt.**—*Clark v. Harrington*, 4 Vt. 69. **Va.**—*Hairston v. Hairston*, 117 Va. 207, 84 S. E. 15. **Wis.**—*McFarlane v. Cushman*, 21 Wis. 401. **Wyo.**—*Tutty v. Ryan*, 13 Wyo. 53, 134, 78 Pac. 657, 1119, 79 Pac. 920, 921. **Can.**

proceedings," or for any irregularity, defect or informality of a technical nature in the institution or maintenance of the proceeding.<sup>87</sup> is not considered as a judgment on the merits and consequently is not a bar to a subsequent action based on the same cause of action. So where a judgment is entered against the plaintiff because he mistook his remedy and proceeded under an improper form of action, it does not operate as a bar to a subsequent action in proper form.<sup>88</sup>

(b.) *For Want of Prosecution.*—The dismissal of a cause of action for want of prosecution thereof, while in effect a final judgment for defendant in that particular suit, is not usually a bar to another suit on the same cause of action.<sup>89</sup> There are cases, however, where

*Rex v. Robinson*, 14 Ont. L. R. 519, 10 Ont. W. R. 338. See *Chisholm v. Morse*, 11 U. C. C. P. 589.

[a] Such judgment is conclusive of the fact that the first action was prematurely brought, however; such fact cannot be raised in a subsequent action. *Wilhelm v. Des Moines Ins. Co. (Iowa)*, 68 N. W. 782.

86. **U. S.**—*Cheney v. Stone*, 29 Fed. 885. **Cal.**—*Riverdale Mining Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896. **Mo.**—*Bick v. Dry*, 134 Mo. App. 538, 114 S. W. 1146. **N. Y.**—*Porges v. Cohen*, 23 Misc. 703, 52 N. Y. Supp. 71. **Wyo.**—*Barkwell v. Chatterton*, 4 Wyo. 307, 33 Pac. 940.

87. See the following: **U. S.**—*Pundt v. Pendleton, Jailer*, 167 Fed. 997; *Ryan v. Seaboard, etc. R. Co.*, 89 Fed. 397. **Ark.**—*Adams v. State*, 9 Ark. 33. **Cal.**—*Riverdale Mining Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896. **Colo.**—*Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20. **Conn.**—*Vincent v. Mut. Reserve Fund Life Assn.*, 77 Conn. 281, 58 Atl. 963. **Ia.**—*Randolph v. Des Moines Cottage Hospital*, 103 N. W. 157. **Mont.**—*Pullen v. Butte*, 45 Mont. 46, 121 Pac. 878. **N. H.**—*Brackett v. Hoitt*, 20 N. H. 257. **Pa.**—*Pittsburg Constr. Co. v. West Side Belt R. Co.*, 227 Pa. 90, 75 Atl. 1029. **Tenn.**—*Stuber v. Louisville & N. R. Co.*, 113 Tenn. 305, 87 S. W. 411; *Cole v. Nashville*, 5 Coldw. 639. **Can.**—*Baker v. Booth*, 2 U. C. Q. B. O. S. 373.

As to judgment on demurrer, see *supra*, XVII, B, 3, d, (II), (F).

88. **U. S.**—*Wiggins Ferry Co. v. Ohio, etc. R. Co.*, 142 U. S. 396, 12 Sup. Ct. 188; 35 L. ed. 1055; *McNamara v. Home Land, etc. Co.*, 121 Fed. 797, 58 C. C. A. 245. **Ala.**—*Johnson v. Amberson*, 140 Ala. 342, 37 So. 273. **Cal.**—*Oakland v. Oakland Water*

*Front Co.*, 118 Cal. 160, 50 Pac. 277; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. **Ga.**—*Reid v. Caldwell*, 114 Ga. 676, 40 S. E. 712. **Ill.**—*Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166, 74 N. E. 815; *Lusk v. Chicago*, 211 Ill. 183, 71 N. E. 878; *Grand Pac. Hotel Co. v. Pinkerton*, 118 Ill. App. 89. **Me.**—*Wyman v. Dorr*, 3 Greenl. 183. **Mass.**—*Walker v. Davis*, 1 Gray 506; *Livermore v. Herschell*, 3 Pick. 33. **Miss.**—*Conn v. Bernheimer*, 67 Miss. 498, 7 So. 345. **Mo.**—*Massey v. McCoy*, 79 Mo. App. 169. **N. H.**—*Meredith Mechanic Assn. v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *Kittredge v. Holt*, 58 N. H. 191. **N. Y.**—*Sager v. Blain*, 44 N. Y. 445; *Steinson v. New York Board of Education*, 49 App. Div. 143, 63 N. Y. Supp. 128. **Ore.**—*Huffman v. Knight*, 36 Ore. 581, 60 Pac. 207. **Pa.**—*Bigley v. Jones*, 114 Pa. 510, 7 Atl. 54. **S. C.**—*Charles v. Charles*, 13 S. C. 385. **Tenn.**—*Donaldson v. Nealis*, 108 Tenn. 638, 69 S. W. 732. **Tex.**—*Bertrand v. Bingham's Admx.*, 13 Tex. 266; *Foster v. Wells*, 4 Tex. 101. **Vt.**—*Derosia v. Ferland*, 86 Vt. 15, 83 Atl. 271. **Va.**—*Taylor v. Hedrick*, 110 Va. 461, 66 S. E. 65. **Wash.**—*State v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373. **Eng.**—*Ferrers v. Arden, Cro. Eliz.* 668, 78 Eng. Reprint 906; *Hitchin v. Campbell*, 2 W. Black. 779, 96 Eng. Reprint 457.

89. See the following: **U. S.**—*Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425; *United States Fastener Co. v. Bradley*, 143 Fed. 523; *Whitaker v. Davis*, 91 Fed. 720; *Keller v. Stolzenbach*, 20 Fed. 47; *American Diamond Rock Boring Co. v. Sheldon*, 17 Blatchf. 208, 1 Fed. Cas. No. 296. **Ala.**—*McBroom v. Sommerville*, 2 Stew. 515. **Cal.**—*Pyle v. Piercy*, 122 Cal. 383, 55



a dismissal upon motion of defendant for failure to prosecute on the part of the plaintiff has been considered as a decision on the merits operating as a bar to another suit.<sup>90</sup>

(c.) *For Want of Jurisdiction.*—A judgment dismissing an action on the ground that the court has no jurisdiction of the subject-matter of the suit, or of the parties thereto, cannot be an adjudication on the merits, and therefore cannot operate as a bar to another action on the same cause in another court.<sup>91</sup> So a decree of a court of equity dis-

Pac. 141. **D. C.**—*Wagenhurst v. Wine-*  
land, 22 App. Cas. 356; *Cummings v.*  
*Baker*, 16 App. Cas. 1. **Haw.**—*Red-*  
*house v. Graham*, 20 Hawaii 717. **Ill.**  
*Chamberlain v. Sutherland*, 4 Ill. App.  
494. **Kan.**—*Mills v. Pettigrew*, 45 Kan.  
573, 26 Pac. 33. **Ky.**—*Nickell v. Fal-*  
*len*, 15 Ky. L. Rep. 389, 23 S. W. 366.  
**Me.**—*McDonough v. Blossom*, 109 Me.  
141, 83 Atl. 323. **Md.**—*Isaac v. Clarke*,  
2 Gill 1. **Miss.**—*Baird v. Bardwell*, 60  
Miss. 164; *Nevill v. Matthews*, Walk.  
377. **Mo.**—*State ex rel. Sheridan Pub.*  
*Co. v. Goodrich*, 159 Mo. App. 422, 140  
S. W. 629. **Neb.**—*Philpott v. Brown*,  
16 Neb. 387, 20 N. W. 288; *Cheney*  
*v. Cooper*, 14 Neb. 415, 16 N. W. 471.  
**Nev.**—*Laird v. Morris*, 23 Nev. 34, 42  
Pac. 11. **N. Y.**—*Oggsbury v. La Farge*,  
2 N. Y. 113; *Miller v. McGuckin*, 15  
Abb. N. C. 204; *Rosse v. Rust*, 4 Johns.  
Ch. 300; *Hayward v. Manhattan R.*  
*Co.*, 52 Hun 383, 5 N. Y. Supp. 473;  
*Porges v. Cohen*, 23 Misc. 703, 52 N. Y.  
Supp. 71. **Ohio.**—*Loudenback v. Col-*  
*lins*, 4 Ohio St. 251. **Pa.**—*Vought v.*  
*Sober*, 73 Pa. 49. **Tenn.**—*Kelton v.*  
*Jacobs*, 5 Baxter 574; *Renshaw v. Tul-*  
*lahoma First Nat. Bank (Tenn. Ch.)*,  
63 S. W. 194. **Tex.**—*Worst v. Sgitco-*  
*vich (Tex. Civ. App.)*, 46 S. W. 72.  
**Vt.**—*Porter v. Vaughn*, 26 Vt. 624.  
**W. Va.**—*Cornell v. Hartley*, 41 W. Va.  
493, 23 S. E. 789. **Wis.**—*Spear v. Door*  
*County*, 65 Wis. 298, 27 N. W. 60. **Eng.**  
*Brandlyn v. Ord*, 1 Atk. 571, 26 Eng.  
Reprint 359; *Magnus v. Scotland Nat.*  
*Bank*, 57 L. J. Ch. 902, 58 L. T. Rep.  
N. S. 617, 36 Wkly. Rep. 602.

**Judgment of nonsuit as bar**, see  
*infra*, XVII, B, 3, d, (II), (H).

90. *Farish v. New Mexico Min. Co.*,  
5 N. M. 279, 21 Pac. 654. See also  
*Mumford v. The Acadia Powder Co.,*  
*Ltd.*, 37 Nova Scotia 375, holding that,  
where an action was dismissed with  
costs for failure of plaintiff to appear  
and prosecute, plaintiff should have ap-  
plied to the trial court to set aside the

judgment, and that it operated as an  
estoppel until set aside.

[a.] **In Alabama** under Chancery  
Practice Rule 28, a dismissal at the  
default, failure or instance of the  
plaintiff is equivalent to a dismissal on  
the merits and a bar to a subsequent  
suit on the same cause of action. *Kelly*  
*v. Griffin*, 165 Ala. 309, 51 So. 789;  
*Crausby v. Crausby*, 164 Ala. 471, 51  
So. 529.

[b.] **By statute in Wisconsin** a dis-  
missal for failure to prosecute, or bring  
to trial a pending action, in which the  
issues have been joined, within five  
years, is a bar to any other action on  
the same subject-matter, whether  
against the same party or another, if  
the former defendant is a necessary  
party to the second suit. *Geo. Walter*  
*Brewing Co. v. Henseleit*, 146 Wis. 666,  
132 N. W. 631.

91. **U. S.**—*Murray v. Pocatello*, 226  
U. S. 318, 33 Sup. Ct. 107, 57 L. ed.  
239; *Smith v. McNeal*, 109 U. S. 426,  
3 Sup. Ct. 319, 27 L. ed. 986; *Walden*  
*v. Bodley*, 14 Pet. 156, 10 L. ed. 398;  
*Hughes v. United States*, 4 Wall. 232,  
18 L. ed. 303; *Bunker Hill, etc. Min.,*  
*etc. Co. v. Shoshone Min. Co.*, 109 Fed.  
504, 47 C. C. A. 200; *United States v.*  
*Rand*, 53 Fed. 348, 3 C. C. A. 556.  
**Ala.**—*Waddle v. Ishe*, 12 Ala. 308.  
**Colo.**—*Lake County v. Schradsky*, 31  
Colo. 178, 71 Pac. 1104. **Fla.**—*O'Neil*  
*v. Percival*, 25 Fla. 118, 5 So. 809.  
**Idaho.**—*Pocatello v. Murray*, 21 Idaho  
180, 120 Pac. 812 (*affirmed* in 226 U. S.  
318, 33 Sup. Ct. 107, 57 L. ed. 239).  
**Ill.**—*Jones v. Hunter*, 32 Ill. App. 445.  
**Ia.**—*Keokuk, etc. R. Co. v. Donnell*, 77  
Iowa 221, 42 N. W. 176; *Weyand v.*  
*Atchison, etc. R. Co.*, 75 Iowa 573, 39  
N. W. 899, 9 Am. St. Rep. 504, 1 L.  
R. A. 650; *Roberts v. Hamilton*, 56  
Iowa 683, 10 N. W. 236; *Arnold v.*  
*Grimes*, 2 Iowa 1. **Ky.**—*Bitzer v.*  
*O'Bryan*, 107 Ky. 590, 54 S. W. 951;  
*La Master v. Lair*, 1 Dana 109. **Md.**

in making a bill for want of jurisdiction, because plaintiff has an adequate remedy at law, does not bar a subsequent action at law;<sup>92</sup> but a decree erroneously dismissing a bill on the ground that an adequate remedy at law exists, will, unless reversed on appeal, bar the right to equitable relief in a subsequent suit.<sup>93</sup>

(d.) *For Want of Defect of Parties.*—A judgment entered against a plaintiff because of a defect or insufficiency of parties," or upon the ground that the plaintiff does not possess the legal capacity to sue, or

*Martin v. Evans*, 85 Md. 8, 30 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; *Schindel v. Suman*, 13 Md. 310. Mich.—*Way v. Seaboard*, 41 Mich. 298, 11 N. W. 166. Minn.—*Goenen v. Schroeder*, 18 Minn. 66. Miss.—*Mosby & Kyle v. Wall*, 23 Miss. 81, 55 Am. Dec. 71. Neb.—*James v. Uhl*, 11 Neb. 380, 9 N. W. 40; *Irwin v. Gay*, 3 Neb. (Unof.) 158, 31 N. W. 106. N. Y.—*Campbell v. Davis, Davis & Co.*, 46 Bar. 266; *Smith v. Adams*, 24 Wend. 585; *Dunlevie v. Spangenberg*, 66 Misc. 354, 121 N. Y. Supp. 288. N. C.—*Wink v. Atlantic Coast Line R. Co.*, 145 N. C. 203, 58 S. E. 1073. Pa.—*Champlin v. Smith*, 164 Pa. 481, 30 Atl. 447; *Weigley v. Coffman*, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep. 667. S. C.—*Gist v. Davis*, 2 Hill Eq. 335, 29 Am. Dec. 89. Tenn.—*Estill v. Taul*, 2 Yerg. 467, 24 Am. Dec. 493. Tex.—*Adone v. Wettermark*, 23 Tex. Civ. App. 593, 68 S. W. 553; *Jecker v. Phytides*, 27 Tex. Civ. App. 410, 65 S. W. 1129; *Seitz v. McKenzie*, 4 Tex. Civ. App. 81, 22 S. W. 104; *Hull v. Quest*, 2 Posey Unrep. Cas. 50. Vt.—*Jordan v. Underhill*, 67 Vt. 85, 30 Atl. 690, 48 Am. St. Rep. 804. Wis.—*Gray v. Tyler*, 40 Wis. 579.

[a] See also *Hackett v. Connett*, 2 Edw. Ch. (N. Y.) 73, holding that a refusal by a court of law to decide a question of set-off is no bar to an inquiry relative thereto in a court of equity having concurrent jurisdiction of the motion.

[b] That it is a final adjudication of the fact that the court was without jurisdiction to hear and determine the matter involved. *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812 (affirmed in 226 U. S. 318, 33 Sup. Ct. 107, 57 L. ed. 239); *Glackin v. Zeller*, 52 Barb. (N. Y.) 147.

92. Mo.—*Barnett v. Smart*, 158 Mo. 167, 59 S. W. 235. Ohio.—*Porter v. Wagner*, 35 Ohio St. 471; *Granger v. Moore*, 35 Ohio St. 317. W. Va.—*Car-*

*berry v. West Virginia, etc. R. Co.*, 44 W. Va. 260, 28 S. E. 694. Eng.—*Beere v. Planting*, 13 Tr. Ct. L. 30d.

[a] Want of jurisdiction, because of an adequate remedy at law, should be stated by a court of equity in dismissing a bill, as otherwise the dismissal will be held to have been on the merits. *Carberry v. West Virginia, etc. R. Co.*, 44 W. Va. 260, 28 S. E. 694.

93. *Barnett v. Smart*, 158 Mo. 167, 59 S. W. 235.

94. U. S.—*Romes v. Levee Steam Cotton-Press Co.*, 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. ed. 289; *Belt's Exrx. v. United States*, 15 Ct. Cl. 92. Ala.—*McCall v. Jones*, 72 Ala. 368. Ark.—*Geisreiter v. Sevier*, 33 Ark. 522. Colo.—*Union Pac. R. Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923. Ia.—*Miller v. Langworthy*, 3 G. Gr. 347. Kan.—*Union Terminal R. Co. v. State Railroad Comrs.*, 54 Kan. 352, 38 Pac. 290; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626. La.—*Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31, 5 So. 728. Mo.—*Baker v. Lane*, 137 Mo. 682, 39 S. W. 450. N. Y.—*O'Connor v. National Ice Co.*, 121 N. Y. 662, 24 N. E. 1092; *Wheeler v. Ruckman*, 51 N. Y. 391; *Vaughan v. O'Brien*, 57 Barb. 491, 39 How. Pr. 515; *Robbins v. Wells*, 1 Rob. 666, 18 Abb. Pr. 191, 26 How. Pr. 15. Pa.—*Fleming v. Ins. Co.*, 12 Pa. 391. S. C.—*Montgomery v. Delaware Ins. Co.*, 67 S. C. 399, 45 S. E. 934. Tenn.—*Harris & Cole Bros. v. Columbia Water, etc. Co.*, 114 Tenn. 328, 85 S. W. 897; *Stubbs v. Louisville, etc. R. Co.*, 113 Tenn. 305, 87 S. W. 411. Tex.—*Nickelson v. Ingram*, 24 Tex. 630. Wis.—*Tierney v. Abbott*, 46 Wis. 329, 1 N. W. 94.

[a] But see *Thompson v. Clay*, 3 Mon. (Ky.) 359, 16 Am. Dec. 108, holding that, while it is error to dismiss a bill for want of sufficient parties defendant without reserving the complainant's rights, yet, if he fails to

is unauthorized to bring or maintain the suit,<sup>95</sup> does not operate as a bar to another suit on the same cause of action.

(e.) *For Defective Pleadings.* — A judgment based upon defects in the pleadings does not, as a general rule, go to the merits of the cause, and will not, therefore, bar another suit on the same cause of action.<sup>96</sup> But where the material issues involved in the suit have been necessarily determined in sustaining a demurrer, the judgment thereupon rendered is a bar to a further action upon the same matter.<sup>97</sup> The fact that a matter was improperly pleaded does not affect the conclusiveness of the judgment rendered, where no objection was made at the time by the adverse party.<sup>98</sup>

(4.) *On Dismissal of Appeal.* — Generally the order of an appellate court dismissing an appeal from a judgment, leaves the judgment to

have it reversed on appeal, it is as conclusive against him as if on the merits.

95. **U. S.**—*Cunningham v. Cleveland*, 98 Fed. 657, 39 C. C. A. 211. **Ark.** *Hill v. Bryant*, 61 Ark. 203, 32 S. W. 506. **Cal.**—*Wills v. Pauly*, 116 Cal. 575, 48 Pac. 709; *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580. **Ia.**—*White v. Savery*, 50 Iowa 515. **La.**—*Cook v. Doremus*, 10 La. Ann. 679. **Mich.**—*Sessions v. Sherwood*, 78 Mich. 234, 44 N. W. 263. **Mo.**—*Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887. **Neb.**—*Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080. **N. Y.**—*Mitchell v. Cook*, 29 Barb. 243; *Robbins v. Wells*, 26 How. Pr. 15, 1 Robt. 666, 18 Abb. Pr. 191; *Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43. **N. D.**—*Webb v. Wegley*, 19 N. D. 606, 125 N. W. 562. **Pa.**—*De Hart v. Kerlin*, 4 Pa. Co. Ct. 396.

96. **U. S.**—*Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591; *Gilmer v. Morris*, 30 Fed. 476; *Keller v. Stolzenbach*, 20 Fed. 47. **Ark.**—*Cooper v. McCoy*, 116 Ark. 501, 173 S. W. 412. **Cal.** *Naftzger v. Gregg*, 31 Pac. 612. **D. C.** *Czarra v. Board of Medical Supervisors*, 25 App. Cas. 443. **Ill.**—*Hoyt v. Chicago*, etc. R. Co., 177 Ill. 617, 52 N. E. 1127 (*affirming* 50 Ill. App. 583); *Gage v. Ewing*, 114 Ill. 15, 28 N. E. 379; *Smalley v. Edey*, 19 Ill. 207; *Vanlandingham v. Ryan*, 17 Ill. 25; *Langmuir v. Landes*, 113 Ill. App. 134. **Ind.**—*Elkhart Car-Works Co. v. Ellis*, 135 Ind. 205, 34 N. E. 11. **Kan.**—*McClung v. Hohl*, 10 Kan. App. 93, 61 Pac. 507. **Ky.**—*Farnsley's Admr. v. Philadelphia L. Ins. Co.*, 156 Ky. 699, 161 S. W. 1111; *Birch v. Funk*, 2 Metc.

544; *Kendal v. Talbot*, 1 A. K. Marsh. 321. **Mass.**—*Soper v. Manning*, 158 Mass. 381, 33 N. E. 516. **Minn.**—*Major v. Owen*, 126 Minn. 1, 147 N. W. 662. **Miss.**—*Perry v. Lewis*, 49 Miss. 443. **Mo.**—*Wells v. Moore*, 49 Mo. 229. **Neb.** *State v. Cornell*, 52 Neb. 25, 71 N. W. 961. **Ohio.**—*Fuher v. Villwock*, 14 Ohio Cir. Ct. 389, 6 Ohio Cir. Dec. 373. **Ore.**—*O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004. **S. C.**—*Duke v. Postal Tel. Cable Co.*, 71 S. C. 95, 50 S. E. 675; *Salinas v. Aultman*, 45 S. C. 283, 22 S. E. 889. **Va.**—*Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431. **Wash.** *Von Tobel v. Stetson*, etc. Mill Co., 32 Wash. 633, 73 Pac. 788. **W. Va.**—*State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650. **Wis.**—*Benware v. Pine Valley*, 53 Wis. 527, 10 N. W. 695. **Eng.**—*Ingram v. Bray*, 2 Lev. 210, 83 Eng. Reprint 523; *Lampen v. Kedgewin*, 1 Mod. 207, 86 Eng. Reprint 832. **Can.**—*Baker v. Booth*, 2 U. C. Q. B. O. S. 373.

[a] *Compare*, *Jones v. Henry*, 3 Litt. (Ky.) 427, holding that, a failure of an investigation of a matter at law, on account of defective pleading of the defendant, is binding on him, and will bar him from a resort to equity, if by properly pleading the matter the whole merits of the case could have been tried at law.

97. **Ill.**—*Godschalek v. Weber*, 247 Ill. 269, 93 N. E. 241. **Ia.**—*Wapello State Sav. Bank v. Colton*, 143 Iowa 359, 122 N. W. 149. **N. M.**—*Board of Comrs. of Grant County v. Cross*, 12 N. M. 72, 73 Pac. 615.

See *supra*, XVII, B, 3, d, (II), (F).

98. *Thompson v. Wineland*, 11 Mo. 243.



operate with the same force and effect as though no appeal from it had been taken.<sup>20</sup> But in cases involving a trial de novo in the appellate court, wherein a dismissal of the appeal operates as a nonsuit or dismissal of the action in the trial court,<sup>1</sup> or in case of a dismissal of the action by the lower court upon order of the higher court, leaving the parties as if no action had been brought,<sup>2</sup> the judgment entered on such dismissals does not operate to bar further suit. So also a judgment dismissing an appeal from a lower court for want of jurisdiction therein does not bar a subsequent action.<sup>3</sup>

(II.) JUDGMENTS OF NONSUIT OR ON A RETRAIT.<sup>4</sup> — Since a judgment of nonsuit is not usually a judgment on the merits, it does not usually constitute a bar to another suit upon the same cause of action; and this is true whether such nonsuit is voluntary or involuntary;<sup>5</sup> where a

99. Ark.—Burgess v. Poole, 45 Ark. 373. Colo.—Pueblo Chicago Lumber Co. v. Danziger, 7 Colo. App. 149, 42 Pac. 683. Fla.—Duval County Comrs. v. Fries, 22 Fla. 303. Ill.—Bank of Montreal v. Griffin, 190 Ill. App. 221. Ia.—Austin v. Walker, 61 Iowa 158, 16 N. W. 65. Mich.—Cummerford v. Paulus, 66 Mich. 648, 33 N. W. 741. Vt.—Catlin v. Taylor, 18 Vt. 104.

But see McMillan v. Conrad, 5 McCrary 140, 16 Fed. 128.

1. Ga.—Phipps v. Alford, 95 Ga. 215, 22 S. E. 152; Fagan v. McTier, 81 Ga. 73, 6 S. E. 177. Ky.—Cave v. Davis & Rice, 5 Mon. 392. Wis.—Holman v. Lueck, 137 Wis. 375, 119 N. W. 124.

[a] A second action, begun before dismissal of the first, after appeal to the circuit court from a justice of the peace, was barred by the judgment in force when it was instituted, in which the cause of action had been merged, and the dismissal could not relate back so as to authorize the second suit. Cooksey v. Kansas City, St. Joseph & C. B. R. Co., 74 Mo. 477.

2. Ind.—Whitworth v. Sour, 57 Ind. 107. Ky.—Davis v. Slaughter, 4 Ky. L. Rep. 999. Miss.—Clay v. Chickasaw, 64 Miss. 534, 1 So. 753.

3. Reading v. Price, 3 J. J. Marsh. (Ky.) 61, 19 Am. Dec. 162; The State v. Brooke, 29 Mo. App. 286.

Dismissal for want of jurisdiction generally, see *supra*, XVII, B, 3, d, 111, 103, (31, 60).

4. See generally the title "Dismissal, Discontinuance and Nonsuit."

5. See the following: U. S.—Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; United States v. Parker, 120 U. S. 89, 7 Sup.

Ct. 454, 30 L. ed. 601; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. ed. 878; Haldeman v. United States, 91 U. S. 584, 23 L. ed. 433; Homer v. Brown, 16 How. 354, 14 L. ed. 970; McClaine v. Rankin, 119 Fed. 110, 56 C. C. A. 160; Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 37; Bixler v. Pennsylvania R. Co., 201 Fed. 553; Union Bank v. Oxford, 90 Fed. 7; Aylesworth v. Gratiot County, 43 Fed. 350. Ala.—Beadle v. Graham's Admr., 66 Ala. 99; Wise v. Falkner, 45 Ala. 471; Savage v. Gunter, 32 Ala. 467; Wyatt v. Judge, 7 Port. 37. Ark.—Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477. Cal.—San Francisco v. Brown, 153 Cal. 644, 96 Pac. 281; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Gates v. McLean, 9 Pac. 938; Fleming v. Hawley, 65 Cal. 492, 4 Pac. 494; Wood v. Ramond, 42 Cal. 643; Lewis v. Superior Court of Butte County, 11 Cal. App. 483, 105 Pac. 763. Colo.—Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; Westcott v. Bock, 2 Colo. 335; Norton's Estate v. McAlister, 22 Colo. App. 293, 123 Pac. 963. Ga.—Central of Ga. R. Co. v. Macon Ry. & Light Co., 140 Ga. 309, 78 S. E. 931; Buchanan v. James, 134 Ga. 475, 68 S. E. 72; Ryan v. Fulgham, 96 Ga. 234, 22 S. E. 940; Alabama Great Southern R. Co. v. Blevins, 92 Ga. 522, 17 S. E. 836; Hendrick v. Clonts, 91 Ga. 196, 17 S. E. 119; Smith v. Floyd, 85 Ga. 420, 11 S. E. 850. Idaho.—Keane v. Pittsburg Lead Mining Co., 17 Idaho 179, 105 Pac. 60. Ill.—Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Holmes v. Chicago, etc. R. Co., 94 Ill. 439; Gibbs v. Jones, 46 Ill. 319; Howes v. Austin, 35 Ill. 396; Bates v. Jenkins,

judgment is in effect merely a nonsuit, it will not operate as a bar to another action because of the fact that it is entered under a differ-

1 Ill. 411; *Falcon Engineering Co. v. Wright*, 171 Ill. App. 521. **Ind.**—*Miller v. Mans*, 28 Ind. 194; *Crews v. Cleg-horn*, 13 Ind. 438; *Daggett v. Robins*, 2 Blackf. 415, 21 Am. Dec. 752. **Ia.** *Boyer v. Austin*, 54 Iowa 402, 6 N. W. 585; *Delany v. Reade*, 4 Iowa 292; *Mason v. Lewis*, 1 G. Gr. 494. **Ky.** *City of Cloverport v. Polk Canning Co.*, 149 Ky. 414, 149 S. W. 817; *Harris v. Tiffany*, 8 B. Mon. 225; *Dana v. Gill*, 5 J. J. Marsh. 242, 20 Am. Dec. 255; *Crawford v. Summers*, 3 J. J. Marsh. 300. **La.**—*Carolina Portland Cement Co. v. Southern Wood, etc. Co.*, 137 La. 469, 68 So. 831; *Riggs Cypress Co. v. Albert Hanson Lumber Co.*, 127 La. 450, 53 So. 700; *Johnson v. City of New Orleans*, 50 La. Ann. 920, 24 So. 635; *Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31, 5 So. 728. **Me.**—*Pendergrass v. York Mfg. Co.*, 76 Me. 509; *Haynes v. Jackson*, 66 Me. 93; *Jay v. Carthage*, 48 Me. 353; *Brett v. Marston*, 45 Me. 401. **Mass.**—*Marsh v. Hammond*, 11 Allen 483; *Clapp v. Thomas*, 5 Allen 158; *Jones v. Howard*, 3 Allen 223; *Ensign v. Bartholomew*, 1 Mete. 274; *Bridge v. Sumner*, 1 Pick. 371; *Morgan v. Bliss*, 2 Mass. 111. **Mich.**—*Deneen v. Houghton County St. Ry. Co.*, 150 Mich. 235, 113 N. W. 1126. **Mo.**—*Wiethaupt v. St. Louis*, 158 Mo. 655, 59 S. W. 960; *Ellington v. Crockett*, 13 Mo. 72; *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119; *Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750; *Dean v. Toledo, St. L. & W. R. Co.*, 148 Mo. App. 428, 128 S. W. 10; *Burns v. Marsh*, 144 Mo. App. 412, 128 S. W. 834; *Zeller v. Ranson*, 140 Mo. App. 220, 123 S. W. 1016; *Hudson-Kimberly Pub. Co. v. Young*, 90 Mo. App. 505; *National Water Works Co. v. Kansas City School Dist.*, 23 Mo. App. 227. **Neb.**—*Cheney v. Cooper*, 14 Neb. 415, 16 N. W. 471. **Nev.**—*Van Vliet v. Olin*, 1 Nev. 495. **N. H.**—*Eaton v. George*, 40 N. H. 258; *Holton v. Gleason*, 26 N. H. 501. **N. J.**—*Beckett v. Stone*, 60 N. J. L. 23, 36 Atl. 880; *Snowhill v. Hillyer*, 9 N. J. L. 38. **N. Y.**—*Hon-singer v. Union Carriage, etc. Co.*, 175 N. Y. 229, 67 N. E. 436; *Wheeler v. Ruckman*, 51 N. Y. 391; *People v. Vilas*, 36 N. Y. 459, 3 Ab. Pr. (N. S.) 252, 93 Am. Dec. 520; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Lewis v. Davis*, 8 Daly 185; *Elwell v. McQueen*, 10 Wend. 519; *Reynolds v. Garner*, 66 Barb. 310; *Kaplan v. Friedman Const. Co.*, 148 App. Div. 14, 132 N. Y. Supp. 233; *Koewing v. Thalmann*, 139 App. Div. 893, 123 N. Y. Supp. 750; *Scott v. Hartog*, 75 Misc. 126, 132 N. Y. Supp. 846; *Galletto v. Serafino*, 40 Misc. 671, 83 N. Y. Supp. 184; *Steel v. Holtzer*, 144 N. Y. Supp. 643; *Hirschfeld v. Monahan*, 143 N. Y. Supp. 1023; *Brooks, et al. v. Schlernitzauer*, 113 N. Y. Supp. 484; *Goldman v. Tobias*, 88 N. Y. Supp. 991; *In re Townshend*, 64 Hun 636, 18 N. Y. Supp. 905. **N. C.** *Culbreth v. Atlantic Coast Line R. Co.*, 169 N. C. 723, 86 S. E. 624; *Starling v. Selma Cotton Mills*, 168 N. C. 229, 84 S. E. 388, L. R. A. 1915D, 850; *Wilson v. Eureka Lumb. Co.*, 166 N. C. 226, 81 S. E. 741; *Tuttle v. Warren*, 153 N. C. 459, 69 S. E. 426; *Smith v. Globe Home Furniture Mfg. Co.*, 151 N. C. 260, 65 S. E. 1009; *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180; *Hood v. Western Union Tel. Co.*, 135 N. C. 622, 47 S. E. 607; *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800. **N. D.**—*Webb v. Wegley*, 19 N. D. 606, 125 N. W. 562. **Ohio.**—*Holland v. Hatch*, 15 Ohio St. 464. **Ore.**—*Wicks v. Sanborn*, 72 Ore. 321, 143 Pac. 1007; *Rehfield v. Winters*, 62 Ore. 299, 125 Pac. 289; *Carroll v. Grande Bonde Electric Co.*, 49 Ore. 477, 90 Pac. 903; *Hughes v. Walker*, 14 Ore. 481, 13 Pac. 450. **Pa.** *Vought v. Sober*, 73 Pa. 49; *Haws v. Tiernan*, 53 Pa. 192; *Blair v. McLean*, 25 Pa. St. 77; *Fisher v. Longnecker*, 8 Pa. 410; *Bournonville v. Goodall*, 10 Pa. 133; *Fleming v. Insurance Co.*, *Brightly* N. P. 102. **Phil. Isl.**—*Ferrer v. Diaz & Diaz*, 15 Phil. Isl. 219. **R. I.** *Robinson v. Merchants', etc. Transp. Co.*, 16 R. I. 637, 19 Atl. 113. **S. C.** *McCown v. Muldrow*, 91 S. C. 523, 74 S. E. 386; *Wall v. Chelsea Plantation Club*, 88 S. C. 61, 70 S. E. 434; *Whaley v. Stevens*, 24 S. C. 479; *McEwen v. Mazyck*, 3 Rich. L. 210; *Foreman v. Sandefur*, 1 Brev. 474. **Tenn.**—*Louis-ville & N. R. Co. v. Beasley & Beasley*, 123 Tenn. 629, 134 S. W. 306; *Illinois Cent. R. Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 91 Am. St. Rep. 763, 58

ent form or name.<sup>6</sup> By statute or rule, however, it is sometimes provided that a judgment of nonsuit shall have the same effect as a judgment on the merits for the defendant, unless the court otherwise directs.<sup>7</sup> And if a judgment of nonsuit is given after a consideration of the cause upon the merits, it operates as a bar to a further suit upon the same cause of action.<sup>8</sup>

A judgment of non prosecution is in effect the same as a nonsuit; that is it turns the plaintiff out of court on the action, or part of the cause of action, non pressed, without barring a subsequent action thereon.<sup>9</sup>

L. R. A. 690; *Hooper v. Atlanta, etc.* R. Co., 107 Tenn. 712, 65 S. W. 405. **Tex.**—*Pillow v. Elliot*, 25 Tex. Supp. 322; *Foster v. Wells*, 4 Tex. 101; *Keller v. J. M. Radford Grocery Co.* (Tex. Civ. App.), 127 S. W. 888; *Long v. Behan*, 19 Tex. Civ. App. 325, 48 S. W. 553; *Brainerd v. Bute* (Tex. Civ. App.), 44 S. W. 575. **Utah.**—*Robinson v. Salt Lake City*, 37 Utah 520, 109 Pac. 817; *Smalley v. Rio Grande Western Ry. Co.*, 34 Utah 423, 98 Pac. 311; *Guthrie v. Gilmer*, 27 Utah 496, 76 Pac. 628. **Va.**—*Staunton Mut. Tel. Co. v. Buchanan*, 108 Va. 810, 62 S. E. 923; *Wortham v. Com.*, 5 Rand. (26 Va.) 669. **Wash.**—*Alberg v. Campbell Lumber Co.*, 60 Wash. 533, 111 Pac. 775; *Union Bank v. Nelson*, 32 Wash. 208, 73 Pac. 372. **Wis.**—*Toledo Computing Scale Co. v. Polanis*, 157 Wis. 312, 147 N. W. 632; *Gratz v. Parker*, 137 Wis. 104, 107, 118 N. W. 637; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Gummer v. Trustees of Village of Omro*, 50 Wis. 247, 6 N. W. 885.

See also 7 STANDARD PROC. 684.

**6. Fla.**—*State v. Anderson*, 26 Fla. 240, 8 So. 1. **La.**—*Bourg v. Gerding*, 33 La. Ann. 1369. **Me.**—*Means v. Hoar*, 110 Me. 409, 86 Atl. 772. **Mass.**—*Marsh v. Hammond*, 11 Allen 483. **N. Y.**—*Smith v. McMillan*, 90 Hun 542, 36 N. Y. Supp. 24; *Nudelman v. Borden's Con. Milk Co.*, 77 Misc. 103, 136 N. Y. Supp. 49. **Pa.**—*Haws v. Tiernan*, 53 Pa. 192.

**7. Poyser v. Minors**, 7 Q. B. D. (Can.) 229.

[a] A judgment of nonsuit in an action to foreclose a mechanic's lien is a bar to a second proceeding to enforce the same lien; statute does not contemplate more than one suit to enforce the lien. *Sullivan v. Brewster*, 1 E. D. Smith (N. Y.) 681, 8 How. Pr. 207.

**8. Morrow v. Atlanta, etc. Air Line Ry. Co.**, 84 S. C. 224, 66 S. E. 186;

*Napier v. Gidiere*, 7 Rich. Eq. (S. C.) 254 (holding that plaintiff was not entitled on the merits, and not entitled to bring another action). See *Chiles v. Champenois*, 69 Miss. 603, 13 So. 840; *Ordway v. Boston & Maine Railroad*, 69 N. H. 429, 45 Atl. 243 (holding that an involuntary nonsuit because of insufficient evidence, is in effect a judgment on the merits, as in the case of a directed verdict, and a bar to a subsequent suit); *Engel v. Union Square Bank*, 94 App. Div. 244, 87 N. Y. Supp. 1070, holding that a dismissal of a complaint in a suit by a trustee in bankruptcy to determine the ownership of some insurance policies assigned to it by the bankrupt after loss, for failure of proof, was an adjudication of the ownership of the funds in the defendant.

[a] A judgment (1) of nonsuit entered after a submission of the case upon evidence is a bar to a subsequent action. *Elwell v. McQueen*, 10 Wend. (N. Y.) 519. (2) The bar is limited to the particular issue involved. *Gillilan v. Spratt*, 3 Daly (N. Y.) 440, 41 How. Pr. 27.

[b] An involuntary nonsuit by a justice of the peace who has no authority to enter such a judgment, is in effect a judgment on the merits. *Lawver v. Walls*, 17 Pa. 75; *Gould v. Crawford*, 2 Pa. 89.

[c] A nonsuit based upon the undisputed validity of a release, unappealed from, is an adjudication of such release, and is a bar to another action for the damages thereby released. *Hughes v. Southern Ry. Co.*, 92 S. C. 1, 75 S. E. 214.

**9. U. S.**—*Gabrielson v. Waydell*, 67 Fed. 342; *Book v. United States*, 31 Ct. Cl. 272. **Ala.**—*J. B. Ellis & Co. v. Brannon*, 161 Ala. 573, 49 So. 1034. **Ill.**—*Howes v. Austin*, 35 Ill. 396. **Ind.**—*Lambert v. Sandford*, 2 Blackf. 137, 18 Am. Dec. 149. **Ky.**—*Shotwell v.*



A judgment on a retraxit, however, is a complete bar to a subsequent action for the same cause of action.<sup>10</sup>

(I.) JUDGMENT NON OBSTANTE VEREDICTO. — The judgment of a court in favor of the defendant non obstante veredicto, on a reserved question of law decisive of the case, is as conclusive as if a binding instruction in his favor had been given, and is a bar to a subsequent action on the same cause.<sup>11</sup>

*e. Judgment Must Be Final.* — (I.) In General. — A judgment to operate as a bar to a subsequent action must be a final judgment on the merits of the controversy, terminating the litigation between the parties.<sup>12</sup> Where the judgment is merely interlocutory in its nature,

Chesapeake & O. R. Co., 130 Ky. 569, 113 S. W. 512. **Tex.**—Foster v. Wells, 4 Tex. 101. **Eng.**—Dordsy v. Cook, 4 Barn. & Cress. 135, 107 Eng. Reprint 1009.

10. **U. S.**—United States v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601. **Ala.**—Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Evans v. McMahan, 1 Ala. 45. **Ark.**—Harris v. Preston, 10 Ark. 201. **Ga.**—Cunningham v. Schley, 68 Ga. 105. **Ind.**—Lambert v. Sandford, 2 Blackf. 137, 18 Am. Dec. 149. **Miss.**—Coffman v. Brown, 7 Smed. & M. 125, 45 Am. Dec. 299. **Pa.**—Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501. **W. Va.**—See South Branch R. Co. v. Long, 26 W. Va. 692. **Eng.**—Beecher v. Shirley, Cro. Jac. 211, 79 Eng. Reprint 183. **Can.**—Exchange Bank of Gilman, 17 Can. Sup. Ct. 108.

See 7 STANDARD PROC. 652.

[a] Retraxit is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not further proceed, which operates as a bar forever. Harris v. Preston, 10 Ark. 201.

[b] Plaintiff's consent to the entry of a judgment of retraxit is necessary to constitute it a bar. Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

11. Casey v. Pennsylvania Asphalt Paving Co., 109 Fed. 744, affirmed, 114 Fed. 189, 52 C. C. A. 145.

12. See the following: **U. S.**—McGourkey v. Toledo, etc. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079; Hickey v. Stewart, 3 How. 750, 11 L. ed. 814; Australian Knitting Co. v. Gormly, 138 Fed. 92; O'Brien v. Wheelock, 78 Fed. 673. **Ala.**—McLane v. Spence, 11 Ala. 172. **Ariz.**—Reilly v. Perkins, 6 Ariz. 188, 56 Pac. 734. **Ark.**—Crump v. Starke, 23 Ark. 131. **Calo.**—Dusing v. Nelson, 7 Colo. 184, 2

Pac. 922. **Ill.**—Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Wadsworth v. Conneff, 104 Ill. 369; Toledo, P. & W. R. Co. v. Eastburn, 79 Ill. 140; Kingsbury v. Buckner, 70 Ill. 514. **Ind.**—Procter v. Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303. **Ia.**—McClelland v. Bennett, 106 Iowa 74, 75 N. W. 667; Woodin v. Clemons, 32 Iowa 280. **Kan.**—Buchanan County First Nat. Bank v. Linvill (Kan. App.), 62 Pac. 165. **Ky.**—Hibler v. Shipp, 78 Ky. 64; Bowen v. Highbaugh, 30 Ky. L. Rep. 1114, 100 S. W. 221; Nickell v. Fallen, 15 Ky. L. Rep. 389, 23 S. W. 366. **La.**—Peet v. Whitmore, 14 La. Ann. 408; Trescott v. Lewis, 12 La. Ann. 197; Kellam v. Rippey, 3 La. Ann. 202. **Me.**—Hobbs v. Staples, 19 Me. 219. **Md.**—Grant Coal Co. v. Clary, 59 Md. 441; Turner v. Plowden, 5 Gill & J. 52, 23 Am. Dec. 596. **Mich.**—Detroit v. Village of Highland Park, 186 Mich. 166, 152 N. W. 1002. **Mo.**—Strong v. Hamilton, 144 Mo. 668, 46 S. W. 439. **Neb.**—Smith v. Smith, 2 Neb. (Unof.) 655, 89 N. W. 799; Hart v. Bank of Commerce, 51 Neb. 486, 71 N. W. 40; Hall v. Vanier, 7 Neb. 397. **N. J.**—State v. Wood, 23 N. J. L. 560. **N. Y.**—Webb v. Buckelew, 82 N. Y. 555; Carlisle v. McCall, 1 Hilt. 399; Sans v. New York, 31 Misc. 559, 64 N. Y. Supp. 681; Thorp v. Philbin, 2 N. Y. Supp. 732. **N. C.**—Shober v. Wheeler, 120 N. C. 353, 27 S. E. 29. **Ohio.**—State v. Ottinger, 43 Ohio St. 457, 3 N. E. 298; White v. Herndon, 15 Ohio Cir. Ct. 290, 8 Ohio Cir. Dec. 292. **Ore.**—Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766; Burnett v. Marrs, 62 Ore. 598, 125 Pac. 838. **Pa.**—Stedman v. Poterie, 139 Pa. 100, 21 Atl. 219; Reed v. Garvin's Exrs., 7 Serg. & R. 354; Barton v. Reynolds, 17 Pa. Super. 504; Ohlinger v. Phillips, 2 Woodw.

it does not operate as a bar to a subsequent action,<sup>13</sup> although it may be final in its form,<sup>14</sup> and if a judgment does not have the effect of terminating the litigation, either by a conclusive adjudication of the question at issue, or throwing the case out of court, it is interlocutory in its nature.<sup>15</sup> But where an interlocutory decree ripens into a final decree after the institution of the second suit it thereby becomes a bar.<sup>16</sup>

A conditional judgment does not operate as a bar to a subsequent action on the same subject-matter until it becomes absolute by the performance, or failure to perform, the conditions upon which it was granted.<sup>17</sup>

(II.) Verdict or Findings. — A verdict or other findings of fact not followed by a judgment based thereon, will not operate as a bar,<sup>18</sup>

53. **Tex.**—Patrick v. Hopkins County, 6 S. W. 626; Bowles v. Belt (Tex. Civ. App.), 159 S. W. 885. **Va.**—Smith v. Blackwell, 31 Gratt. (72 Va.) 291. **Wash.**—Westmoreland Co. v. Howell, 62 Wash. 146, 113 Pac. 281; Wilson v. Seattle Dry Dock, etc. Co., 26 Wash. 297, 66 Pac. 384. **W. Va.**—Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154; Gallaher v. Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942.

See also 7 ENCY. OF EV. 814, et seq. Necessity for judgment on merits, see *supra*, XVII, B, 3, d.

13. **U. S.**—L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242; Australian Knitting Co. v. Gormly, 138 Fed. 92; Roemer v. Neumann, 26 Fed. 332. **Ala.**—McCurdy v. Middleton, 90 Ala. 99, 7 So. 655. **Ariz.**—Reilly v. Perkins, 6 Ariz. 188, 56 Pac. 734. **Ky.**—Morgan v. Goode, 151 Ky. 284, 152 S. W. 584; Schafer-Meyer Brew. Co. v. Hasselback, 22 Ky. L. Rep. 218, 56 S. W. 971. **Md.**—Levy & Barry v. Levy, 28 Md. 25. **Mo.**—Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809. **Va.**—Smith v. Blackwell, 31 Gratt. (72 Va.) 291; Quarles v. Kerr, 14 Gratt. (55 Va.) 48. **W. Va.**—Staley v. Big Sandy, E. L. & G. R. Co., 63 W. Va. 119, 59 S. E. 946. **Eng.**—Massam v. Thorley's Cattle Food Co., 14 Ch. Div. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966.

14. **U. S.**—Ogden City v. Weaver, 108 Fed. 564, 47 C. C. A. 485. **Ala.**—McLane v. Spence, 11 Ala. 172. **Pa.**—Com. v. McCleary, 92 Pa. 188; O'Neal v. O'Neal, 4 Watts & S. 130.

15. **U. S.**—Newman v. Newton, 4 McCrary 293, 14 Fed. 634. **Colo.**—Dusing v. Nelson, 7 Colo. 184, 2 Pac. 922. **Ill.**—Clifford v. Gridley, 113 Ill. App. 161. **Ind.**—Farmers L. & T. Co. v.

Canada, etc. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; The State v. Krug, 94 Ind. 366. **Ky.**—Morgan v. Goode, 151 Ky. 284, 152 S. W. 584. **Mo.**—Joseph, Nelke & Co. v. Boldridge, 43 Mo. App. 333. **N. Y.**—Place v. Rogers, 101 App. Div. 193, 91 N. Y. Supp. 912. **W. Va.**—Staley v. Big Sandy, E. L. & G. R. Co., 63 W. Va. 119, 59 S. E. 946; Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521.

[a] "A judgment is not available as an estoppel until the court rendering it has finally parted with control over the decision." L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242.

16. David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

17. **Ill.**—Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762. **Ky.**—Mattingly v. Louisville, etc. R. Co., 92 Ky. 463, 25 S. W. 830. **Md.**—Shafer v. Shafer, 6 Md. 518. **Mass.**—Flanders v. Hall, 159 Mass. 95, 34 N. E. 178; Com. v. Pejep-scut Proprietors, 7 Mass. 399. **E. I.**—Hicks v. Aylsworth, 13 R. I. 562.

[a] Remittitur.—Where a judgment in ejectment is conditioned on a remittitur by plaintiff for certain interfering surveys, such remittitur is not a retraxit, and not a bar to another suit. Gibson v. Chouteau, 7 Mo. App. 1. See also Martin v. Chapman, 1 Ala. 278, holding that where plaintiff remits a part of his judgment to prevent a new trial for defendant, such remittitur will not bar an action for the amount remitted.

18. **U. S.**—Oklahoma v. McMaster, 196 U. S. 529, 25 Sup. Ct. 324, 49 L. ed. 587 (reversing 12 Okla. 570, 73 Pac. 1012); Smith v. McCool, 16 Wall. 560, 21 L. ed. 324; Reed v. Merrimac

unless the parties have agreed that it shall serve the office of judgment as well as that of verdict, or have acquiesced therein, and thereby renounced their right to further litigate the matter.<sup>19</sup> But some cases hold that, where the time has elapsed in which a new trial may be had, or the verdict set aside, the verdict is a bar to a second suit.<sup>20</sup>

The decision of a court in a case tried without the aid of a jury, if followed by judgment, will as effectually bar another suit upon the same cause of action as if based upon a verdict.<sup>21</sup>

(III.) Master's Report. — The report of a master in chancery is not competent as independent evidence as an adjudication between the parties unless it can be shown that it was accepted by the court and judgment rendered thereon.<sup>22</sup>

(IV.) Effect of Motion for New Trial. — The judgment of a court of competent jurisdiction is, so long as it remains unreversed, usually a

River Locks, etc., 8 How. 274, 12 L. ed. 1077; *Bouldin v. Phelps*, 30 Fed. 547; *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526; *Allen v. Blunt*, 2 Woodb. & Mc. 121, 1 Fed. Cas. No. 217. Cal.—*Estate of Holbert*, 57 Cal. 257. Dak.—*Pearson v. Post*, 2 Dak. 220, 9 N. W. 684. Ga.—*Walden v. Walden*, 124 Ga. 145, 52 S. E. 323; *Harris v. Gano*, 117 Ga. 934, 44 S. E. 11. Ill.—*Stubbings v. Durham*, 210 Ill. 542, 71 N. E. 586; *Harnish v. Miles*, 111 Ill. App. 105. Kan.—*Stauffer v. Remick*, 37 Kan. 454, 15 Pac. 584; *Attica State Bank v. Benson*, 8 Kan. App. 566, 54 Pac. 1037. La.—*Humphreys v. Browne*, 19 La. Ann. 158. Minn.—*Schurmeier v. Johnson*, 10 Minn. 319. Miss.—*Butler v. Stephens*, *Walker* 219. Neb.—*Gapen v. Bretternitz*, 31 Neb. 302, 47 N. W. 918; *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333. N. H.—*Piper v. Boston & M. R. R.*, 75 N. H. 485, 75 Atl. 1041. N. Y.—*Lance v. Shaughnessy*, 153 N. Y. 653, 47 N. E. 1108; *Lorillard v. Clyde*, 99 N. Y. 195, 1 N. E. 614; *Young v. Rummell*, 7 Hill 503; *Derby v. Yale*, 13 Hun 273; *Lance v. Shaughnessy*, 86 Hun 411, 33 N. Y. Supp. 515 (*affirmed* in 153 N. Y. 653, 47 N. E. 1108); *Denike v. Denike*, 44 App. Div. 621, 60 N. Y. Supp. 110; *De Forest v. Andrews*, 27 Misc. 145, 58 N. Y. Supp. 358. Ohio.—*Dunlap v. Robinson*, 12 Ohio St. 530. Pa.—*Dougherty v. Lehigh Coal Co.*, 202 Pa. 635, 52 Atl. 18, 90 Am. St. Rep. 660; *Ferguson & Betts v. Staver*, 40 Pa. 213; *Saylor v. Hicks*, 36 Pa. 392; *Chester City Presb. Church v. Conlin*, 11 Pa. Super. 413. Tenn.—*Railroad Co. v. Brigran*, 95 Tenn. 624, 32 S. W. 762.

Eng.—*Needham v. Bremner*, L. R. 1 C. P. 583, 1 Harr. & R. 731, 2 Jur. N. S. 434, 35 L. J. C. P. 313, 14 L. T. Rep. N. S. 437, 14 Wkly. Rep. 694. Can.—*Twohy v. Armstrong*, 15 U. C. C. P. 269; *Gordon v. Robinson*, 14 U. C. C. P. 566.

19. U. S.—*Pollitz v. Schell*, 30 Fed. 421; *Bartels v. Redfield*, 16 Fed. 336. Ga.—*Crosby v. Pittman*, 129 Ga. 573, 59 S. E. 279, 121 Am. St. Rep. 234; *Carstarphen v. Holt*, 96 Ga. 703, 23 S. E. 904; *Webster v. Dundee Mortg. & Tr. Co.*, 93 Ga. 278, 20 S. E. 310. Pa.—*Estep v. Hutchman*, 14 Serg. & R. 435.

20. U. S.—*Ball v. Trenholm*, 45 Fed. 588. N. Y.—*Felter v. Mulliner*, 2 Johns. 181. Tex.—*Hume v. Schmitz*, 91 Tex. 204, 42 S. W. 543; *Hume v. Schmitz*, 90 Tex. 72, 36 S. W. 429.

21. U. S.—*Bassett v. United States*, 9 Wall. 38, 19 L. ed. 548. Kan.—*Auld v. Smith*, 23 Kan. 65. N. Y.—*Bissell v. Kellogg*, 60 Barb. 617. Vt.—*Dauchy v. Goodrich*, 20 Vt. 127. Wis.—*Morgan v. Chicago, etc. R. Co.*, 83 Wis. 348, 53 N. W. 741; *Kibbee v. Howard*, 7 Wis. 150.

[a] The fact that the judgment is wrong in law, does not prevent it from operating as a bar to another action. *Beall v. Pearre*, 12 Md. 550.

[b] Findings Confirmed by Final Judgment Are Adjudications Only So Far as Necessarily Included in the Judgment.—*Mitchell v. Insley*, 33 Kan. 654, 7 Pac. 201.

22. St. Amand v. Nunnally, 131 Ga. 469, 62 S. E. 589; *Nash v. Hunt*, 116 Mass. 237.



bar to another suit on the same cause of action," and this estoppel is not removed by the pendency of a motion for a new trial,<sup>24</sup> in the absence of statute to the contrary,<sup>25</sup> unless the motion is granted, in which event the judgment cannot be pleaded as a bar pending a new trial.<sup>26</sup>

(V.) Effect of Appeal or Right Thereto. — (A.) IN GENERAL. — Whether the taking of an appeal from a judgment suspends its operation as a bar to a further recovery upon the same cause of action is a question upon which the courts are divided; in some jurisdictions, it does not so operate;<sup>27</sup> in other jurisdictions, however, it is held that, pend-

23. See generally *supra*, this section.

U. S.—Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. ed. 174. Cal.—People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866, Ann. Cas. 1912B, 1148; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. Del. Chase v. Jefferson, 1 Houst. 257. Nev. Young v. Brehl, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892. N. Y.—Blanchard v. Pompelly, Lalor's Supp. 198. Pa.—Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766.

But see *Sterling v. Parker-Washington Co.*, 185 Mo. App. 192, 170 S. W. 1156; *Snow v. Rich*, 22 Utah 123, 61 Pac. 336.

25. *Fresno Milling Co. v. Fresno Canal, etc. Co.*, 103 Cal. xviii, 36 Pac. 412; *Brown v. Campbell*, 109 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *In re Blythe's Estate*, 99 Cal. 472, 34 Pac. 108; *Naftzger v. Gregg*, 99 Cal. 23, 23 Pac. 757, 71 Am. St. Rep. 23.

26. U. S.—*Lamprey v. Pike*, 28 Fed. 30. Ill.—*Preachers' Aid Soc. v. England*, 106 Ill. 125; *Sheldon v. Van Vleck*, 106 Ill. 45. Ind.—*Brown v. Cody*, 115 Ind. 484, 18 N. E. 9. Md.—*Mahoney v. Ashton*, 4 Harr. & McH. 295. Tex.—*Gulf, C. & S. F. Ry. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743. Vt.—*Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

27. U. S.—*Ransom v. Pierre*, 101 Fed. 665, 41 C. C. A. 585; *Elk Garden Co. v. T. W. Thayer Co.*, 206 Fed. 212; *Oregonian R. Co. v. Oregon R., etc. Co.*, 27 Fed. 277. Ala.—*Collier v. Alexander*, 142 Ala. 422, 38 So. 244. Ark.—*Boynton v. Chicago Mill & Lumb. Co.*, 54 Ark. 209, 165 S. W. 77; *Burgess v. Poole*, 45 Ark. 373; *Cloud v. Wiley*, 29 Ark. 80. Fla.—*Reese v. Damato*, 44 Fla. 692, 33 So. 462. Ill.—*People v.*

*Rickert*, 159 Ill. 496, 42 N. E. 884; *Moore v. Williams*, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; *Gaddis v. Leeson*, 55 Ill. 522. Ind.—*Buchanan v. Logansport, etc. R. Co.*, 71 Ind. 265. Kan.—*Messing v. Faulkner*, 83 Kan. 115, 109 Pac. 1001; *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; *Small v. Reeves*, 25 Ky. L. Rep. 729, 76 S. W. 395. Mass.—*Merriam v. Whittemore*, 5 Gray 316. But see *Lockhead v. Jones*, 137 Mass. 25. Mont.—*Curtis v. Donnell*, 3 Mont. 211. Neb.—*Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406. N. Y.—*Wilkes v. Henry*, 4 Sandf. Ch. 390; *Burns v. Howard*, 3 Abb. N. C. 321; *Mercantile Nat. Bank v. Corn Exch. Bank*, 73 Hun 78, 25 N. Y. Supp. 1068; *Sullivan v. Ringler*, 69 App. Div. 388, 74 N. Y. Supp. 374, 14 N. Y. Misc. 133, 112 N. Y. Supp. 207. Okla.—*Hicks v. Swank*, 37 Okla. 451, 132 Pac. 654. Pa.—*Thompson v. Graham*, 246 Pa. 202, 92 Atl. 118; *Small's Appeal*, 1 Monag. 676, 15 Atl. 807; *Garvin v. Dawson*, 13 Serg. & R. 246. Wash.—*Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688; *Kaufman v. Klain*, 69 Wash. 113, 124 Pac. 391. Wis.—*Smith v. Schreiner*, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869.

[a] Though an appeal has been taken, and a supersedeas bond filed, a decree is sufficient to sustain a plea of res judicata. *Boynton v. Chicago Mill & Lumb. Co.*, 84 Ark. 203, 105 S. W. 77.

[b] The estoppel is limited to the point actually litigated and determined. *Moorehouse v. Moorehouse*, 7 Pa. Super. 287.

[c] In admiralty and maritime causes, an appeal suspends the decree or sentence appealed from, and it is not res adjudicata until the final judg-

ing an appeal operating as a supersedeas, the judgment cannot be regarded as final, and therefore is not a bar to another action,<sup>28</sup> although upon the withdrawal, abandonment, or failure to perfect the appeal, the judgment will operate as a bar to another action.<sup>29</sup> And where the statute provides that a judgment does not become final until the time for an appeal has expired, the judgment does not operate as a bar until the expiration of such time.<sup>30</sup>

(B.) WHERE JUDGMENT AFFIRMED. — The affirmance on appeal of a general judgment is an affirmance thereof with respect to all the issues in the case, as to which it becomes *res judicata*, even where the opinion is based upon one only of several issues involved.<sup>31</sup> And a judg-

ment of the appellate court is pronounced. *Souter v. Baymore*, 7 Pa. 415, 47 Am. Dec. 518.

28. **U. S.**—*Contra Costa Water Co. v. City of Oakland*, 165 Fed. 518; *Tampa Water Works Co. v. Tampa*, 124 Fed. 932; *Eastern Bldg. & Loan Assn. v. Welling*, 103 Fed. 352; *Sharon v. Hill*, 26 Fed. 337; *New Orleans Nat. Banking Assn. v. Adams*, 3 Woods 21, 18 Fed. Cas. No. 10,184; *Robinson v. Tuttle*, 2 Hask. 76, 20 Fed. Cas. No. 11,968; *Green v. United States*, 18 Ct. Cl. 93. **Colo.**—See *Sylvester v. J. I. Case Threshing Machine Co.*, 21 Colo. App. 464, 122 Pac. 62. **Ia.**—*Millaudon's Succession*, 22 La. Ann. 12; *Byrne, Vance & Co. v. Prather*, 14 La. Ann. 653; *Bacon v. Dahlgreen*, 7 La. Ann. 599; *Eseurix v. Daboval*, 7 La. 575; *Turnbull v. Cureton*, 9 Mart. (O. S.) 37; *Seville v. Chretien*, 5 Mart. (O. S.) 275. **Mo.**—*Ketchum v. Thatcher*, 12 Mo. App. 185. **Nev.**—*Sherman v. Dille*, 3 Nev. 21. **N. H.**—*Haynes v. Ordway*, 52 N. H. 284. **N. J.**—*De Camp v. Miller*, 44 N. J. L. 617. **Tenn.**—*Delk v. Yelton*, 103 Tenn. 476, 53 S. W. 729; *Southern R. Co. v. Brigman*, 95 Tenn. 624, 32 S. W. 762; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891; *Chilton v. Wilson*, 9 Humph. 399; *W. V. Davidson Lumb. Co. v. Jones* (Tenn. Ch.), 62 S. W. 386; *Hall v. Calvert* (Tenn. Ch.), 46 S. W. 1120. **Tex.** *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605, 22 S. W. 1030; *Cunningham v. Holt*, 12 Tex. Civ. App. 150, 33 S. W. 981; *New York & T. Steamship Co. v. Wright* (Tex. Civ. App.), 26 S. W. 106.

[a] But see *Westmoreland v. Richardson*, 2 Tex. Civ. App. 175, 21 S. W. 167, holding that it was error to exclude as evidence a copy of a former judgment offered in bar as *res judicata*,

on the ground that the suit in which it was rendered was pending on appeal.

[b] Appeal merely suspends, but does not vacate, the judgment. *Thompson v. Griffin*, 69 Tex. 139, 6 S. W. 410.

[c] A judgment of a probate court in New York, from which an appeal has been taken, will be regarded as *res judicata* by the courts of Louisiana, since the appeal was not suspensive in the former state. *Gaines' Succession*, 45 La. Ann. 1237, 14 So. 233.

29. **U. S.**—*Hubbell v. United States*, 171 U. S. 203, 18 Sup. Ct. 828, 33 Sup. Ct. 513, 43 L. ed. 136; *Southern Pacific R. Co. v. United States*, 133 Fed. 662, 66 C. C. A. 560. **Ia.**—*Warder v. Rivers*, 64 Iowa 412, 20 N. W. 739.

30. *Fresno Milling Co. v. Fresno Canal, etc. Co.*, 102 Cal. xviii, 36 Pac. 412; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Story v. Story, etc. Commercial Co.*, 100 Cal. 41, 34 Pac. 675; *In re Blythe*, 99 Cal. 472, 34 Pac. 108; *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *McGarrahan v. Maxwell*, 28 Cal. 75; *Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258.

31. **U. S.**—*Russell v. Russell*, 134 Fed. 840, 67 C. C. A. 436 (*reversing* 129 Fed. 434); *Oglesby v. Attrill*, 20 Fed. 570. **Cal.**—*People v. Skidmore*, 27 Cal. 287. **Ia.**—*Finch v. Hollinger*, 46 Iowa 216. **Va.**—*Stuart v. Heiskell's Trustee*, 86 Va. 191, 9 S. E. 984. **Wis.** *Ford v. Ford*, 88 Wis. 122, 59 N. W. 464.

[a] A question expressly decided by a court of equity, in a decree which is affirmed on appeal, is *res judicata*, although such question was not considered by the appellate court, whose

ment amended without jurisdiction before affirmance, when affirmed as thus amended, becomes *res judicata*.<sup>32</sup>

(C.) **WHEN JUDGMENT VACATED OR REVERSED.**—As a general rule, when a judgment is vacated or set aside by the court in which it was entered, or reversed by an appellate tribunal and remanded for further proceedings, it thereby loses its conclusive character as a bar to a subsequent action.<sup>33</sup> But where a reversal is upon the merits of the con-

affirmance was based on other grounds. *Russell v. Russell*, 134 Fed. 840, 67 C. C. A. 436, *reversing* 129 Fed. 331.

[B] But a judgment rendered in an action prematurely brought, although affirmed on appeal, is no bar to another action brought after the right of action has accrued. *Maloney v. Nelson*, 12 App. Div. 545, 42 N. Y. Supp. 418.

32. *Missouri Pac. Ry. Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605.

33. See the following: **U. S.**—*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 795; *Grant v. Phoenix Mut. L. Ins. Co.*, 121 U. S. 105, 7 Sup. Ct. 841, 30 L. ed. 905; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *Hennessy v. Tacoma Smelt.*, etc. Co., 129 Fed. 40, 64 C. C. A. 54; *Empire State-Idaho Min. & Dev. Co. v. Bunker Hill*, etc. Co., 121 Fed. 973, 58 C. C. A. 311; *Gilbert v. American Sur. Co.*, 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; *Freeman v. Clay*, 52 Fed. 1, 2 C. C. A. 587; *French v. Edwards*, 4 Sawy. 125, 9 Fed. Cas. No. 5,097. **Ala.**—*Pope v. Nance*, 1 Stew. 354, 18 Am. Dec. 60; *Nance & Co. v. Pope & Hickman*, 1 Stew. 220. **Cal.**—*People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; *Board of Education v. Fowler*, 19 Cal. 11; *Stearns v. Aguirre*, 7 Cal. 443. **Ga.**—*Taylor v. Smith*, 4 Ga. 133. **Ill.**—*Stubbings v. Durham*, 210 Ill. 542, 71 N. E. 586; *Pittsburgh*, etc. R. Co. *v. Reno*, 123 Ill. 273, 14 N. E. 195; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786; *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454; *Bonner v. Peterson*, 44 Ill. 253; *Ottawa v. Chicago*, etc. R. Co., 25 Ill. 47; *Chicago Forge & Bolt Co. v. Rose*, 69 Ill. App. 123; *Chicago, R. I. & P. R. Co. v. Berg*, 57 Ill. App. 521. **Ind.**—*Indiana, B. & W. Ry. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Clodfelter v. Hulet*, 92 Ind. 426. **Ia.**—*School Tp. of Franklin v. Wiggins*, 142 Iowa 377, 120 N. W. 1032; *Stanbrough v. Cook*, 86 Iowa 740, 53 N. W. 131; *Poole v.*

*Seney*, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634; *Edgar v. Greer*, 10 Iowa 279. **Kan.**—*Munn v. Gardner*, 87 Kan. 519, 125 Pac. 7; *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731. **Ky.**—*Frankfort v. Deposit Bank*, 111 Ky. 950, 65 S. W. 10, 98 Am. St. Rep. 444; *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Parish v. Wood*, 6 J. J. Marsh. 600; *Cook v. Vimont*, 6 Mon. 284, 17 Am. Dec. 157. **La.**—*Surget v. Newman*, 43 La. Ann. 873, 9 So. 561; *Jackson v. Tiernan*, 15 La. 485. **Md.**—*Borden Min. Co. v. Barry*, 17 Md. 419. **Mass.**—*Goodrich v. Bodurtha*, 6 Gray 323. **Mich.**—*Porter v. Leache*, 56 Mich. 40, 22 N. W. 104. **Minn.**—*Daley v. Mead*, 40 Minn. 382, 42 N. W. 85. **Mo.**—*Lilly v. Tobbein*, 13 S. W. 1060; *Atkinson v. Dixon*, 96 Mo. 582, 10 S. W. 163. **Neb.**—*Colby v. Parker*, 34 Neb. 510, 52 N. W. 693; *Van Etten v. Kusters*, 31 Neb. 285, 47 N. W. 916; *Merriam v. Dovey*, 25 Neb. 618, 41 N. W. 550. **N. Y.**—*In re Patterson's Est.*, 146 N. Y. 327, 40 N. E. 990; *Smith v. Frankfield*, 77 N. Y. 414; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603, 18 Wend. 107; *Close v. Stuart*, 4 Wend. 95; *Onderdonk v. Ranlett*, 3 Hill 323; *Hunt v. Hoboken Land*, etc. Co., 1 Hilt. 161; *Vaughan v. O'Brien*, 57 Barb. 491, 39 How. Pr. 515; *O'Hanlon v. Scott*, 89 Hun 44, 35 N. Y. Supp. 31; *McElroy v. Mumford*, 62 Hun 619, 16 N. Y. Supp. 691; *Hochstein v. James W. Hill Co.*, 153 N. Y. Supp. 899; *People v. McClave*, 8 N. Y. Supp. 504. **N. C.**—*Person v. Montgomery*, 120 N. C. 111, 26 S. E. 645. **Ore.**—*Trotter v. Stayton*, 45 Ore. 301, 77 Pac. 395. **Pa.**—*Spees v. Boggs*, 204 Pa. 504, 54 Atl. 346; *In re Smith*, 204 Pa. 337, 54 Atl. 174; *Roll v. Davison*, 165 Pa. 392, 30 Atl. 987; *Jenkinson v. Hilands*, 146 Pa. 380, 23 Atl. 394; *Earnest v. Hoskins*, 100 Pa. 551; *Fries v. Pennsylvania R. Co.*, 98 Pa. 142; *Small's Appeal*, 1 Monag. 676, 15 Atl. 807; *Mannerback v. Pennsylvania R. Co.*, 16 Pa. Super. 622. **S. C.**—*Thew v. Southern Porcelain Mfg. Co.*, 8 S. C. 286. **Tenn.**



controversy it bars any further action upon the same matter.<sup>34</sup> And the reversal of a judgment upon which another judgment is founded deprives the latter of its effect as a bar in subsequent proceedings.<sup>35</sup>

**4. Persons as to Whom Doctrine of Bar Available.**—a. *Parties, Privies and Strangers.*—(I.) *In General.*—In order that one may plead in bar a judgment in a former action, he must have been a party to or represented in the former action as an actual party, and in the same attitude as an adversary party toward the subject of the litigation as he appears in the second suit,<sup>36</sup> or he must be in privity<sup>37</sup> with

Rosenbaum *v.* Davis, 106 Tenn. 51, 60 S. W. 497; Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891. **Tex.**—Gulf, C. & S. F. Ry. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Coats *v.* Blanding (Tex. Civ. App.), 125 S. W. 627; Hermann *v.* Allen (Tex. Civ. App.), 118 S. W. 794. See Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307, holding that a judgment reversed on appeal as to one plaintiff, and ordered to remain “undisturbed” as to two others, is res adjudicata as to the two. **Va.**—Flemings *v.* Riddick, 5 Gratt. (46 Va.) 272, 50 Am. Dec. 119. **Eng.**—Partington *v.* Hawthorne, 52 J. P. 807.

[a] The subsequent reversal of a judgment admitted in evidence, is not ground for reversing the judgment, rendered in the case in which the first judgment was admitted as evidence. Munn *v.* Gordon, 87 Kan. 519, 125 Pac. 7.

**34. Ill.**—Larkins *v.* Terminal R. R. Assn. of St. Louis, 122 Ill. App. 246, where the appellate court makes findings of the facts. **Mo.**—Ginnocchio *v.* Illinois Cent. R. Co., 264 Mo. 516, 175 S. W. 196. **N. Y.**—Platz *v.* Burton & Cory Cider & Vinegar Co., 7 Misc. 473, 28 N. Y. Supp. 385. **S. C.**—Thew *v.* Southern Porcelain Mfg. Co., 8 S. C. 286.

**35.** Gould *v.* Sternburg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138.

[a] The reversal of a judgment rendered by a state court, will not operate to deprive the judgment of a federal court, based on such state judgment as a reason therefor, of its conclusive effect as res judicata, where the adjudication involves the impairment of a right guaranteed by the federal constitution. Deposit Bank *v.* Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. ed. 276.

**36. U. S.**—Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432. **Ind.**—Louisville,

H. & St. L. R. Co. *v.* Linton, 43 Ind. App. 709, 88 N. E. 532. **Mass.**—Frost *v.* Thompson, 219 Mass. 360, 106 N. E. 1009. **Minn.**—Chadbourne *v.* Rahilly, 34 Minn. 346, 25 N. W. 633. **S. C.**—Wilkes *v.* Southern Ry. Co., 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890; Rookard *v.* Atlanta & C. Air Line Ry. Co., 84 S. C. 190, 65 S. E. 1047.

See also 7 ENCY. OF EV. 816, et seq.; and the title “Res Judicata.”

**37. U. S.**—Souffront *v.* Compagnie Des Sucreries, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846; Estill County *v.* Embry, 112 Fed. 882, 50 C. C. A. 573; Jonathan Mills Mfg. Co. *v.* Whitehurst, 65 Fed. 996. See Bigelow *v.* Old Dominion Copper, etc. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. **Cal.**—Hibernian Sav. & L. Soc. *v.* London, etc. F. Ins. Co., 138 Cal. 257, 71 Pac. 334. **Ga.**—Garlington *v.* Fletcher, 111 Ga. 861, 36 S. E. 920. **Ia.**—Collins *v.* Jennings, 42 Iowa 447. **N. J.**—Scott *v.* Hall, 60 N. J. Eq. 451, 46 Atl. 611. **N. Y.**—Pray *v.* Hegeman, 98 N. Y. 351; Bush *v.* Knox, 2 Hun 576, 5 Thomp. & C. 130. **S. C.**—Wilkes *v.* Southern Ry. Co., 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890; Rookard *v.* Atlanta & C. Air Line Ry. Co., 84 S. C. 190, 65 S. E. 1047; *Ex parte* Roberts, 19 S. C. 150. **Tex.**—Kramer *v.* Breedlove, 3 S. W. 561; Hair *v.* Wood, 58 Tex. 77. **Vt.**—Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

[a] To make one a privy to an action, (1) he must be one who has acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase from a party to the action subsequent to its institution. Bryan *v.* Malloy, 90 N. C. 508. (2) “One who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly,

such a party, by contract, estate, or blood,<sup>40</sup> or in law.<sup>41</sup> And a judgment on the merits operates as an estoppel against all parties of record participating in the action, both plaintiff and defendant, and their privies,<sup>42</sup> whether or not they are included in the judgment;<sup>43</sup> nor is the operation of such estoppel hindered by the fact that some of the parties to the former action are not joined in the second,<sup>42</sup> or that there are parties to the second action not included in the former.<sup>43</sup> A defendant is entitled to invoke this estoppel against a second recovery of the same claim, whether by the claimant himself or his beneficiary, representative or trustee.<sup>44</sup>

(II.) *Strangers.*—Since a judgment does not operate as an estoppel either against or in favor of a stranger to the litigation culminating therein,<sup>45</sup> a defendant cannot plead in bar of an action against him

to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront v. Compagnie Des Sucreries*, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846. (3) Persons who are represented by the parties, and who claim under and in privity with them, or have mutual or successive relationship to the same thing, are included in the rule. *Goddard v. Benson*, 15 Abb. Pr. (N. Y.) 191. (4) A privity may exist even among the citizens of the same municipality as to matters affecting the same, as the validity of an election to locate the county-seat, and a judgment on the merits in an action to test such question, instituted by one citizen, will bar another action for the same purpose by another citizen. *Sabin v. Sherman*, 28 Kan. 289.

38. **U. S.**—*Souffront v. Compagnie Des Sucreries*, 217 U. S. 475, 30 Sup. Ct. 608, 54 L. ed. 846. **Ia.**—*Weiser v. Ross*, 150 Iowa 353, 130 N. W. 387. **N. Y.**—*Goddard v. Benson*, 15 Abb. Pr. 191.

*Compare*, *Brill v. Washington Ry. & Elect. Co.*, 215 U. S. 527, 30 Sup. Ct. 177, 54 L. ed. 311.

[a] Where one appears as the legitimate son and heir of the defendant, to sustain the right of the latter, he is in privity with such defendant, and is bound by the judgment rendered in such action. *Lichaueo v. Go-Chun-Chae*, 19 Phil. Isl. 258.

See also 7 *ENCY. OF EV.* 816, and the title "Res Judicata."

39. *Weiser v. Ross*, 150 Iowa 353,

130 N. W. 387; *Johnson v. Collins*, 14 Iowa 63. And see *Knott v. Dubuque*, etc. Ry. Co., 84 Iowa 462, 51 N. W. 57.

40. **Md.**—*Muscgrave v. Staylor*, 36 Md. 123. **Mo.**—*Smith v. Kiene*, 231 Mo. 215, 132 S. W. 1052. **P. I.**—*Lichaueo v. Go-Chun-Chae*, 19 Phil. Isl. 258. **Vt.**—*Lampson v. Hobart*, 28 Vt. 697. **Va.**—*Pollard v. Coleman*, 4 Call (8 Va.) 245. **Wash.**—*Parker v. Galbraith*, 46 Wash. 280, 89 Pac. 712.

41. **Ga.**—*Central of Georgia Ry. Co. v. Garrison*, 12 Ga. App. 369, 77 S. E. 193. **N. H.**—*Gerrish v. Whitfield*, 72 N. H. 222, 55 Atl. 551. **Tex.**—*Missouri Pac. R. Co. v. Smith*, 16 S. W. 803. **Wash.**—*Parker v. Galbraith*, 46 Wash. 280, 89 Pac. 712.

42. **Colo.**—*Best v. Hoppie*, 3 Colo. 137. **Ind.**—*State v. Krug*, 94 Ind. 366. **N. Y.**—*New York Land Imp. Co. v. Chapman*, 118 N. Y. 283, 23 N. E. 187. See *supra*, XVII, B, 2, f, (II).

43. **La.**—*Allard v. Lobau*, 3 Mart. (N. S.) 293. **N. Y.**—*Meagley v. Binghamton*, 36 Hun 171. **Tex.**—*Johnson v. Murphy*, 17 Tex. 216.

See *supra*, XVII, B, 2, f, (II).

44. **La.**—*Shaw v. Thompson*, 3 Mart. (N. S.) 392. **N. Y.**—*Kent v. Hudson River R. Co.*, 22 Barb. 278; *Tinkham v. Borst*, 24 How. Pr. 246; *Thomas v. Coe*, 51 Hun 481, 4 N. Y. Supp. 253. **Ohio.**—*Burkham v. Cooper*, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371. **Pa.**—*Welsh v. London Assur. Corp.*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

45. **U. S.**—*Bigelow v. Old Dominion Copper, etc. Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; *Feidler v. Bartleson*, 161 Fed. 30, 88 C. C. A. 194; *Merchants Coal Co. v. Fairmont Coal*

the judgment obtained in a previous action by a stranger,<sup>46</sup> nor can

Co., 160 Fed. 769, 80 C. C. A. 23; Westinghouse Electric, etc. Co. v. Jefferson Electric Light, etc., 135 Fed. 365 (affirmed in 139 Fed. 385, 71 C. C. A. 481). Ala.—Smith v. Gayle, 62 Ala. 446; Kennedy v. Holman, 19 Ala. 734. Ark.—Robinson v. Baskins, 53 Ark. 330, 14 S. W. 93, 22 Am. St. Rep. 202. Cal.—Silva v. Hawkins, 152 Cal. 138, 92 Pac. 72; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487; Irving v. Cunningham, 77 Cal. 52, 18 Pac. 878; Chester v. Bakersfield Town Hall Assn., 64 Cal. 42, 27 Pac. 1104. Colo.—Woodworth v. Garstline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417. Conn.—Bethlehem v. Watertown, 51 Conn. 490. Ill.—Mount v. Scholes, 21 Ill. App. 192 (affirmed in 120 Ill. 394, 11 N. E. 401); Jones v. People, 19 Ill. App. 300. Ind.—Woodhull v. Freeman, 21 Ind. 229; Louisville, H. & St. L. R. Co. v. Linton, 43 Ind. App. 709, 88 N. E. 532. Ia.—American Express Co. v. Des Moines Nat. Bank, 136 Iowa 597, 111 N. W. 31; Tiffany v. Stewart, 60 Iowa 207, 14 N. W. 241; Barr v. Patrick, 52 Iowa 704, 3 N. W. 743; Huntington v. Jewett, 25 Iowa 249, 95 Am. Dec. 788. Kan.—Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698; Boyd v. Moore, 34 Kan. 119, 8 Pac. 255; Atchison, T. & S. F. Ry. Co. v. Jefferson County Comrs., 12 Kan. 127. Ky.—Hostetter v. Green, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870; Marshall v. Rough's Heirs, 2 Bibb 628. Md.—Cheveront v. Textor, 53 Md. 295. Mass.—Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; McGillvray v. Employers' Liability Assur. Corporation, 214 Mass. 484, 102 N. E. 77, 46 L. R. A. (N. S.) 110; Low v. Low, 177 Mass. 306, 59 N. E. 57. Minn.—Nowak v. Knight, 44 Minn. 241, 46 N. W. 348. Mo.—Henry v. Woods, 77 Mo. 277; Trauerman v. Lipincott, 39 Mo. App. 478; State v. St. Louis, etc. R. Co., 29 Mo. App. 301. Neb.—School Dist. No. 34, Thayer County v. Thompson, 51 Neb. 857, 71 N. W. 728. N. Y.—Boerum v. Schenck, 41 N. Y. 182; American Bank-Note Co. v. Metropolitan El. Ry. Co., 63 Hun 506, 18 N. Y. Supp. 532; Cornell v. Donovan, 14 Daly 295, 14 N. Y. St. 687. N. C.—Williams v. Hutton & Buorboundais Co., 164 N. C. 216, 80 S. E. 257; White v. Green, 50 N. C. 47. N. D.—Schmidt v. Johnstone, 31 N. D.

53, 153 N. W. 293. Ohio.—State v. Cincinnati Gas Light, etc. Co., 18 Ohio St. 262; Hardman v. Cincinnati, etc. R. Co., 9 Ohio Dec. (Reprint) 578, 15 Wkly. L. Bul. 164. S. D.—Henton v. Spencer, 29 S. D. 190, 136 N. W. 112. Tex.—Bertrand v. Bingham, 13 Tex. 266; Smith v. Banks (Tex. Civ. App.), 152 S. W. 449; Oaks v. West (Tex. Civ. App.), 64 S. W. 1033; Southern Pine Lumber Co. v. Rogers, 26 Tex. Civ. App. 535, 64 S. W. 794. Vt.—Parmelee v. Woodbridge, Brayt. 132. Wis.—Franke v. H. P. Nelson Co., 157 Wis. 241, 147 N. W. 13; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859.

Compare, Ethers v. Wilson, 12 Rich. L. (S. C.) 145.

See the title "Res Judicata."

[a] A judgment granting a wife a divorce on the ground of abandonment, and deciding against the husband's counterclaim for divorce based on the same ground, was not a bar to a subsequent action by him against his wife's parents for alienation of her affections, although he relied upon practically the same evidence in both cases, since the parties and issues were different. Hostetter v. Green, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870.

46. Merchants' Coal Co. v. Fairmont Coal Co., 160 Fed. 769, 80 C. C. A. 23; Schmidt v. Johnstone, 31 N. D. 53, 153 N. W. 293.

[a] A person who contributed to the expense of, and otherwise aided in, a mandamus suit instituted by a coal company against a railroad company to compel a fair distribution of cars under the interstate commerce law, is not estopped thereby to maintain an independent suit against the same defendant for the same purpose, nor does such judgment inure to his benefit, unless the defendant in the former suit agreed that it should be a test case. Merchants' Coal Co. v. Fairmont Coal Co., 160 Fed. 769, 80 C. C. A. 23.

[b] In separate actions by three grantees, brought in the name of a common grantor to the use of such grantees, such use plaintiffs are the real parties in interest, and a judgment in one of such suits is not a bar to the other actions for the cancellation of the same contract as to the other tracts of land and to quiet title in the respective plaintiffs and to re-



he plead in bar one recovered by the plaintiff against a stranger,<sup>47</sup> or one obtained by a stranger against the plaintiff, on the same cause of action,<sup>48</sup> or state of facts.<sup>49</sup>

b. *Joint and Joint and Several Contractors.*—(I.) *Joint Obligors.* In the absence of a statute to the contrary, a judgment against one joint contractor is a bar to a subsequent action on the same obligation whether that action be against another joint contractor alone,<sup>50</sup> or

cover damages for the use and occupation of their premises. *Schmidt v. Johnstone*, 31 N. D. 53, 153 N. W. 293.

47. **U. S.**—*Ingersoll v. Jewett*, 16 Blatch. 378, 13 Fed. Cas. No. 7,029. *Ind.*—*Ellis v. State*, 2 Ind. 262. **Ky.**—*Owingsville & Mt. S. Turnpike Road Co. v. Hamilton*, 21 Ky. L. Rep. 815, 53 S. W. 5. **N. Y.**—*Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Mathews v. Lawrence*, 1 Denio 212, 43 Am. Dec. 665. **Ore.**—*Hawley v. Dawson*, 16 Ore. 344, 18 Pac. 592.

[a] But where the plaintiff has, in a previous suit against another alleged that the benefit of the consideration of the debt now sued on inured to the latter, he is estopped from alleging and proving it inured to the benefit of the present defendant. *Durham v. Williams*, 32 La. Ann. 962; *Louisiana Levee Co. v. State*, 31 La. Ann. 250.

48. *American Express Co. v. Des Moines Nat. Bank*, 136 Iowa 597, 111 N. W. 31.

49. **U. S.**—*Merchants' Coal Co. v. Fairmont Coal Co.*, 160 Fed. 769, 88 C. C. A. 23. **Ia.**—*American Express Co. v. Des Moines Nat. Bank*, 136 Iowa 597, 111 N. W. 31. **N. D.**—*Schmidt v. Johnston*, 31 N. D. 53, 153 N. W. 293.

50. **U. S.**—*Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596; *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Woodworth v. Spafford*, 2 McLean 168, 30 Fed. Cas. No. 18,020; *Willings v. Consequa*, Pet. C. C. 301, 30 Fed. Cas. No. 17,767; *Trafton v. United States*, 3 Story 646, 24 Fed. Cas. No. 14,135. **Colo.**—*Blythe v. Cordingley*, 20 Colo. App. 508, 80 Pac. 495. **Fla.**—*Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293. **Ga.**—*Almand v. Hathecock*, 140 Ga. 26, 78 S. E. 315; *Scarborough & Co. v. Yarborough*, 13 Ga. App. 792, 79 S. E. 1131. **Ill.**—*Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850; *Nickerson v. Rockwell*, 90 Ill. 460; *People v. Harrison*, 82 Ill. 84; *Mitchell v. Brewster*, 28 Ill. 103; *King v. Arney*, 114 Ill.

App. 141. **Ind.**—*Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Robinson v. Snyder*, 74 Ind. 110; *Odell v. Carpenter*, 71 Ind. 463; *Kennard v. Carter*, 64 Ind. 31; *Richardson v. Jones*, 58 Ind. 240; *Erwin v. Scotten*, 40 Ind. 389; *Holman v. Langtree*, 40 Ind. 349; *Capital City Dairy Co. v. Plummer*, 20 Ind. App. 408, 49 N. E. 963; *Martin v. Baugh*, 1 Ind. App. 20, 27 N. E. 110. **Ia.**—*Pugh v. Olson*, 159 Iowa 364, 140 N. W. 433; *North v. Mudge & Co.*, 13 Iowa 496, 81 Am. Dec. 441. **Ky.**—*Elliott v. Porter*, 5 Dana 299, 30 Am. Dec. 689; *Slaughter v. Ripperdan*, 5 Litt. 337. **Md.**—*Moale v. Hollins*, 11 Gill & J. 11, 33 Am. Dec. 684. **Mass.**—*Gibbs v. Bryant*, 1 Pick. 118; *Ward v. Johnson*, 13 Mass. 118. **Mich.**—*McKinley v. Small*, 178 Mich. 555, 146 N. W. 230; *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90. **Minn.**—*Davidson v. Harmon*, 65 Minn. 402, 67 N. W. 1015. **N. J.**—*Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344. **N. Y.**—*Suydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254; *Olmstead v. Webster*, 8 N. Y. 413, Seld. Notes 135; *Gray v. Palmer*, 2 Rob. 500; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Penny v. Martin*, 4 Johns. Ch. 566. **Ohio.**—*Clinton Bank v. Hart*, 5 Ohio St. 33; *Carr v. Beckett*, 1 Ohio Cir. Ct. 72, 1 Ohio Cir. Dec. 43; *Pfau v. Lorain*, 13 Ohio Dec. 423, 1 Cine. Super. Ct. 73. **Ore.**—*Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915C, 522. **Va.**—*Brown's Admr. v. Johnson*, 13 Gratt. (54 Va.) 644. **W. Va.**—*Armentrout v. Smith*, 56 W. Va. 356, 49 S. E. 377. **Wis.**—*Lauer v. Mandow*, 48 Wis. 638, 4 N. W. 774; *Bowen v. Hastings*, 47 Wis. 232, 2 N. W. 301. **Eng.**—*McLeod v. Power*, 67 L. J. Ch. 551, 79 L. T. N. S. 67, 47 Wkly. Rep. 74; *Hoare v. Niblett*, 1 Q. B. 781, 55 J. P. 664, 60 L. J. Q. B. 565, 64 L. T. N. S. 659, 39 Wkly. Rep. 491; *Cambefort v. Chapman*, 19 Q. B. D. 229, 51 J. P. 455, 56 L. J. Q. B. 639, 57 L. T. N. S. 625, 35 Wkly. Rep. 838; *Kendall v. Hamilton*,

against all of such contractors or obligors jointly,<sup>51</sup> as effectually as a recovery against all the joint obligors bars a subsequent action against one of them upon the same joint obligation.<sup>52</sup> But exceptions to the general rule have been recognized in case of the death,<sup>53</sup> infancy,<sup>54</sup> discharge in bankruptcy,<sup>55</sup> or absence from the jurisdiction of the state at the time the first action is begun, of one or more of the joint obligors, rendering a joint suit against all the joint obligors impossible.<sup>56</sup> It has also been held that where a creditor is induced by the fraudulent promises or statements of some of the joint obligors to omit them from his suit, a judgment recovered against others in such action is not a bar to a suit against those who perpetrate the fraud.<sup>57</sup> And the general rule does not apply to cases in which the first recovery is had upon a collateral security furnished by one of the

4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. N. S. 418, 28 Wkly. Rep. 97.

See also 7 ENCY. OF EV. 818; and the title "Res Judicata."

As to necessity for joining joint contractors, see 11 STANDARD PROC. 975, et seq.

[a] When a creditor has obtained one judgment or decree on a joint obligation, the claim is merged therein, and he is estopped to sue again on the same obligation, whether he sued one or all of the joint obligors. *Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915C, 522. But see *Middleton v. Nibling* (Tex. Civ. App.), 142 S. W. 968, holding that under the statute of Texas any principal obligor may be sued alone or jointly with any other party liable on the contract.

[b] In *South Carolina*, a contrary rule has prevailed for nearly a century, however. *Union Bank v. Hodges*, 11 Rich. L. 480; *State Treasurer v. Bates*, 2 Bailey 362; *Collins v. Lemasters*, 1 Bailey 348, 21 Am. Dec. 469.

51. *Mass.*—*French v. Neal*, 24 Pick. 55. *Mich.*—*McKinley v. Small*, 178 Mich. 555, 146 N. W. 230. *N. J.* *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344. *Ohio.*—*Reynolds v. Pittsburgh, etc. R. Co.*, 29 Ohio St. 602. *Ore.*—*Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915C, 522.

52. *Ind.*—*Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231. *Mich.*—*McKinley v. Small*, 178 Mich. 555, 146 N. W. 230. *Ohio.*—*Carr v. Beckett*, 1 Ohio Cir. Ct. 72, 1 Ohio Cir. Dec. 43.

53. *Ind.*—*Devol v. Halstead*, 16 Ind. 287; *Weyer v. Thornburgh*, 15 Ind. 124. *Mich.*—*McKinley v. Small*, 178 Mich. 555, 146 N. W. 230. *Eng.*—*In re Hodg-*

*son*, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. N. S. 222, 34 Wkly. Rep. 127.

See 11 STANDARD PROC. 977.

54. *McKinley v. Small*, 178 Mich. 555, 146 N. W. 230; *J. Fay & Co. v. James Jenks & Co.*, 78 Mich. 312, 44 N. W. 380. See 11 STANDARD PROC. 979.

55. *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Fay & Co. v. James Jenks & Co.*, 78 Mich. 312, 44 N. W. 380. See 11 STANDARD PROC. 979.

56. *U. S.*—*Beck & Pauli Lith. Co. v. Wacker, etc. Co.*, 76 Fed. 10, 22 C. C. A. 11. See *Larison v. Hager*, 44 Fed. 49. *Conn.*—*Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562. *Ind.* *Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992; *Cox v. Maddux*, 72 Ind. 206. *Me.*—*West v. Furbish*, 67 Me. 17; *Rand v. Nutter*, 56 Me. 339; *Dennett v. Chick*, 2 Greenl. 191, 11 Am. Dec. 59. *Mass.*—*Odum v. Denny*, 16 Gray 114; *Tappan v. Bruen*, 5 Mass. 193. *Mich.* *Hitchcock v. Frackelton*, 116 Mich. 487, 74 N. W. 720; *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90. *N. H.* *Tibbetts v. Shapleigh*, 60 N. H. 487; *Burt v. Stevens*, 22 N. H. 229; *Oleott v. Little*, 9 N. H. 259, 32 Am. Dec. 357. *N. Y.*—*Brown v. Birdsall*, 29 Barb. 549. *Ohio.*—*Yoho v. McGovern*, 42 Ohio St. 11; *Whittaker v. Stone*, 16 Ohio Cir. Ct. 635, 7 Ohio Cir. Dec. 591. *Pa.*—*Campbell v. Steele*, 11 Pa. 394. *Tenn.*—*Davis v. Reeves*, 7 Lea 585. *Wash.*—*Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170.

See 11 STANDARD PROC. 979.

57. *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293.

joint obligors, unless full satisfaction has been received thereon," or where a judgment, entered against all of the joint obligors on a default, is opened as to one of them, over the objection of the plaintiff, since there is, in such case, no election by plaintiff to sue a part only of the joint obligors.<sup>59</sup>

Where the plaintiff is defeated in an action against one of the obligors on a joint obligation," on the merits of the cause, he is thereby barred from maintaining another suit on the same cause of action, except where the statute authorizes the entry of judgment against one or more of several joint defendants," or the plaintiff's case failed because of a defect of parties.<sup>62</sup>

Statutes in some states abrogate the common-law distinction between joint and several obligations, and give the holders of joint obligations the right to proceed against the joint obligors the same as if they were severally liable, and to bring a separate suit against a joint obligor who was joined but not served in a previous suit against all joint obligors.<sup>63</sup>

58. First Nat. Bank of Milwaukee v. Finck, 100 Wis. 446, 76 N. W. 608; Wegg-Prosser v. Evans, 1 Q. B. (1895) 108; Drake v. Mitchell, 3 East 251, 7 Rev. Rep. 449, 102 Eng. Reprint 594.

59. Heckemann v. Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655; O'Hanlon v. Scott, 89 Hun 44, 35 N. Y. Supp. 31.

60. Ark.—Neyill v. Hancock, 17 Ark. 511. Ill.—Mann v. Edwards, 31 Ill. App. 473. Ky.—Hunt v. Terril, 7 J. J. Marsh. 67. Me.—Hill v. Morse, 61 Me. 541. Ohio.—Pfau v. Lorain, 13 Ohio Dec. 423, 1 Cine. Super. Ct. 73. Vt.—Spencer v. Dearth, 43 Vt. 98. Va. Brown's Admr. v. Johnson, 13 Gratt. (54 Va.) 644. Eng.—Phillips v. Ward, 2 H. & C. 717, 9 Jur. (N. S.) 1182, 23 L. J. Exch. 7, 9 L. T. N. S. 345, 12 Wkly. Rep. 106.

Contra, McLelland v. Ridgway, 12 Ala. 482; McCormack v. Barton, 19 Misc. 625, 44 N. Y. Supp. 393.

[a] A judgment in favor of one or more joint obligors will not bar an action against another who was not within the jurisdiction of the court, and was not served and did not appear in the former action. Larson v. Hager, 44 Fed. 49.

61. Roby v. Rainsberger, 27 Ohio St. 674.

62. McLean v. Hansen, 37 Ill. App. 48; Detroit v. Houghton, 42 Mich. 459, 4 N. W. 171, 287.

63. Cal.—Melander v. Western Nat. Bank, 21 Cal. App. 462, 132 Pac. 265. D. C.—Harris v. Leonard, 2 App. Cas.

318. Ga.—Ells v. Bone, 11 Ga. 466. Ill.—Finch v. Galigher, 181 Ill. 625, 54 N. E. 611. Ia.—Smith v. Coopers, 9 Iowa 370. Kan.—Marvin v. Choate, 96 Kan. 433, 152 Pac. 20. Md.—Westheimer v. Craig, 76 Md. 399, 25 Atl. 419; Thomas v. Mohler, 25 Md. 36. Mich.—Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90. Minn.—Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579. Mo.—Bagnell Timber Co. v. Missouri, K. & T. Ry Co., 242 Mo. 11, 145 S. W. 469; Knox County Sav. Bank v. Cottey, 70 Mo. 150; Cowan v. Leming, 111 Mo. App. 253, 85 S. W. 953. N. M. Territory v. Mills, 16 N. M. 555, 120 Pac. 325. N. Y.—Lane v. Salter, 51 N. Y. 1; Orleans County Nat. Bank v. Spencer, 19 Hun 569; Dean v. Eldridge, 29 How. Pr. 218; Kramer v. Schatzkin, 27 Misc. 206, 57 N. Y. Supp. 803. But see Oakley v. Aspinwall, 2 Sandf. 7, 3 Code Rep. 209. N. C. Ruffy v. Claywell, 93 N. C. 306. Ohio. Whittaker v. Stone, 16 Ohio Cir. Ct. 635, 7 Ohio Cir. Dec. 591. Okla.—McMaster v. City Nat. Bank, 23 Okla. 550, 101 Pac. 1103. Pa.—Davis v. Sidle, 25 Pa. Co. Ct. 122; Herschberger v. Brown, 2 Woodw. Dec. 101. Tenn.—Lowry v. Hardwick, 4 Humph. 188. Tex.—Bute v. Brainerd, 93 Tex. 137, 53 S. W. 1017; Wooters v. Smith, 56 Tex. 198. Va.—Cahoon v. McCulloch, 92 Va. 177, 23 S. E. 225. Wis. Dill v. White, 52 Wis. 456, 9 N. W. 404.

See 11 STANDARD PROC. 976, 980.

[a] Where the statute raises a pre-



The effect in another state, of a judgment involving a joint obligation is treated elsewhere in this article.<sup>64</sup>

(II.) Joint and Several Obligors. — While satisfaction of a joint and several obligation by one of the joint and several obligors operates as a release of all of them,<sup>65</sup> an unsatisfied judgment against one of the obligors on a joint and several obligation, such as a maker, endorser, drawer or acceptor of a promissory note or bill of exchange,<sup>66</sup> or other obligation both joint and several in its nature, does not bar an action against another obligor on the same obligation, since such debt or undertaking is not merged in the former judgment.<sup>67</sup>

sumption that an obligation is both joint and several, this presumption must be overcome before common-law rule making a recovery against one joint obligor a bar, can be invoked. *McMaster v. City Nat. Bank*, 23 Okla. 550, 101 Pac. 1103.

[b] Joint obligees may maintain separate actions against a common obligor, under a statute which provides that "all contracts which are joint only, shall be construed to be joint and several," and an action by one does not bar an action by another. *Martin v. Chanute*, 96 Kan. 433, 152 Pac. 20.

64. See *infra*, XVIII, B, 3, d, (II), (B).

65. *Coonley v. Wood*, 36 Hun (N. Y.) 559; *Jameson v. Barber*, 56 Wis. 630, 14 N. W. 859.

[a] But see *Day v. Hill*, 2 Spears (S. C.) 628, 42 Am. Dec. 390, holding that "satisfaction or payment is no bar, unless the whole debt is paid, or something accepted in full of it. For less than this, the defendant is only entitled to a deduction from the debt, for the amount paid, and the plaintiff is entitled to a judgment for the balance," against the other joint and several obligors.

66. *U. S.*—*Brooklyn City & N. R. Co. v. New York Nat. Bank of Republic*, 102 U. S. 14, 26 L. ed. 61. *Ind.*—*Morrison v. Fishel*, 64 Ind. 177; *Beard v. Adams*, 8 Blackf. 469. *Ia.*—*Citizens' Sav. Bank v. Oleson*, 47 Iowa 492; *Gilman, Bentley & Co. v. Foote*, 22 Iowa 560. *Mass.*—*Porter v. Ingraham*, 10 Mass. 88. *Mich.*—*Hitchcock v. Frackelton*, 116 Mich. 487, 74 N. W. 720; *Beals v. Clinton County Cir. Judge*, 91 Mich. 146, 51 N. W. 885. *Mo.*—*Phoenix Mut. L. Ins. Co. v. Landis*, 50 Mo. App. 116. *N. Y.*—*Russell, etc. Mfg. Co. v. Carpenter*, 5 Hun 162. *Pa.*—*Allen v.*

*Union Bank*, 5 Whart. 420. *Tex.*—*Still v. Lombardi*, 8 Tex. Civ. App. 315, 27 S. W. 845.

But see *Brown v. Foster*, 4 Ala. 282.

67. *U. S.*—*United States v. Price*, 9 How. 83, 13 L. ed. 56; *Sheehy v. Mandeville*, 6 Cranch 253, 3 L. ed. 215. *Conn.*—*Fairchild v. Holly*, 10 Conn. 474; *Morgan v. Chester*, 4 Conn. 387. *Ga.*—*Booth v. Huff*, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98. *Ill.*—*People v. Harrison*, 32 Ill. 84; *Moore v. Rogers*, 19 Ill. 347; *Orr v. Thompson*, 9 Ill. 451; *Joyce v. Spafford*, 101 Ill. App. 422. *Ind.*—*Giles v. Canary*, 99 Ind. 116; *Greathouse v. Kline*, 93 Ind. 598; *McClure v. McClure*, 65 Ind. 482; *Kirkpatrick v. Stingley*, 2 Ind. 269. *Ia.*—*Beall v. West*, 13 Iowa 61; *Smith v. Coopers*, 9 Iowa 376; *Harlan v. Berry*, 4 G. Gr. 212. *Kan.*—*Martin v. Chanute*, 96 Kan. 433, 152 Pac. 20; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Jenks v. School Dist. No. 38*, 18 Kan. 356. *Ky.*—*Burrus v. Anderson*, 3 Mete. 500; *Sayre v. Coleman*, 9 Dana 173. *La.*—*Hite v. Vaught*, 2 La. Ann. 970; *Illinois State Bank v. Sloo*, 16 La. 544; *Williams v. Brent*, 7 Mart. (N. S.) 205. *Mass.*—*Hawkes v. Phillips*, 7 Gray 284; *Simonds v. Center*, 6 Mass. 18. *Miss.*—*Scharff v. Noble*, 67 Miss. 143, 6 So. 843. *Mo.*—*Phillips v. Fitzpatrick*, 34 Mo. 276; *McLaurine v. Monroe's Admrs.*, 30 Mo. 462; *Armstrong v. Prewitt*, 5 Mo. 476, 32 Am. Dec. 338. *Neb.*—*McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333. *N. H.*—*Townsend v. Riddle*, 2 N. H. 448. *N. Y.*—*Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; *Benson v. Paine*, 9 Abb. Pr. 28, 17 How. Pr. 407, 2 Hilt. 552; *Jepson v. International R. Co.*, 80 Misc. 247, 140 N. Y. Supp. 941; *Carter, Rice & Co. v. Howard*, 17 Misc. 381, 39 N. Y. Supp. 1060; *Strauss v. Trotter*, 6 Misc. 77, 26 N. Y. Supp. 20.

**Effect of Joint Judgment.**—A joint judgment against all of the debtors on a joint and several obligation is generally held to be a bar to another suit on the same demand,<sup>68</sup> though in some states a plaintiff's remedy is regarded as double, rather than elective, where the obligation is both joint and several, and a joint judgment is no bar to a several action.<sup>69</sup>

(III.) **Partners.**—Where partnership obligations are considered or made by statute, joint and several, a judgment against one is not ordinarily a bar to an action against the other partners on the same claim.<sup>70</sup> The debts of partnerships are usually considered joint and not several obligations, however, and therefore a judgment against one

**N. C.**—*Hix v. Davis*, 68 N. C. 231. **Ohio.**—*Clinton Bank v. Hart*, 5 Ohio St. 33. **Ore.**—*Noble v. Beeman-Spauld- ing-Woodward Co.*, 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162; *Hand- ley v. Jackson*, 51 Pac. 1098. **Pa.**—*Hayes v. Gudykunst*, 11 Pa. 221; *Miller v. Reed*, 3 Grant Cas. 51; *Vanemen v. Herdman*, 3 Watts 202; *Philadelphia v. Stewart*, 23 Pa. Co. Ct. 552. **S. C.** *Day v. Hill*, 2 Spears 628, 42 Am. Dec. 390; *Collins v. Lemasters*, 1 Bailey 348, 21 Am. Dec. 469. **Tenn.**—*Sully v. Campbell*, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161. **Tex.**—*Wilson v. Casey*, 3 Tex. Civ. App. 141, 22 S. W. 118. **Vt.**—*Sawyer v. White*, 19 Vt. 40. **Eng.**—*King v. Hoare*, 2 D. & L. 383, 14 L. J. Exch. 29, 13 Mees. & W. 494.

See also 7 ENCY. OF EV. 819.

[a] A default judgment against one of several parties jointly and severally liable on a contract is not a bar to a recovery against other joint and several obligors. *Noble v. Beeman-Spauld- ing-Woodward Co.*, 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162.

68. **U. S.**—*Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596; *United States v. Price*, 9 How. 83, 13 L. ed. 56. **Ga.** *Fullington v. Killen*, 65 Ga. 575. **Kan.** *Martin v. Chanute*, 96 Kan. 433, 152 Pac. 20. **Mich.**—*McKinley v. Small*, 178 Mich. 555, 146 N. W. 230. **Ohio.** *Baker v. Kinsey*, 41 Ohio St. 403; *Clinton Bank t. Hart*, 5 Ohio St. 33. **Pa.** *McDivitt's Exr. v. McDivitt*, 4 Watts 384; *Downey v. Farmers'*, etc. Bank, 13 Serg. & R. 288; *Williams v. McFall*, 2 Serg. & R. 280. **Eng.**—*Ex parte Row- landson*, 3 P. Wms. 405, 24 Eng. Re- print 1121.

But see *United States v. Cushman*, 2 Sumn. 426, 25 Fed. Cas. No. 14,908; *Trafton v. United States*, 3 Story 646, 24 Fed. Cas. No. 14,135. Compare, Tay-

lor v. Henderson, 17 Serg. & R. (Pa.) 453.

[a] "If the plaintiff brings suit against two joint promisors and ac- cepts a judgment against one, that would of course put an end to the cause as against the other; it is called a merger of the whole cause of action. Practically there is no difference in this respect between a joint and a joint and several cause of action." *Hutch- inson v. Brown*, 8 Mackey (D. C.) 136.

[b] The merger of a debt into a joint judgment will not bar a resort to the original note and the relations of the parties to it, for the purpose of enabling him to disclose and assert an equitable set-off. *Baker v. Kinsey*, 41 Ohio St. 403.

69. **Ill.**—*People v. Harrison*, 82 Ill. 84; *Moore v. Rogers*, 19 Ill. 347. **Ind.** *Kirkpatrick v. Stingley*, 2 Ind. 269. **Ia.**—See *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148.

70. **Ala.**—*Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806. **Ky.**—*Valz v. Birmingham First Nat. Bank*, 96 Ky. 543, 29 S. W. 329, 49 Am. St. Rep. 306; *Williams v. Rogers*, 14 Bush 776; *Scott v. Colmes- nil*, 7 J. J. Marsh. 416. **Miss.**—*Hyman v. Stadler*, 63 Miss. 362. **S. C.**—*Union Bank v. Hodges*, 11 Rich. L. 489; *Wat- son v. Owens*, 1 Rich. 111. **Can.**—*Hough Lithographing Co. v. Morley*, 20 Ont. L. R. 484, 15 Ont. W. R. 571.

See also *Martin v. Chanute*, 96 Kan. 433, 152 Pac. 20; *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307; *Davis v. Sand- erlin*, 119 N. C. 84, 25 S. E. 815.

[a] But see *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S. W. 1089, hold- ing that even where, by statute, part- nership obligations are made both joint and several, a judgment in favor of some of the partners signing a joint

partner on a partnership debt will bar not only a subsequent action on the same claim against the firm or any partner,<sup>71</sup> but also an amendment of the judgment so as to include another partner subsequently discovered to have been such, but who was not a party to the action.<sup>72</sup> This is true though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced,<sup>73</sup> or were non-residents of the state, and without the jurisdiction of the court.<sup>74</sup> But a judgment against an individual who is severally liable with a co-partnership of which he is a member, does not bar an action against the partnership.<sup>75</sup>

and several contract, will bar an action on the same contract against another signer thereof, on the ground that a judgment for plaintiff in the second suit would deprive the other defendants of the benefits of their judgment, through contribution in the second. *Compare*, also, *Nichols & Co. v. Burton*, 5 Bush (Ky.) 320; *Philson v. Bampfield's Admr.*, 1 Brev. (S. C.) 202.

**71. U. S.**—*United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *Mason v. Eldred*, 6 Wall. 231, 238, 18 L. ed. 783; *Sedam v. Williams*, 4 McLean 51, 21 Fed. Cas. No. 12,609. **Colo.**—*Denver Exch. Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. **Ill.**—*Fleming v. Ross*, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314 (*affirming* 125 Ill. App. 265); *Thompson v. Emmert*, 15 Ill. 415; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58. See also, *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1003 (holding that neither section 3 of chapter 76 nor section 9 of chapter 110, *Hurd's Rev. St.*, 1905, applied to partnerships, so as to take it out of the common-law rule); *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *People v. Harrison*, 82 Ill. 84; *Mitchell v. Brewster*, 28 Ill. 163; *Moore v. Rogers*, 19 Ill. 347. **Ind.**—*Crosby v. Jeroloman*, 37 Ind. 264; *Rose v. Constock*, 17 Ind. 1; *Nicklaus v. Roach*, 3 Ind. 78. **Ia.**—*North v. Mudge & Co.*, 13 Iowa 496, 81 Am. Dec. 441. **Mich.** *Candee & Scribner v. Clark*, 2 Mich. 255. **Minn.**—*Davison v. Harmon*, 65 Minn. 402, 67 N. W. 1015. **Neb.**—*Tootle, Hosea & Co. v. Otis*, 1 Neb. (Unof.) 360, 95 N. W. 681. **N. J.** *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344. **N. Y.**—*National Broadway Bank v. Hitch*, 66 Hun 401, 21 N. Y. Supp. 395, 29 Abb. N. C. 400, 23 Civ. Pr. 10; *McMaster v. Vernon*, 3 Duer 249; *Benson v. Paine*, 9 Abb. Pr. 28, 17 How. Pr. 407, 2 Hilt. 552. **Ohio.**

*Sloo v. Lea*, 18 Ohio 279. **Ore.**—*Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826, Ann. Cas. 1915C, 522; *North Pac. Lumb. Co. v. Spore*, 44 Ore. 462, 476, 75 Pac. 890; *Poppleton v. Jones*, 42 Ore. 24, 69 Pac. 919. **Tex.**—*Gaut v. Reed*, 24 Tex. 46, 76 Am. Dec. 94. **Wis.** *Keith Bros. & Co. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860. See *Lauer v. Bandow*, 48 Wis. 638, 4 N. W. 774; *Bowen v. Hastings*, 47 Wis. 232, 2 N. W. 301. **Eng.**—*Ex parte Higgins*, 3 De G. & J. 33, 4 Jur. (N. S.) 595, 27 L. J. Bankr. 27, 6 Wkly. Rep. 406, 44 Eng. Reprint 1181.

[a] Where, in an action against four partners, final (rather than interlocutory) judgment by default is rendered against two of them, the entire cause of action is as effectually merged therein as if the judgment had been recovered in a separate suit, and further proceedings in the action against the other two defendant partners is thereby barred. *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344. See *supra*, XVII, B, 4, b, (I).

**72.** *Munster v. Railton*, 11 Q. B. D. 435, 52 L. J. Q. B. 409, 48 L. T. N. S. 624, 31 W. R. 880.

**73. U. S.**—*United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *Mason v. Eldred*, 6 Wall. 231, 238, 18 L. ed. 783; *In re Herrick*, 12 Fed. Cas. No. 6,420. **Md.**—*Moale v. Hollins*, 11 Gill & J. 11, 33 Am. Dec. 684. **N. Y.**—*Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Penny v. Martin*, 4 Johns. Ch. 566. **Pa.**—*Smith v. Black*, 9 Serg. & R. 142, 11 Am. Dec. 686.

**74.** *Fleming v. Ross*, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314 (*affirming* 125 Ill. App. 265); *Candee & Scribner v. Clark*, 2 Mich. 255.

**75.** *Gilman, Bentley & Co. v. Foote*, 22 Iowa 560. *Compare*, *Cushing v. Poli*, 151 Ill. App. 1.



c. *Joint Wranglers*.—(I.) In General.—Wherever the liability on the part of joint tort-feasors is regarded as joint and several, a judgment against one does not bar an action against another for the same tort,<sup>76</sup> unless such recovery has been followed by a satisfaction.<sup>77</sup> But a joint recovery against all of them will bar a subsequent action against

76. **U. S.**—*Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; *Albright v. American Bell Tel. Co.*, 136 U. S. 629, 10 Sup. Ct. 1064, 34 L. ed. 557; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129; *Power v. Baker*, 27 Fed. 306; *Collard v. Delaware, etc. R. Co.*, 6 Fed. 246; *Smith v. Rines*, 2 Sumn. 338, 22 Fed. Cas. No. 13,100; *Long v. Conner*, 15 Fed. Cas. No. 8,479. **Ala.**—*Du Bose v. Marx*, 52 Ala. 506; *Blann v. Crocheron*, 20 Ala. 320, 19 Ala. 647, 54 Am. Dec. 203. **Ark.**—*McGee v. Overby*, 12 Ark. 164. **Cal.**—*San Pedro Lumb. Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Williams v. Sutton*, 43 Cal. 65. **Conn.**—*Vincent v. McNamara*, 70 Conn. 332, 39 Atl. 444; *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Morgan v. Chester*, 4 Conn. 387. **Ga.**—*Brooks v. Ashburn*, 9 Ga. 297. **Ill.**—*Roodhouse v. Christian*, 153 Ill. 137, 41 N. E. 748. **Ind.**—*Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711; *Brady v. Ball*, 14 Ind. 317; *Fleming v. City of Anderson*, 39 Ind. App. 343, 76 N. E. 266. **Ia.**—*Cushing v. Hederman*, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320; *Turner v. Hitchcock*, 20 Iowa 310. **Ky.**—*Louisville Bridge Co. v. Sieber*, 157 Ky. 151, 162 S. W. 804; *Renfrow v. Condor*, 153 Ky. 701, 156 S. W. 385; *United Soc. of Shakers v. Underwood*, 11 Bush 265, 21 Am. Rep. 214; *Sharp v. Gray*, 5 B. Mon. 4; *Elliot v. Porter*, 5 Dana 299, 30 Am. Dec. 689; *Carpenter v. Laswell*, 23 Ky. L. Rep. 686, 63 S. W. 609. **La.**—*Wallace v. Miller*, 15 La. Ann. 449. **Me.**—*Cleveland v. Bangor*, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; *Jones v. Lowell*, 35 Me. 538; *Hopkins v. Hersey*, 20 Me. 449. **Mass.**—*Hunt v. New York, N. H. & H. R. Co.*, 211 Mass. 102, 98 N. E. 787; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 149, 89 N. E. 193, 40 L. R. A. (N. S.) 314; *Cameron v. Knapp*, 201 Mass. 451, 87 N. E. 605; *Savage v. Stevens*, 188 Mass. 254; *Knight v. Nelson*, 117 Mass. 458; *Elliott v. Hay-*

*den*, 104 Mass. 180; *Stone v. Dickinson*, 5 Allen 29, 81 Am. Dec. 727; *Sprague v. Waite*, 19 Pick. 455. *Compare*, *Campbell v. Phelps*, 1 Pick. 62, 11 Am. Dec. 139. **Miss.**—*Nelson v. Illinois Cent. R. Co.*, 98 Miss. 295, 53 So. 619, 31 L. R. A. (N. S.) 689. **Mo.**—*Page v. Freeman*, 19 Mo. 421. **Neb.**—*Fitzgerald v. Union Stockyards Co.*, 89 Neb. 393, 131 N. W. 612, 33 L. R. A. (N. S.) 983. **N. H.**—*Fowler v. Owen*, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508. **N. J.**—*Johnston v. O'Reilly*, 74 N. J. Eq. 448, 70 Atl. 312; *Johnson v. McKenna*, 73 N. J. Eq. 1, 67 Atl. 395; *Allen v. Craig*, 13 N. J. L. 294. **N. Y.**—*Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; *Russell v. McCally*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Tanzer v. Breen*, 131 App. Div. 654, 116 N. Y. Supp. 110; *Reno v. Thompson*, 111 App. Div. 316, 97 N. Y. Supp. 744; *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96; *Cohn v. Goldman*, 11 Jones & S. 436; *Wies v. Fanning*, 9 How. Pr. 543; *Marsh v. Berry*, 7 Cow. 344; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330. **Ohio.**—*Maple v. Cincinnati, etc. R. Co.*, 40 Ohio St. 313, 48 Am. Rep. 685; *Jack v. Hudnall*, 25 Ohio St. 255, 18 Am. Rep. 298; *Wright v. Lathrop*, 2 Ohio 33, 15 Am. Dec. 529. **Pa.**—*Floyd v. Browne*, 1 Rawle 121, 18 Am. Dec. 602. **S. C.**—*Hawkins v. Hatton*, 1 Nott & McC. 318, 9 Am. Dec. 700; *Whitaker's Admr. v. English*, 1 Bay 15. **Tenn.**—*Turner v. Brock*, 6 Heisk. 50; *Knott v. Cunningham*, 2 Sneed 204; *Christian v. Hoover*, 6 Yerg. 505. **Tex.**—*McGehee v. Shafer*, 15 Tex. 198. **Vt.**—*Chamberlin v. Murphy*, 41 Vt. 110; *Preston v. Hutchinson*, 29 Vt. 144; *Sanderson v. Caldwell*, 2 Aik. 195. **W. Va.**—*Griffie v. McClung*, 5 W. Va. 131; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

See also 7 ENCY. OF EV. 819.

77. See *infra*, XVII, B, 5, c, (II).

one or more, since the plaintiff is required to elect whether he will proceed against them jointly or severally, and will be limited to his choice.<sup>73</sup> Where the obligation of joint tort-feasors is merely joint, and not joint and several, a recovery against one of the wrongdoers will bar an action against another on the same cause of action.<sup>79</sup>

(II.) Effect of Satisfaction by One Tort-feasor. — While joint tort-feasors may be sued separately, and as many judgments had as there are wrongdoers, a plaintiff can have but one satisfaction for the joint injury;<sup>80</sup> and where several separate judgments are recovered, he is required to elect upon which he will proceed to satisfy his demand.<sup>81</sup> An estoppel arises as to the other tort-feasors whenever the plaintiff recovers a judgment against one of them and receives satisfaction thereof,<sup>82</sup> or what

78. **U. S.**—Sessions *v. Johnson*, 95 U. S. 347, 24 L. ed. 596; Smith *v. Rines*, 2 Sumn. 338, 22 Fed. Cas. No. 13,100. **D. C.**—Hutchinson *v. Brown*, 8 Mackey 136. **Ill.**—Davis *v. Taylor*, 41 Ill. 405. **Ind.**—Smith *v. Graves* (Ind. App.), 108 N. E. 168. **Mass.**—Cameron *v. Kanrich*, 201 Mass. 451, 87 N. E. 605. **N. Y.**—O'Hanlon *v. Scott*, 89 Hun 44, 35 N. Y. Supp. 31; McCready *v. Thrush*, 37 App. Div. 465, 56 N. Y. Supp. 68. **Ohio.**—Zigler *v. Rommel*, 4 Ohio Dec. 472, 30 Wkly. L. Bul. 115. **Va.**—Ammonett *v. Harris*, 1 Hen. & M. (11 Va.) 488.

*Compare*, Gilbreath *v. Jones*, 66 Ala. 129; Davis *v. Caswell*, 50 Me. 294.

79. **R. I.**—Hunt *v. Bates*, 7 R. I. 217, 82 Am. Dec. 592. **Va.**—Staunton Mut. Telephone Co. *v. Buchanan*, 108 Va. 810, 62 S. E. 928; Petticolas *v. City of Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811; Wilkes *v. Jackson*, 2 Hen. & M. (12 Va.) 355; Ammonett *v. Harris*, 1 Hen. & M. (11 Va.) 488. **Eng.**—Brinsmead *v. Harrison*, L. R. 7 C. R. 547, 41 L. J. C. P. 190, 27 L. T. N. S. 99, 20 Wkly. Rep. 784; Buckland *v. Johnson*, 15 C. B. 145, 2 C. L. R. 784, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145, 139 Eng. Reprint 375; Bowden *v. Beauchamp*, 2 Atk. 82, 26 Eng. Reprint 450; King *v. Hoare*, 2 D. & L. 383, 8 Jur. 1127, 14 L. J. Exch. 29, 13 Mees. & W. 494; Day *v. Porter*, 2 M. & Rob. 151; Brown *v. Wootton*, Cro. Jac. 73, Yelv. 67, 79 Eng. Reprint 62, Fr. Moore 762, the leading case. **Can.**—Longmore *v. The J. D. McArthur Co.*, 43 Can. S. Ct. 640, 19 Man. 641.

[a] In Bennett *v. Fairfield*, 13 R. I. 139, 43 Am. Rep. 17, it was held that where a person leaves in a town highway an object calculated to frighten

horses, and the town negligently suffers it to remain, with the result that plaintiff's horse took fright at it and did damage, the person, who left the object on the highway, and the town are not joint tort-feasors, but that they are collaterally liable by reason of distinct though related torts for the same injury, and a judgment against the individual, from which he was discharged in bankruptcy, did not bar an action against the town.

80. See generally the title "Judgments, Satisfaction of."

81. See generally the title "Judgments, Satisfaction of."

82. **U. S.**—Sessions *v. Johnson*, 95 U. S. 347, 24 L. ed. 596; Lovejoy *v. Murray*, 3 Wall. 1, 18 L. ed. 129; Duane *v. Goodall*, 7 Fed. Cas. No. 4,105. **Ala.**—McCoy *v. Louisville & N. R. Co.*, 146 Ala. 333, 40 So. 106; Vandiver *v. Poliak*, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118; Smith *v. Gayle*, 58 Ala. 600; Du Bose *v. Marx*, 52 Ala. 506; The Steamboat Farmer *v. McGraw*, 26 Ala. 189; O'Neal *v. Brown*, 21 Ala. 482; Blann *v. Crocheron*, 20 Ala. 320; Layman *v. Hendrix*, 1 Ala. 212. **Cal.**—Hartigan *v. Southern P. R. Co.*, 86 Cal. 142, 24 Pac. 851; Tompkins *v. Clay Street Ry. Co.*, 66 Cal. 163, 4 Pac. 1165. **Ill.**—People *v. Wilson*, 260 Ill. 145, 102 N. E. 1055; Karr *v. Barstow*, 24 Ill. 580; Stanley *v. Leahy*, 87 Ill. App. 465. **Ind.**—Baltes *v. Bass Foundry, etc. Works*, 129 Ind. 185, 28 N. E. 319; American, etc. Co. *v. Patterson*, 73 Ind. 430; Smith *v. Graves* (Ind. App.), 108 N. E. 168; City of Valparaiso *v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522. **Ia.**—Miller *v. Beck*, 108 Iowa 575, 79 N. W. 344. **Ky.**—Louisville *v. Nicholls*, 158 Ky. 516, 165 S. W. 660; Renfrow

in law is deemed the equivalent of satisfaction of the judgment.<sup>53</sup>

(III.) *Effect of Judgment for One Tort-feasor.*—Generally a judgment in favor of one joint tort-feasor, is not a bar to an action against another joint tort-feasor, since he was neither party nor privy thereto, and consequently cannot be bound thereby.<sup>54</sup> But where the liability of one is wholly derivative and dependent upon the relation which he

*r. Conover*, 153 Ky. 701, 140 S. W. 237. Me.—*Cleveland v. City of Bangor*, 86 Me. 283, 22 Atl. 902, 47 Am. 91, Rep. 320; *Mitchell v. Biddeford*, 33 Me. 74. Md.—*Peabody v. Wilson*, 87 Md. 219, 30 Atl. 800. Mass.—*Hunt v. New York, N. H. & H. R. Co.*, 212 Mass. 102, 98 N. E. 787; *Garrison v. Baugh*, 201 Mass. 451, 87 N. E. 605; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Luce v. Dexter*, 127 Mass. 243; *Savage v. Stevens*, 128 Mass. 254; *Stone v. Dickinson*, 5 Allen 23, 31 Am. Dec. 727; *Gilmore v. Carr*, 2 Mass. 171. Mich. *Blackman v. Simpson*, 120 Mich. 377, 79 N. W. 573, 58 L. R. A. 410; *Grimes v. Williams' Est.*, 113 Mich. 450, 71 N. W. 835. Minn.—*Abundant v. Wylcox*, 115 Minn. 57, 137 N. W. 700. Mo.—*Packard v. Hannibal & St. J. R. Co.*, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607; *Hubbard v. St. Louis & M. R. R. Co.*, 173 Mo. 249, 72 S. W. 197; *Garrow v. Menard*, 15 Mo. App. 591. Neb.—*Fitzgerald v. Union Stockyards Co.*, 89 Neb. 393, 131 N. W. 612, 23 L. R. A. (N. S.) 983; *Bryant v. Reed*, 34 Neb. 720, 52 N. W. 694. N. H. *Farwell v. Hilliard*, 3 N. H. 318. N. J. *Johnston v. O'Reilly*, 74 N. J. Eq. 448, 70 Atl. 712. N. Y.—*Quigley v. Undermann*, 190 N. Y. 394, 87 N. E. 437; *Russell v. Marshall*, 141 N. Y. 417, 30 N. E. 108, 38 Am. St. Rep. 807; *Atlantic Dock Co. v. New York*, 53 N. Y. 63; *Dexter v. Brock*, 16 Barb. 337; *Mathews v. Lawrence*, 1 Denio 212, 43 Am. Dec. 665; *Pasthoff v. Banendahl*, 43 Ind. 370, 8 N. Y. Bl. 323; *Borg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1032; *Reno v. Thompson*, 111 App. Div. 310, 97 N. Y. Supp. 743; *Union Associated Press v. Press Pub. Co.*, 24 Misc. 610, 54 N. Y. Supp. 183. Pa.—*Smith v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 11 Am. St. Rep. 385, 4 L. R. A. 54; *Fla. v. Northern Traction*, 3 Watts & S. 100. S. C.—*Smith v. Shepley*, 3 McMill. 184, 39 Am. Dec. 122. Wash.—*Abb v. North. Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 863, 92 Am. St. Rep. 864, 58

L. R. A. 293; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. Eng.—*Wright v. London General Omnibus Co.*, 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. N. S. 590, 25 Wkly. Rep. 647.

[a] Whether the wrongdoers are only severally liable or jointly and severally, a recovery and satisfaction from one will bar an action against the other, since the law will permit but one satisfaction for a single injury. *McCoy v. Louisville & N. R. Co.*, 146 Ala. 333, 40 So. 106.

[b] A partial satisfaction under one judgment does not release the judgment against the other joint tort-feasor. *McVey v. Manatt*, 80 Iowa 132, 45 N. W. 548.

83. Ill.—*Karr v. Barstow*, 24 Ill. 580. N. J.—*Spurr v. North Hudson County R. Co.*, 56 N. J. L. 346, 28 Atl. 582. Vt.—*Hyde v. Long*, 4 Vt. 531.

[a] An unaccepted payment into court, is not equivalent to a satisfaction of the judgment. *Blann v. Crocheron*, 20 Ala. 320.

[b] Settlement of one separate suit, and discharge of the defendant therein operates as a settlement of the entire cause of action as to all the joint tort-feasors, and bars a recovery in the actions pending against them. *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154.

84. U. S.—*Bigelow v. Old Dominion Cop. Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. Ind.—*Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308. Ill.—See *Humason v. Michigan Cent. R. Co.*, 176 Ill. App. 329. Mass.—*Old Dominion Copper, etc. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; *Sprague v. Waite*, 19 Pick. 455. Minn.—*Thompson v. Chicago, St. P. & K. C. R. Co.*, 71 Minn. 89, 73 N. W. 707. Miss.—*Nelson v. Hildebrand Cent. R. Co.*, 95 Mo. 295, 53 So. 619, 31 L. R. A. (N. S.) 689. N. Y.—*Lanning v. Montgomery*, 2 Johns. 382; *Marsh v. Berry*, 7 Cow. 344; *Moore v. Tracy*, 7 Wend. 229;



occupies to the active tort-feasor, as in the case of principal and agent, master and servant, or analogous relations, where there would be a right to reimbursement or indemnity, a judgment in favor of the latter would bar a subsequent action against the former.<sup>85</sup> And it has been held that in such cases a judgment for the principal or master would bar an action against the agent or servant.<sup>86</sup>

*Calkins v. Allerton*, 3 Barb. 171; *Tanzer v. Breen*, 131 App. Div. 654, 116 N. Y. Supp. 110; *Gittleman v. Feltman*, 122 App. Div. 385, 166 N. Y. Supp. 583. But see *Tyng v. Clarke*, 9 Hun 269, holding to the contrary, by a divided court. **Tenn.**—*Three States Lumber Co. v. Blanks*, 118 Tenn. 627, 102 S. W. 79. But see *Moore v. Chattanooga Electric Ry. Co.*, 119 Tenn. 710, 109 S. W. 497.

**85. U. S.**—*Portland Gold Min. Co. v. Stratton's Independence*, 158 Fed. 63, 85 C. C. A. 393, 16 L. R. A. (N. S.) 677; *Ransom v. Pierre*, 101 Fed. 665, 41 C. C. A. 585; *Williford v. Kansas City, M. & B. R. Co.*, 154 Fed. 514; *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401. See also *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. ed. 919. **Ga.**—*Southern R. Co. v. Harbin*, 135 Ga. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404. **Ill.**—*Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764; *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329, 65 N. E. 717. **Ind.**—*Indiana Nitroglycerine & Torpedo Co. v. Lipincott Glass Co.*, 165 Ind. 361, 75 N. E. 649; *Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; *Faust v. Baumgartner*, 113 Ind. 139, 15 N. E. 337; *Childress v. Lake Erie & W. R. Co.* (Ind. App.), 101 N. E. 332. **Ky.**—See *Warfield v. Davis*, 14 B. Mon. 40. **Md.**—See *McKinzie v. Baltimore & O. R. Co.*, 28 Md. 161. **Me.**—*Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627. **Mo.**—*McGinnis v. Chicago, R. I. & P. R. Co.*, 200 Mo. 347, 98 S. W. 590; *State, use Hempstead v. Coste*, 36 Mo. 437, 88 Am. Dec. 148; *Kansas City v. Mitchener*, 85 Mo. App. 36. **Neb.** *Chicago, St. P. M. & O. R. Co. v. McManegal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243. **N. H.**—*King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. **N. Y.** *Castle v. Noyes*, 14 N. Y. 329; *Montfort v. Hughes*, 3 E. D. Smith 591; *Featherston v. Newburgh, etc. Turn-*

*pike Road*, 71 Hun 109, 24 N. Y. Supp. 603. **R. I.**—*Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873. **S. C.** *Jenkins v. Atlantic Coast Line R. Co.*, 89 S. C. 408, 71 S. E. 1010. **Tex.** *Sonnentheil v. Moody* (Tex. Civ. App.), 56 S. W. 1001; *Sonnentheil v. Texas G. & T. Co.*, 23 Tex. Civ. App. 436, 56 S. W. 143. **Wash.**—*Sipes v. Puget Sound Electric Co.*, 54 Wash. 47, 102 Pac. 1057; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. **W. Va.**—*Gallagher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859.

*Compare, Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Illinois Cent. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352.

[a] Judgment must have been upon the merits. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401.

[b] But where both are sued together and the verdict is in favor of the active wrongdoer but against his principal or master, it will not be set aside on appeal by the latter, since the jury may have improperly acquitted the agent. *Gulf, C. & S. F. Ry. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; *Texas & P. R. Co. v. Huber* (Tex. Civ. App.), 95 S. W. 568. See also *Illinois Cent. R. Co. v. Clarke*, 85 Miss. 691, 38 So. 97.

[c] **Judgment of Sister State.**—Although a judgment dismissing the bill against one of two joint tort-feasors may be a bar in the state where rendered, against a suit on the same cause of action against the other joint tort-feasor, the courts of another state may, without denying full faith and credit to such judgment, determine for itself under principles of general law whether or not such judgment is a bar to suits against the other tort-feasor. *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. See *infra*, XVIII, B.

**86. Anderson v. West Chicago St.**

5. **Waiver of Benefit of Bar.**—Where a party fails to take advantage of a former adjudication by claiming the benefit thereof, as a bar or defense, he will be deemed to have waived his right to the benefit of estoppel arising therefrom and the case may be determined without regard thereto.<sup>87</sup> But it has been held that the court on grounds of public policy and convenience may refuse to relitigate matters which have already been litigated between the same parties.<sup>88</sup>

One who seeks the reversal of a judgment is estopped from pleading the same in bar of an action pending the appeal.<sup>89</sup>

C. **RES JUDICATA.**—While the term “*res judicata*” is frequently used in a more extensive sense, it does not cover or embrace the doctrine of merger or bar,<sup>90</sup> though the principles which govern them are to some extent the same. The scope and application of the doctrine of *res judicata* will be found elsewhere in this work.<sup>91</sup>

D. **PLEADING AND PRACTICE.**—1. **Necessity of Pleading Former Adjudication.**—a. *As Res Judicata.*—A party who desires to rely on a former judgment merely as a conclusive determination of a fact material in a pending action, is not required to plead such judgment, since it may be given in evidence in proof of the fact determined, whenever it becomes material, without being specially pleaded.<sup>92</sup> A dis-

R. Co., 200 Ill. 329, 65 N. E. 717; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627.

87. **U. S.**—Mack v. Levy, 60 Fed. 751. See David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661. **Md.**—Fledderman v. Fledderman, 112 Md. 226, 76 Atl. 85. **Mich.**—McArthur v. Oliver, 53 Mich. 299, 19 N. W. 5. **N. Y.**—Blanchard v. Richly, 7 Johns. 198.

As to necessity of pleading, see *infra*, XVII, D, 1, b.

88. Long v. Jarratt, 94 N. C. 413. See also Walker v. Chase, 53 Me. 258. Compare, Bolton v. Hey, 168 Pa. 418, 31 Atl. 1097; Hammond v. Schofield, 1 Q. B. 453, 60 L. J. Q. B. 539.

89. Hughes v. Dundee Mtg. & Tr. Inv. Co., 28 Fed. 40.

90. See *supra*, XVII, B, 1, b, (I).

91. See the title “*Res Judicata*.”

As to the pleading of a judgment as *res judicata*, see *infra*, XVII, D, 1, a.

92. **U. S.**—Southern Pac. R. R. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. Compare, Blandy v. Griffith, 3 Fed. Cas. No. 1,529. **Cal.**—Riverside Land & Irr. Co. v. Jensen, 108 Cal. 146, 41 Pac. 40; Clink v. Thurston, 47 Cal. 21; Ahlers v. Smiley, 11 Cal. App. 343, 104 Pac. 997. **Colo.**—Gray v. Linton, 38 Colo. 175, 88 Pac. 749. **Conn.**—Bell v. Raymond, 18 Conn. 91. **Fla.**—Fulton v. Gesterding, 47 Fla.

150, 36 So. 56. **Ia.**—Larum v. Wilmer, 35 Iowa 244. See Woods v. Allen, 122 Iowa 695, 98 N. W. 499. **Me.**—Walker v. Chase, 53 Me. 258. **Minn.**—Swank v. St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088. **Mo.**—See Bartley v. Bartley, 172 Mo. 208, 72 S. W. 521. **N. Y.**—Krekeler v. Ritter, 62 N. Y. 372; Lance v. Shaughnessy, 86 Hun 411, 33 N. Y. Supp. 515, 67 N. Y. St. 171; Burlingame v. Mandeville, 44 Hun 623, 7 N. Y. St. 858; Kelsey v. Sargent, 42 Hun 652, 3 N. Y. St. 477; Royal Live Fish. Co. v. Central Fish Co., 159 App. Div. 151, 144 N. Y. Supp. 21; Stearns v. Shepard & Morse Lumber Co., 91 App. Div. 49, 86 N. Y. Supp. 391; Foulke v. Thalmeisinger, 1 App. Div. 598, 37 N. Y. Supp. 563; Standard Supply & Equip. Co. v. Merritt, 48 Misc. 498, 96 N. Y. Supp. 181. **N. C.**—Stancill v. James, 126 N. C. 190, 35 S. E. 245. **Wis.**—Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

[a] “It is no surprise as the existence of the judgment is equally well known to each party.” Stancill v. James, 126 N. C. 190, 35 S. E. 245.

[b] “While as a general rule, in order to render evidence available in support of a defense based upon matters of estoppel, such matters must be pleaded, the rule does not apply to the statement of a cause of action by plaintiff. Indeed, under our system of

inction in this respect must be made between a judgment merely as *res judicata* and as a merger or bar,<sup>93</sup> but this distinction does not always seem to be clearly drawn in the cases.

The general rule is as applicable to a defendant as to the plaintiff, although less frequently involved in such cases,<sup>94</sup> and applies whether the judgment is determinative of a question of law or a question of fact.<sup>95</sup>

b. *In Bar*.—Generally in order to rely upon the estoppel of a former adjudication, in bar of the prosecution of another action, the former judgment must be pleaded specially in the subsequent action.<sup>96</sup>

pleading, no opportunity is afforded for such pleading on the part of plaintiff. Nevertheless, the record may be given in evidence with the same conclusive effect as if it had been specially pleaded." *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997.

[c] *Under Former United States Equity Rule 45*.—When a former recovery is to be relied on by the plaintiff it is not "necessary" to amend the bill, setting up the former recovery, where such recovery is relied upon as evidence of a material fact. *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355.

93. See generally, *supra*, XVII, B, 1, b, (I); the title "*Res Judicata*;" and *infra*, XVII, D, 1, b.

[a] *Distinction Between Former Judgment as Bar and as Res Judicata*.—"A former judgment on the same cause of action, being a complete bar to a second action, must always be pleaded by way of defense. . . . But a former judgment is no bar to a second suit upon a different cause of action. It merely operates as conclusive evidence of the facts actually litigated in the first action, and upon the determination of which the finding or verdict therein was rendered, and need not be pleaded any more than any other evidence. In such a case it is proper for a party to plead his cause of action or defense in the ordinary form, leaving the judgment to be used in evidence to establish his general right." *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 63 N. W. 1088. See also *Krekeler v. Ritter*, 62 N. Y. 372.

94. *Krekeler v. Ritter*, 62 N. Y. 372; *Lance v. Shaughnessy*, 86 Hun 411, 33 N. Y. Supp. 515, 67 N. Y. St. 171; *Fritz v. Tompkins*, 39 App. Div. 73, 56 N. Y. Supp. 847; *Drake v. New York Suburban Water Co.*, 26 App. Div. 499,

50 N. Y. Supp. 826; *Bonanza Con. Min. Co. v. Golden Head Min. Co.*, 29 Utah 159, 80 Pac. 736.

95. *Royal Live Fish Co. v. Central Fish Co.*, 159 App. Div. 151, 144 N. Y. Supp. 21. See *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

96. *U. S.*—*Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. ed. 926; *Preferred Acc. Ins. Co. v. Barker*, 93 Fed. 158, 35 C. C. A. 250 (applying law of Louisiana); *Glenn v. Priest*, 48 Fed. 19 (applying law of Missouri). *Ala.*—*Jordan v. Jordan*, 175 Ala. 640, 57 So. 436; *Winkles v. Powell*, 173 Ala. 46, 55 So. 536; *Chattanooga Brewing Co. v. Smith*, 2 Ala. App. 565, 58 So. 67. *Ark.*—*State v. Spikes*, 33 Ark. 801. *Cal.*—*Swamp Land Rec. Dist. No. 341 v. Blumenberg*, 156 Cal. 532, 106 Pac. 389; *In re McNeil's Estate*, 155 Cal. 333, 100 Pac. 1086; *McLean v. Baldwin*, 136 Cal. 565, 69 Pac. 259; *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *Schermerhorn v. Los Angeles Pac. R. Co.*, 18 Cal. App. 454, 123 Pac. 351. *Colo.*—*Boston & Colorado Smelt. Co. v. Reed*, 23 Colo. 523, 48 Pac. 515. *Ga.*—*Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727. *Ill.*—*Mettler v. Warner*, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082, 1099; *Gerber v. Gerber*, 155 Ill. 219, 40 N. E. 581; *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761; *Hahn v. Ritter*, 12 Ill. 80. *Ind.*—*Hoover v. Lewin*, 56 Ind. App. 367, 105 N. E. 400. *Ia.*—*Cedar County v. Hillyer*, 155 N. W. 277; *Majestic Co. v. Ira D. Davis Co.*, 170 Iowa 5, 151 N. W. 1069; *In re Heaven's Est.*, 168 Iowa 563, 150 N. W. 698; *Carleton v. Byington*, 24 Iowa 172; *Cooley v. Brayton*, 16 Iowa 10; *Van Orman v. Spafford*, 16 Iowa 186 (*overruling George v. Gillespie*, 1 G. Gr. 421). *Ky.*—*Louis-*



It constitutes "new matter" under the codes,<sup>1</sup> and cannot be given in

ville & N. R. Co. v. Louisville, 141 Ky. 131, 132 S. W. 184; Morrison v. Price, 130 Ky. 139, 112 S. W. 1090; Bibb v. Jones, 12 Ky. L. Rep. 605. **La.**—Hinton v. Roane, 124 La. 927, 50 So. 798; Thompson v. Vance, 111 La. 548, 35 So. 741; Mitchell v. Levi, 28 La. Ann. 946. **Mich.**—Briggs v. Milburn, 40 Mich. 502. **Minn.**—McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485; Reilly v. Bader, 50 Minn. 199, 52 N. W. 522. **Miss.**—Grenada Bank v. Adams, 87 Miss. 669, 40 So. 4; Adams v. Yazoo & M. V. R. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. **Mo.**—Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; Iroquois Mfg. Co. v. Annan-Burg Mill. Co., 179 Mo. App. 87, 161 S. W. 320; Underwood v. City of Caruthersville (Mo. App.), 129 S. W. 1070; Trueman v. Lippincott, 39 Mo. App. 478. **Mont.**—Joseph v. Mady Clothing Co., 13 Mont. 195, 33 Pac. 1. **Neb.**—Gregory v. Kenyon, 34 Neb. 640, 52 N. W. 685; Kitchen Bros. Hotel Co. v. Hammond, 30 Neb. 618, 16 N. W. 320. **Nev.**—State v. Board of Comrs. Mashoe Co., 12 Nev. 17. **N. J.**—Water Comrs. v. Cramer, 61 N. J. L. 270, 39 Atl. 671, 68 Am. St. Rep. 705; Ward v. Ward, 22 N. J. L. 699. **N. M.**—Ortiz v. First Nat. Bank, 12 N. M. 519, 78 Pac. 529. **N. Y.**—Westminster Pres. Church v. Trustees of Presby., 211 N. Y. 214, 105 N. E. 199; Krekeler v. Ritter, 62 N. Y. 372; Lyon v. Tallmadge, 14 Johns. 501; Dexter v. Hazen, 10 Johns. 246; Dennis v. Snell, 50 Barb. 95, 54 Barb. 411, 34 How. Pr. 467; Henderson v. Scott, 32 Hun 412, 6 Civ. Proc. 39; Derby v. Yale, 13 Hun 273; Willis v. McKinnon, 37 Misc. 386, 75 N. Y. Supp. 770. **N. C.**—Williams v. Hutton, 164 N. C. 216, 80 S. E. 257; Smith v. Cashie, etc. Lumb. Co., 140 N. C. 375, 53 S. E. 233; Tatum v. Tatum, 36 N. C. 113. But see Weeks v. McPhail, 129 N. C. 72, 39 S. E. 732. **N. D.**—Compare Persons v. Smith, 12 N. D. 403, 97 N. W. 551. **Ohio.**—Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656. **Ore.**—Murray v. Murray, 6 Ore. 26. **Pa.**—Smith v. Elliott, 9 Pa. 345. **S. C.**—Curtis v. Reneker, 34 S. C. 468, 13 S. E. 664. **Tenn.**—Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693; Daniel v. Gum, 45 S. W. 468; Jourolman v. Massengill, 86 Tenn. 81, 5 S. W.

719 (in equity); Turley v. Turley, 85 Tenn. 251, 1 S. W. 891 (the rule applies in equity but not at law). **Tex.**—Norris v. Belcher Land Mtg. Co., 98 Tex. 176, 82 S. W. 500, 83 S. W. 799; Mullinax v. Barrett (Tex. Civ. App.), 173 S. W. 1181; State v. St. Louis S. W. Ry. Co. (Tex. Civ. App.), 165 S. W. 491. **Vt.**—Wells v. Boston & M. R. R. Co., 82 Vt. 108, 71 Atl. 1103. **W. Va.**—Collins v. Board of Trustees, 72 W. Va. 583, 79 S. E. 10; Beall v. Walker, 26 W. Va. 741.

[a] "The plaintiff is entitled to be apprised of any new matter which tends to defeat his cause of action in order, if he have answer thereto, that he may be prepared to establish it. In the present case the plaintiff became entitled to attack this judgment as obtained by fraud or that the court was without jurisdiction to render it, or to prove any other matter which might overthrow it, and for this reason the provision [of the statute] is salutary and should be enforced." Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660.

[b] "If the rule were otherwise, pleadings would, in many cases, impart little or no information to the adverse party of the real cause of action or defense, and would, as a consequence, become a trap to catch an unsuspecting party relying upon the apparent issue presented therein." Bays v. Trulson, 25 Ore. 109, 35 Pac. 26.

[c] **Question Cannot Be Raised for the First Time on Appeal.**—On appeal from a judgment of dismissal entered upon sustaining a demurrer to the petition, the question of res judicata cannot be considered. Louisville & N. R. Co. v. Louisville, 141 Ky. 131, 132 S. W. 184.

[d] **Reference by counsel to the opinion of the court in rendering the former judgment, cannot authorize a consideration of the question of res judicata.** Collins v. Board of Trustees, 72 W. Va. 583, 79 S. E. 10.

97. Fanning v. Hibernia Ins. Co., 37 Ohio St. 344; and see cases in preceding note.

[a] "Prior to the code, a former suit and recovery for the same cause of action could be given in evidence under the plea of the general issue, in actions, like ejectment and trover, in

evidence under a general denial.<sup>98</sup> The same general rule applies to suits in equity.<sup>99</sup>

But under the common law system of pleading, the general issue being pleaded, evidence of a former judgment is admissible in those classes of actions<sup>1</sup> in which other matters in discharge of the action

which special pleas were not allowed.

. . . But now the answer of the defendant, in every case, must contain a statement of any new matter constituting a defense (Code, §149). Hence a former recovery, whether obtained before or after the joining of the issue, cannot be given in evidence, in any action whatever, under a general denial of the allegations in the complaint." *Hendricks v. Decker*, 35 Barb. (N. Y.) 298.

[b] "The defense of a bar by a former judgment, being in the nature of a confession and avoidance, is 'new matter,' within the meaning of the code, and must be specially pleaded." *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151.

98. **U. S.**—*Glenn v. Priest*, 48 Fed. 19, applying law of Missouri. **Cal.** *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Cauley*, 119 Ind. 142, 21 N. E. 546; *Brady v. Murphy*, 19 Ind. 258; *Norris v. Amos*, 15 Ind. 365. **N. Y.** *Dalrymple v. Hunt*, 5 Hun 111; *Lytle v. Crawford*, 69 App. Div. 273, 74 N. Y. Supp. 660, 32 Civ. Proc. 360. **N. C.** *Smith v. Cashie Lumb Co.*, 140 N. C. 375, 53 S. E. 233; *Blackwell v. Diblell*, 103 N. C. 270, 9 S. E. 192. **Ohio.** *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344.

99. **Ill.**—*Williams v. Williams*, 265 Ill. 64, 106 N. E. 476. **N. Y.**—*Lyon v. Tallmadge*, 14 Johns. 501. **Tenn.** *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891.

[a] Former judgment cannot be the basis of a suit to enjoin the enforcement of a judgment, where defendant failed to plead the rendition of the former judgment, in the absence of fraud. *Pye v. Wyatt* (Tex. Civ. App.), 151 S. W. 1086.

1. **U. S.**—*Young v. Black*, 7 Cranch 565, 3 L. ed. 440; *Ridgway v. Ghequier*, 1 Cranch C. C. 87, 20 Fed. Cas. No. 11,816; *Stone v. Stone*, 2 Cranch 119, 23 Fed. Cas. No. 13,488, p. 162; *Lonsdale v. Brown*, 4 Wash. C. C. 86, 15 Fed. Cas. No. 8,493. **Ala.**—*Smith v. Roney*, 182 Ala. 540, 62 So. 753; *Boon*

*v. Riley*, 171 Ala. 657, 54 So. 997 (an ejectment action). **Fla.**—*Bell v. Niles*, 61 Fla. 114, 55 So. 392; *Little v. Barlow*, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249. **Ill.**—*MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209; *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58. **Ia.**—*George v. Gillespie*, 1 G. Gr. 421. **Ky.**—*Lampton v. Jones*, 5 Mon. 235. **Me.**—*Kimball v. Hilton*, 92 Me. 214, 42 Atl. 394; *Whiting v. Burger*, 78 Me. 287, 4 Atl. 694. See also *Walker v. Chase*, 53 Me. 258. **Mass.** *French v. Neal*, 24 Pick. 55. See *Foye v. Patch*, 132 Mass. 105. **Mo.**—*Garton v. Botts*, 73 Mo. 274; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417. See *In re Breck*, 252 Mo. 302, 158 S. W. 843. **N. H.**—*Gove v. Lyford*, 44 N. H. 525. **N. Y.**—*Niles v. Tolman*, 3 Barb. 594; *Derby v. Hartman*, 3 Daly 458; *Young v. Rummell*, 2 Hill 478, 38 Am. Dec. 594; *Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256. **N. C.** *Weeks v. McPhail*, 129 N. C. 73, 39 S. E. 732 (in ejectment). **Ohio.**—*Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459 (overruling *Inman v. Jenkins*, 3 Ohio 271). **Pa.**—*Bruner v. Finley*, 211 Pa. 74, 60 Atl. 488; *Finley v. Hanbest*, 30 Pa. 190; *Carvill v. Garrigues*, 5 Pa. 152. **Vt.**—*Mussey v. White*, 58 Vt. 45, 3 Atl. 319; *Whitney's Admr. v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150.

But see apparently *contra*, *Jones v. Lavender*, 55 Ga. 228; *Porter v. Leache*, 56 Mich. 40, 22 N. W. 104.

[a] In Maryland a former adjudication "may be pleaded in bar, or given in evidence under the general issue." *Brooke v. Gregg*, 89 Md. 234, 43 Atl. 38.

[b] A public officer, where permitted by statute to prove under the general issue, any defense which might have been specially pleaded, may prove former adjudication under the general issue. *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350.

Joining the general issue and a special plea of former adjudication, see *infra*, XVII, D, 2, a, (I).

might be proved under the general issue, though inadmissible in other actions.<sup>2</sup>

c. *By Reply or Subsequent Pleadings.*—In jurisdictions in which a replication or reply is necessary, a plaintiff must plead therein a former judgment upon which he relies as a bar to matter contained in the answer.<sup>3</sup> But where replications have been abolished obviously it is neither necessary nor possible for a plaintiff to plead a former adjudication in bar of matters set up by the defendant.<sup>4</sup> The same rules would hold good as to pleadings subsequent to the replication.<sup>5</sup>

d. *Where No Opportunity To Plead.*—A former recovery may always be given in evidence, without being specially pleaded, when either party seeking to rely on the estoppel has had no opportunity to interpose the defense,<sup>6</sup> and it is as conclusive under such circumstances as

General issue with notice of special defense, see *infra*, XVII, D, 2, a, (I).

2. See cases in preceding note.

[a] Even if the practice is proper in assumption it is not allowed in trespass. "In *Bird v. Randall* (3 Burr. 1353), Lord Mansfield took a distinction between actions on the case, and actions for torts. He says, a former recovery, release, or satisfaction, cannot be given in evidence in actions for torts; but must be pleaded. But an action on the case is founded on the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity; and in effect is so; and therefore in such a former recovery, etc., need not be pleaded, but may be given in evidence. Chitty adopts the same distinction. (1 Chitty Pl. 472, 475, 496.)" *Coles v. Carter*, 6 Cow. (N. Y.) 691.

3. III.—*Thriffs v. Fritz*, 101 Ill. 457. Ky.—*Norton v. Norton*, 15 Ky. L. Rep. 872, 25 S. W. 750, 27 S. W. 85. Mass.—*Saco Brick Co. v. J. P. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629. N. C.—*Bear v. Brunswick*, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586, if no demurrer to the answer is interposed. Ohio.—*Meiss v. Gill*, 44 Ohio St. 253, 6 N. E. 656; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344. Ore.—*Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460; *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. 154. Va.—*Bogle v. Conway's Exrs.*, 3 Call (7 Va.) 1.

4. U. S.—*Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. Cal.—*Wixson v. Devine*, 67 Cal. 341, 7 Pac. 776. N. Y.—*Dows v. McMichael*, 6 Paige 139. N. D.

*Kain v. Garmaas*, 27 N. D. 292, 145 N. W. 825.

See *infra*, XVII, D, 1, d.

[a] In North Dakota, the court may, on defendant's motion require a reply to be filed by the plaintiff to new matter in the answer. See *Kain v. Garmaas*, 27 N. D. 292, 145 N. W. 825.

As to when replication is necessary or proper, see the title "Replication and Reply."

5. See *Merriam v. Whittemore*, 5 Gray (Mass.) 316, where the statute does not provide for a rejoinder to the replication.

See generally the title "Rejoinder and Subsequent Pleadings."

6. Cal.—*Riverside Land & Irr. Co. v. Jensen*, 108 Cal. 146, 41 Pac. 40; *Clink v. Thurston*, 47 Cal. 21; *Flandreau v. Downey*, 23 Cal. 354. Conn.—*Bell v. Raymond*, 18 Conn. 91. Mo.—*In re Breck*, 252 Mo. 302, 158 S. W. 843; *McNair v. O'Fallon*, 8 Mo. 188. Nev.—*Young v. Brehl*, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892. N. H.—*King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. N. J.—*Ward v. Ward*, 22 N. J. L. 699. N. Y.—*Kingsland v. Spalding*, 3 Barb. Ch. 341; *Beebe v. Elliott*, 4 Barb. 457. Wash.—*Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

[a] Where the plaintiff in ejectment does not set forth his chain of title defendant has no opportunity to plead his estoppel. *Dame v. Wingate*, 12 N. H. 291.

[b] Garnishment Proceedings.—Where a statute provided that upon traverse of the answer of a garnishee, "the court shall direct without the formality



though it had been pleaded specially.<sup>7</sup> This rule applies to both domestic and foreign judgments<sup>8</sup> and is applicable where special replications are abolished and a plaintiff has no opportunity to reply to new matter set up in the answer,<sup>9</sup> and also where the estoppel of the judgment would be a complete defense to the issues raised by a plea of the general issue.<sup>10</sup> If it does not appear from the complaint that plaintiff relies upon or denies a fact which has already been adjudicated, evidence of such adjudication may be given by the defendant at the trial without pleading it, when plaintiff attempts to make use of the fact.<sup>11</sup> Where the former judgment is not rendered until the pleadings in the action are closed, it is not necessary to plead it.<sup>12</sup>

e. *When Pleaded by Adversary.*—Where a former adjudication is pleaded by one party the other may rely upon it as an estoppel without pleading it.<sup>13</sup>

f. *Raising the Point by Demurrer or Motion.*—Ordinarily the defense of an estoppel by former judgment cannot be raised by demurrer,<sup>14</sup> but where a complaint discloses upon its face that there has been a former adjudication of the merits between the same parties, advantage of this may be taken by demurrer.<sup>15</sup> The estoppel cannot ordinarily be

of pleading, a jury to be empanelled to inquire what is the true amount due from such garnishee," etc., a judgment may be relied on as res judicata without being specially pleaded. *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56.

7. *Beebe v. Elliott*, 4 Barb. (N. Y.) 457; *Perkins v. Walker*, 19 Vt. 144.

8. *MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209.

9. *Dows v. McMichael*, 6 Paige (N. Y.) 139. See *supra*, XVII, D, 1, c.

10. *Hall v. Dodge*, 38 N. H. 346; *Chamberlain v. Carlisle*, 26 N. H. 540; *Stancill v. James*, 126 N. C. 190, 35 S. E. 245.

11. Cal.—*Jackson v. Lodge*, 36 Cal. 28. Vt.—*Perkins v. Walker*, 19 Vt. 144. Va.—*Manchester, etc. B. & L. Assn. v. Porter*, 106 Va. 528, 56 S. E. 337.

[a] "The matter of estoppel was properly in evidence; for the defendant, upon the case made by the complaint, was not called upon, and had no opportunity to plead it. The plaintiff did not set out his title. It was only developed in the evidence, and, therefore could only be met by counter evidence." *Jackson v. Lodge*, 36 Cal. 28.

12. *MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209; *Sheldon v. Patterson*, 55 Ill. 507; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627. Compare,

*infra*, XVII, D, 1, h; XVII, D, 2, a, (II).

13. *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566, where a former judgment was pleaded by plaintiff and defendant asked for judgment on the pleadings.

See *infra*, XVII, D, 1, g.

[a] Where the plaintiff refers to the former judgment for the purpose of alleging facts to destroy its effect the defendant is not required to plead it formally. *Neill v. Tarin*, 9 Tex. 256.

14. Ark.—*Adams v. Billingsley*, 107 Ark. 38, 153 S. W. 1105. Fla.—*Lindsley v. McIver*, 51 Fla. 463, 40 So. 619. Ga.—*Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191; *New England Mtg. Sec. Co. v. Robson*, 79 Ga. 757, 4 S. E. 251. Mo.—*Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142, 65 S. W. 1035 ("especially when the ground of demurrer goes to its [the petition's] sufficiency"); *Kelly v. Hurt*, 61 Mo. 463. N. D. *Beyer v. North American Coal & Min. Co.*, 32 N. D. 542, 156 N. W. 204.

Judicial notice of former adjudication will not be taken, see *infra*, XVII, D, 1, h.

15. U. S.—*Hewitt v. Great Western Beet Sugar Co. (C. C. A.)*, 230 Fed. 394. See *National Casket Co. v. Stoltz*, 174 Fed. 413, 98 C. C. A. 617. Fla. *Keen v. Brown*, 46 Fla. 487, 35 So. 401. Ga.—*Williams v. Cheatham*, 99 Ga. 301,

presented to the court for determination by motion.<sup>16</sup> Neither a motion to dismiss the complaint,<sup>17</sup> nor a motion to dismiss an appeal,<sup>18</sup> nor a motion to set aside a verdict,<sup>19</sup> affords a proper opportunity for a determination of the existence or non-existence of the estoppel; nor can the point be raised by an exception to the answer.<sup>20</sup>

*v. Waiver and Effect of Failure To Plead.*—(1.) Generally. — Failure to plead the prior adjudication, where special pleading is required, is generally a waiver of the right to rely upon it as a bar,<sup>21</sup> since the relitigation of the matter does not involve any question of jurisdiction.<sup>22</sup> It has been held, however, that a court may refuse, on grounds of public policy and convenience, to entertain an action on the same cause of action which is already being litigated before it by the same parties in an action previously instituted and in which they can obtain the same relief sought in the subsequent action.<sup>23</sup> But where

25 S. E. 688. Ind.—Indianapolis, D. & W. Ry. Co. v. Center, 130 Ind. 89, 28 N. E. 439; Greenup v. Crooks, 50 Ind. 410. Ky.—Holtzcler v. Smith's Guardian, 27 Ky. L. Rep. 66, 84 S. W. 324; Bramlett v. Louisville & N. R. Co., 24 Ky. L. Rep. 976, 70 S. W. 410. N. M.—Lockhart v. Leeds, 12 N. M. 156, 76 Pac. 312. N. C.—Davis v. Hall, 57 N. C. 403. Pa.—See Bruner v. Finley, 211 Pa. 74, 60 Atl. 488. Tex.—Shook v. Shook (Tex. Civ. App.), 145 S. W. 699; Fricke v. Wood, 31 Tex. Civ. App. 167, 71 S. W. 784.

[a] The bill "sets forth the substance of the pleadings in these former suits and the findings therein, and prays for a decree inconsistent with the decree in that litigation. It also states the result of that litigation, and the holding that the Gillespie lease was valid, and prays that it may be declared null and void. The defense of former adjudication may therefore be raised by demurrer." Ferriman v. Gillespie, 270 Ill. 309, 85 S. E. 490.

16. Jordan v. Jordan, 175 Ala. 610, 57 So. 436, by motion to require payment of costs in previous divorce suit as a condition precedent to the maintenance of the case at bar and the allowance of alimony pendente lite.

17. Ind.—First Nat. Bank of Huntington v. Williams, 126 Ind. 423, 26 N. E. 75. Kan.—Attica State Bank v. Benson, 8 Kan. App. 566, 64 Pac. 1037. N. Y.—But see Reich v. Cochran, 74 Hun 551, 26 N. Y. Supp. 443. Pa.—Bruner v. Finley, 211 Pa. 74, 60 Atl. 488.

[a] But where an issue had been determined by the court, upon a hear-

ing of the equitable issues of the case, and the same issue was presented at the subsequent hearing on the legal phases of the action, it was held to be error for the court to deny a motion that no jury be impaneled for the reason that all the issues had been decided upon the hearing before the court; the defendant was not required to plead res judicata by a supplemental answer, since the court should have taken notice of the condition of the record. Cox v. McClure, 73 Conn. 486, 47 Atl. 757.

18. Phillips v. Her Creditors, 37 La. Ann. 701.

19. Reilly v. Bader, 50 Minn. 199, 52 N. W. 522.

20. Thrifts v. Fritz, 101 Ill. 457. Contra, Tutorship v. Scarborough, 44 La. Ann. 288, 10 So. 858.

21. Cal.—Schudel v. Helbing, 26 Cal. App. 410, 147 Pac. 89. Mass.—Howard v. Mitchell, 14 Mass. 241. N. C.—Blackwell v. Dibbrell, 103 N. C. 270, 9 S. E. 192. N. D.—Borden v. McNamara, 20 N. D. 225, 127 N. W. 104.

See *supra*, XVII, B, 5; and cases *supra*, XVII, D, 1, a and b.

22. Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. ed. 926. And see Curtis v. Renneker, 34 S. C. 468, 13 S. E. 664.

23. Long v. Jarratt, 94 N. C. 443. See also Walker v. Chase, 53 Me. 258, where the court says: "Litigation is an expense to the public as well as to the parties. In fact the expense to the public is often greater than it is to the parties. It is for the public good, therefore, that there be an end of litigation. . . . And when a cause

both parties try the case and allow it to be submitted on the theory that a former adjudication is an issue, they will be deemed to have consented to the trial of that issue and are bound by the result as though the issue had been raised by the pleadings.<sup>24</sup> A failure to object to evidence of the former judgment on the ground that it has not been specially pleaded,<sup>25</sup> or to take an exception, on that ground,<sup>26</sup> is a waiver of the irregularity arising from a failure to plead the judgment.

(II.) As Affecting Conclusiveness. — By the weight of authority the conclusiveness of a former adjudication as an estoppel is not affected by the fact that it was not specially pleaded, where it is has been proved;<sup>27</sup> thus a former judgment, admitted in evidence by consent,<sup>28</sup>

has been once fairly tried, it ought not to be tried over again, even if the parties are willing. Such a course would be unjust to other parties whose causes might be thereby delayed."

24. *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151.

25. *Flandreau v. Downey*, 23 Cal. 354; *Saco Brick Co. v. J. P. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629.

26. *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401.

27. **U. S.**—*Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355. **Ala.**—*Boon v. Riley*, 171 Ala. 657, 54 So. 997; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Cannon v. Brame*, 45 Ala. 262. **Cal.**—*Wixon v. Devine*, 67 Cal. 341, 7 Pac. 776; *Flandreau v. Downey*, 23 Cal. 354. **Conn.**—*Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94. **Fla.**—*Bell v. Niles*, 61 Fla. 114, 55 So. 392; *Little v. Barlow*, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249. **Ill.**—*Sheldon v. Patterson*, 55 Ill. 507; *Gray v. Gillilan*, 15 Ill. 453, 60 Am. Dec. 761. **Me.**—*Walker v. Chase*, 53 Me. 258; *Lynch v. Swanton*, 53 Me. 100. **Md.**—*Beall v. Pearre*, 12 Md. 550; *Shafer v. Stonebraker*, 4 Gill & J. 345, 360. **Mass.**—*Sprague v. Waite*, 19 Pick. 455; *Jennison v. West Springfield*, 13 Gray 544; *Sawyer v. Woodbury*, 7 Gray 499. **Md.**—*Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459. **Mo.**—*Garton v. Botts*, 73 Mo. 274; *McNair v. O'Fallon*, 8 Mo. 188. **N. H.**—*Dame v. Wingate*, 12 N. H. 291. **N. Y.**—*Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256; *Miller v. Manice*, 6 Hill 114; *Young v. Rummell*, 2 Hill 478, 38 Am. Dec. 594; *Lawrence v. Hunt*, 10 Wend. 80, 25 Am. Dec. 539. **Pa.**—*Westcott v. Edmunds*, 68 Pa. 34; *Finley v. Hanbest*, 30 Pa. 190; *Marsh v. Pier*, 4

*Rawle* 273, 26 Am. Dec. 131. **R. I.**—*Bradford v. Burgess*, 20 R. I. 290, 38 Atl. 975. **S. C.**—*Jones v. Weathersbee*, 4 Strobb. L. 50, 51 Am. Dec. 653. **Tenn.**—*Warwick v. Underwood*, 3 Head 238. **Utah.**—*Rio Grande W. Ry. Co. v. Telluride P. T. Co.*, 23 Utah 22, 63 Pac. 995. **Vt.**—*Perkins v. Walker*, 19 Vt. 144; *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372.

[a] "In cases of this description, where nearly everything that shows the plaintiff has no subsisting cause of action, may be given in evidence under the general issue, there can be no good reason why a former judgment, . . . should have any greater effect when pleaded, than when shown in evidence. Judgments, it is said, ought to be final; because it is for the public interest that there should be an end to litigation; and a man ought not to be twice vexed with the same cause of action. But to make the weight of the evidence to depend upon the form of the issue, is to disregard these reasons, in all cases where a judgment is held not to be conclusive; and if it is not conclusive, upon what principle is it admissible at all?" *Bell v. Raymond*, 18 Conn. 91.

[b] "There must, at some time, be an end to litigation upon the same facts; and it has been well remarked that it appears inconsistent that the authority of a *res judicata* should govern the court, when the matter is referred to them by pleading, but that a jury should be at liberty altogether to disregard it when it referred to them in evidence." *Chamberlain v. Carlisle*, 26 N. H. 540.

28. "A former decree may be good as a plea in bar, or may be available as evidence. It was said in the *Duchess*



or on a stipulation that proceedings had been brought and a judgment rendered<sup>28</sup> is conclusive though not pleaded. In some jurisdictions, however, a former adjudication does not operate as a conclusive estoppel, unless it has been pleaded as such (if there has been an opportunity to plead it) but is merely *prima facie* or persuasive evidence of the matters adjudged.<sup>30</sup>

b. *Judicial Notice*.—Generally a court may not judicially notice without pleading or proof, its proceedings or judgment in other wholly independent cases before it,<sup>31</sup> but this rule is not strictly adhered to under all circumstances and in all jurisdictions,<sup>32</sup> and in case of apparent necessity or otherwise courts have judicially noticed a former adjudication for the benefit of a party who neither pleaded nor proved it,<sup>33</sup> as where both cases were pending before it and under submission at the same time.<sup>34</sup> Adjudications which are part of the case at bar will, of course, be judicially noticed.<sup>35</sup>

of Kingston's Case, 11 State Tr. 261, 2 Smith, Lead. Cas. (6th Amer. ed.) 663, that such decree is 'as a plea, a bar, or as evidence conclusive.' . . . It is certainly true that, without respect to pleading, wherever a former recovery is properly in evidence—as here it was by agreement of the parties—full effect should be given to it, so far as it bears upon the issue presented. The issue here being novelty of invention, and that fact having been determined by the prior adjudication, the former decree becomes conclusive evidence of the validity of the patent as between the parties affected by such prior adjudication." David Bradley Mfg. Co. v. Eagle Mfg. Co., 58 Fed. 721, 7 C. C. A. 442.

29. Reich v. Cochran, 74 Hun 551, 26 N. Y. Supp. 443.

30. U. S.—Richardson v. Boston, 19 How. 263, 15 L. ed. 639. Ill.—Wann v. McNulty, 7 Ill. 355, 43 Am. Dec. 53. Ind.—Picquet v. McKay, 2 Blackf. 465. Ia.—Cooley v. Brayton, 16 Iowa 10. N. Y.—Jackson v. Wood, 3 Wend. 27; Miller v. Manice, 6 Hill 114, 124; Gabriel v. Gabriel, 79 Misc. 346, 139 N. Y. Supp. 778, affirmed, 144 N. Y. Supp. 1117. Ohio.—Werner v. Cincinnati, 23 Ohio Cir. Ct. 475; Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656. Tex.—Smith v. Bean, 36 Tex. Civ. App. 623, 82 S. W. 793. Va.—Chesapeake & O. Ry. Co. v. Rison, 99 Va. 18, 37 S. E. 320; Cleaton v. Chambliss, 6 Rand. 377. Va. 80. W. Va.—Brown v. Cook, 37 S. E. 454.

[a] "When a judgment is not pleaded, and could have been pleaded,

'in evidence,' such a judgment is not conclusive to estop a party from proving the truth of a fact in dispute. To this extent the rule laid down in the case of the Duchess of Kingston, 20 Howell's State Trials 355, has been modified." Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656.

[b] "The doctrine being, that though the party is estopped if the matter be pleaded, yet that the jury, upon the general issue, are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment." Cleaton v. Chambliss, 6 Rand. (27 Va.) 38, 39.

Where there has been no opportunity to plead it, see *supra*, XVII, D, 1, d.

31. First Nat. Bank v. Williams, 126 Ind. 423, 26 N. E. 75. See 7 ENCY. OF EV. 1003, et seq., and supplement thereto; and also the title "Judicial Notice."

32. See 7 ENCY. OF EV. 1003, et seq., and supplement thereto.

33. Judicial notice may be taken by a court of its own records, and where no opportunity has been afforded a party to plead a judgment or to introduce evidence of it, the court may consider the matter and determine the question of estoppel. Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

34. Keely v. Ophir Hill Consol. Min. Co., 169 Fed. 601, 95 C. C. A. 99.

35. Rentz v. Eckert, 74 Conn. 11, 49 Atl. 203, preliminary or interlocutory judgment. See also Cox v. McClure, 73 Conn. 486, 47 Atl. 757.

## 2. Manner of Pleading. — a. Character of the Pleading. — (I.)

Generally. — Where specially pleaded an estoppel by a former adjudication is properly set up by way of a special plea or answer.<sup>36</sup> As heretofore shown, however, in some jurisdictions or under some circumstances, a former adjudication is provable under the general issue;<sup>37</sup> but even where this practice prevails it is not improper to plead the defence specially, in connection with the general issue, unless the special plea amounts to no more than the general issue,<sup>38</sup> or it may be incorporated in the notice attached to the general issue.<sup>39</sup> It is improper to plead *res judicata* in abatement.<sup>40</sup>

In equity practice the defense of *res judicata* or former adjudication may be raised either by answer or plea,<sup>41</sup> though more properly by plea.<sup>42</sup>

(II.) Pleading by Amended or Supplemental Pleadings. — An amendment setting up the plea of *res judicata* is properly allowed.<sup>43</sup>

36. *Troxell v. Delaware, L. & W. R. Co.*, 185 Fed. 540 (applying Pennsylvania practice); *Feldmeyer v. Werntz*, 119 Md. 285, 86 Atl. 523; *Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623. And see *supra*, XVII, D, 1, b.

As to pleas generally, see the title "Pleas."

As to answers generally, see the title "Answers."

37. See *supra*, XVII, D, 1, b.

38. Ala.—*Hopkinson v. Shelton*, 37 Ala. 306. Fla.—*Compare, Bell v. Niles*, 61 Fla. 114, 55 So. 392, the special plea will be stricken out on motion. *Me. See Whiting v. Burger*, 78 Me. 287, 4 Atl. 694. Va.—*Chesapeake & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

[a] Where the special plea is for some reason, defective, evidence of the former adjudication may be received under the general issue. *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526, p. 947.

[b] "The defendant had the right to elect whether he would make defense under the special plea or submit the case on the general issue," and a refusal to allow a special plea in connection with the general issue is reversible error. *Brown v. Cook* (W. Va.), 87 S. E. 454.

[c] In Virginia although a statute provides that in ejectment the defendant shall plead the general issue only, a special plea of a judgment in bar may still be made. *Elk Garden Co. v. T. W. Thayer Co.*, 206 Fed. 212.

39. Where the plea is the general issue "with leave to give in defense any matter that can be well pleaded," the defense of *res judicata* is avail-

able. *C. H. Austin & Sons v. Hunter* (Ala.), 69 So. 113.

[a] It is sufficient to set up the previous judgment in the notice attached to a plea of the general issue. *Ehle v. Bingham*, 7 Barb. (N. Y.) 494.

40. *Fields v. Walker*, 23 Ala. 155.

41. D. C.—*Wagenhurst v. Wineland*, 22 App. Cas. 356. N. J.—*Passaic Match Co. v. Helio Match Co.* (N. J. Eq.), 70 Atl. 466. Ohio.—*White v. Bank of United States*, 6 Ohio 528. Tenn. *Jourrolman v. Massengill*, 86 Tenn. 81, 5 S. W. 719.

See generally the title "Bills and Answers."

[a] Designating a portion of an answer to be a separate defense is insufficient to constitute it a "plea." *Sill v. Kentucky C. & T. Dev. Co.* (Del. Ch.), 97 Atl. 617.

[b] A plea having been overruled the same matter can be set up by answer. *Wagenhurst v. Wineland*, 22 App. Cas. (D. C.) 356.

42. *Warren Featherbone Co. v. De Camp*, 154 Fed. 198 ("since it goes to the whole subject-matter"); *Ferguson v. Miller*, 5 Ohio 459. See generally the title "Plea in Equity."

[a] "If it be set up by answer it cannot be proved until the hearing; while if it be set up by plea, then by the rules of this court it is taken to be true unless within thirty days a replication thereto be not filed, and it stands for argument upon the question of its sufficiency in law." *Sill v. Kentucky C. & T. Dev. Co.* (Del. Ch.), 97 Atl. 617, 619.

43. *National Bank v. Southern Porcelain Mfg. Co.*, 59 Ga. 157; *Porter v.*

**Supplemental Pleadings.**—Where the judgment relied on as an estoppel is rendered and becomes final after the institution of the action in which it is sought to be used, it should be set up in a supplemental pleading,<sup>44</sup> rather than by an amendment,<sup>45</sup> or by a plea of puis d'arrien continuance,<sup>46</sup> and at such times as will not prejudice the rights of the other party to a speedy determination of the cause.<sup>47</sup> The former adjudication may be set up as a bar even after an interlocutory decree has been entered in the case.<sup>48</sup>

**6. Form and Substance of the Pleading.**<sup>49</sup>—(I.) In General. — No particular form or language need be employed in pleading a former

Armstrong, 134 N. C. 447, 46 S. E. 997.

44. U. S.—Robinson v. Satterlee, 3 Sawyer, 144, 20 Fed. Cas. No. 11367. Ga.—See Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727. Mo.—Nave v. Adams, 107 Mo. 414, 7 S. W. 958, 28 Am. St. Rep. 421. N. Y.—Westminster Presb. Church v. Trustees of Presb., 211 N. Y. 214, 105 N. E. 199; Jex v. Jacob, 19 Hun 105, 7 Abb. N. C. 452; Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660, 32 Civ. Proc. 360; Jones v. Ramsey, 111 N. Y. Supp. 993. N. C.—Williams v. Hutton, 164 N. C. 216, 80 S. E. 257. Tenn.—Delk v. Yelton, 103 Tenn. 473, 54 S. W. 329.

See the title "Supplemental Pleading."

45. "It is clearly not matter ordinarily raised by amendment, since it was not in existence at the time of the filing of the bill." Warren Featherbone Co. v. De Camp, 154 Fed. 198.

46. Ill.—Mount v. Scholes, 120 Ill. 394, 11 N. E. 401. Md.—Bank of United States v. Merchants' Bank, 7 Gill 415, but by special plea in bar. N. C.—See Williams v. Hutton, 164 N. C. 216, 80 S. E. 257.

See generally the title "Puis D'arrien Continuance."

[a] "A plea of this kind involves grave legal consequences that do not attach to an ordinary plea. It only questions the plaintiff's right to further maintain the suit. When filed, it, by operation of law, supersedes all other pleas and defenses in the cause, and the parties proceed to settle the proceedings de novo, just as though no plea or pleas had theretofore been filed in the case." Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

47. La Salle v. Friedman, 150 N. Y. Supp. 152.

48. Penfield v. C. & A. Potts & Co., 126 Fed. 475, 61 C. C. A. 371.

49. In action on judgment, see the title "Judgments and Decrees, Enforcement of;" and 9 STANDARD PROC. 742, et seq.

**Forms.**—No form can be given which will meet the necessities of every case or conform to the varying requirements of different jurisdictions, as to which the pleader must consult the rules hereinafter stated. For forms of pleas and replications, see 9 STANDARD PROC. 1073, 1074.

[a] **Answer of Former Adjudication.** (Title of court and cause.) And for a further and separate answer defendant alleges that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, plaintiff herein filed in the office of the clerk of (here designate the court in which the action was brought), his complaint against \_\_\_\_\_, this defendant (or if said action was brought against parties with whom the defendant was in privity set forth the facts showing the nature of the relation between the parties) in which he alleged that this defendant was indebted to him in the same manner and for the same services (or goods) as is set forth in the complaint in this action; that thereafter such proceedings were had in said court that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, said court duly and regularly rendered its judgment in said cause on the merits of said cause in favor of this defendant and against this plaintiff; that this judgment remains in full force and effect; that the matters adjudicated therein are the same matters attempted to be litigated in this action, and that by said former adjudication plaintiff is hereby estopped from again claiming the right to recover on the cause of action herein attempted to be set forth. See Richardson v. Jones, 58 Ind. 240; Wilson v. Vance, 55 Ind. 584.

[b] **Form in Action To Recover Pos-**



adjudication.<sup>50</sup> The pleading must, however, be definite and certain.<sup>51</sup> But allegations treated by the parties at the trial as sufficient cannot be attacked for the first time on appeal.<sup>52</sup> Where former adjudication is pleaded in bar of an action, the plea must conform to the general rules governing such pleas.<sup>53</sup> All the facts necessary to make the bar

**session of Real Property.**—Further answering and as and for a separate defense, defendant alleges that plaintiff ought not to maintain this action or any action to recover the parcel of land described in the complaint for the reason that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, one \_\_\_\_\_, who is the plaintiff's predecessor in interest, filed an action in (here designate the court) in which one \_\_\_\_\_, who is the defendant's predecessor in interest and title, was the defendant; in and by which the said plaintiff \_\_\_\_\_ therein sued to recover possession of the said land herein and therein described, alleging that he was the owner and entitled to the possession thereof and that the said defendant, \_\_\_\_\_ had entered into and was wrongfully withholding possession thereof from him; that such proceedings were duly and regularly had that after a trial, judgment on the merits was duly given and made on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, that the plaintiff therein, \_\_\_\_\_, plaintiff's predecessor in interest, herein, should take nothing by his said action and that defendant should recover his costs; that said judgment remains in full force and effect, and is a bar to the prosecution of this or any action for the recovery of possession of the premises herein described, or any part thereof, or for the use and occupation, or for damages for the withholding of possession thereof, by this plaintiff against this defendant.

[c] **Form of Pleading Former Decree Granting a Divorce.**—See *Hanks v. Hanks*, 218 Mo. 670, 677, 117 S. W. 1101.

As to allegations of jurisdiction of justice, see 9 STANDARD PROC. 743.

50. See *Kelly v. Kelly*, 118 Va. 376, 87 S. E. 567.

[a] Notation by the court made upon the calendar: "Defendant claims all items prior to November 16, 1897, settled in former suit," is not a pleading of the defense. *Cedar County v. Hillyer* (Iowa), 155 N. W. 277.

51. See generally the title "Certainty in Pleading."

[a] A pleading inconsistent with itself is insufficient. *Smith v. Roney*, 182 Ala. 540, 62 So. 753.

[b] That the judgment pleaded has unfilled blank spaces where the amount of the recovery is usually inserted, does not necessarily defeat the plea. *Wells v. Dench*, 1 Mass. 232, the blanks may be filled by application to the proper court.

[c] But an indefinite and uncertain pleading may be aided and cured of its defects by allegations in the subsequent pleadings. *Small v. Reeves*, 25 Ky. L. Rep. 729, 76 S. W. 395; *Pond v. Huling*, 125 Mo. App. 474, 101 S. W. 115. And see *Hofmann v. Burris*, 210 Ill. 587, 71 N. E. 584.

[d] Where pleaded as an estoppel "every fact necessary to create the estoppel must be alleged with the strictest certainty." *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345. See 8 STANDARD PROC. 695.

52. Cal.—*Kriste v. International Sav. & Exch. Bank*, 17 Cal. App. 301, 119 Pac. 666. Mo.—*Barber v. Hartford Life Ins. Co.*, 187 S. W. 867; *Pond v. Huling*, 125 Mo. App. 474, 101 S. W. 115. N. Y.—*Reich v. Cochran*, 74 Hun 551, 26 N. Y. Supp. 443, 57 N. Y. St. 159.

53. See generally the title "Pleas."

[a] A plea which purports to go to the whole cause of action must set forth matter constituting a bar to the entire action. Ala.—*Corey v. Penney*, 165 Ala. 234, 51 So. 624; *Scottish Union & Nat. Ins. Co. v. Dangaix*, 103 Ala. 388, 15 So. 956. Ind.—*Cornwell v. Hungate*, 1 Ind. 156; *Dunn v. Barton*, 2 Ind. App. 444, 28 N. E. 717. Va.—*Manchester Home B. & L. Assn. v. Porter*, 106 Va. 528, 56 S. E. 337.

[b] But a plea which goes to less than all of the counts of the complaint is sufficient if it clearly points out to which ones it refers, without expressly mentioning them. *Chesapeake & O. Ry. Co. v. Rison*, 99 Va. 18, 37 S. E. 520.

complete or the adjudication conclusive, must be alleged.<sup>54</sup> The record of the former action need not accompany the pleading,<sup>55</sup> nor need a copy of the judgment be filed.<sup>56</sup> There are cases, however, which approve of, if they do not require, the filing of the record of the prior cause, in the pending action.<sup>57</sup> And so much of the proceedings in the former case as is necessary to show the essential facts should be set forth;<sup>58</sup> a general reference to the records of the former case is insuffi-

[c] **Plea Must Be Verified.**—*Cates v. Loftus* Heirs, 4 Men. (Ky.) 417. But see *Detroit, L. & N. R. R. Co. v. McCummon*, 108 Mich. 368, 66 N. W. 471, "the practice does not require a verification of the plea when it sets up a public record of the same court in which the action is pending." See generally the titles "Pleas;" "Verification."

54. *Lange v. Hammer*, 157 Ala. 522, 47 So. 724; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 245.

As to the essential elements of former adjudication, see *supra*, XVII, B, and the title "Res Judicata."

[a] **Satisfaction of Judgment Against Joint Tort Feasor.**—A plea of former recovery interposed in an action against a joint tort-feasor, must allege a satisfaction of the judgment. *Park v. Hopkins*, 2 Bailey (S. C.) 411.

55. Ala.—*Perkins v. Moore*, 16 Ala. 17. Ind.—*Berry v. Reed*, 73 Ind. 235; *McSweeney v. Carney*, 72 Ind. 430; *Mull v. McKnight*, 67 Ind. 525; *Lytle v. Lytle*, 37 Ind. 281 (impliedly overruling earlier Indiana cases to the contrary); *Johnson v. Knudson-Mercer Co.* (Ind. App.), 79 N. E. 367. Tex.—*Malory v. Dawson Cotton Oil Co.*, 32 Tex. Civ. App. 294, 74 S. W. 953.

[a] "The answer of former adjudication is not founded on the pleadings in the former suit, and it is not necessary, therefore, to file with such answer a copy thereof as an exhibit." *McCarty v. Kinsey*, 154 Ind. 447, 57 N. E. 108. And see *Allen v. Randolph*, 48 Ind. 496.

[b] **The filing of such a transcript does not render the pleading bad on demurrer.** *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Richardson v. Jones*, 58 Ind. 240. And see *Wilson v. Vance*, 55 Ind. 584.

[c] **Profert Unnecessary.**—"When a judgment is relied on in a declaration as a ground of action, or in a plea as a defense, it is never declared on or pleaded with a profert." *Burnham v.*

*Webster*, 2 Ware 210, 4 Fed. Cas. No. 2,178. See generally the title "Oyer and Profert."

[d] But the plea should contain an offer to prove the estoppel set up, by the record. *Carpenter v. Booker*, 33 Miss. 45.

56. *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Mull v. McKnight*, 67 Ind. 525; *Davenport v. Barnett*, 51 Ind. 529; *Wyant v. Wyant*, 38 Ind. 48.

[a] A judgment is not a written instrument within the meaning of a code provision requiring written instruments or copies of them to be filed with pleadings founded on such instruments. *Berry v. Reed*, 73 Ind. 235; *Mull v. McKnight*, 67 Ind. 525.

57. U. S.—*Bank of United States v. Beverley*, 1 How. 134, 11 L. ed. 75. Conn.—See *Bulkley v. Seymour*, 74 Conn. 459, 51 Atl. 125. D. C.—*Wagenhurst v. Wineland*, 22 App. Cas. 356. Ga.—*Butler, Stevens & Co. v. Moseley*, 14 Ga. App. 288, 80 S. E. 789. Ia.—*Lee v. Keister*, 11 Iowa 480; *Campbell v. Ayres*, 6 Iowa 339. N. C.—*Allred v. Smith*, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. Tenn.—*Jourlomon v. Massengill*, 86 Tenn. 81, 5 S. W. 719.

[a] A plea which does not set out the record of the former proceedings nor undertakes to state the entire effect of the decree, is insufficient. *Quinn v. Pratt Consol. Coal Co.*, 117 Ala. 434, 59 So. 49.

[b] "If the plaintiffs claim that they acquired certain rights of property under the judgment, they should have set up the entire record to the end that the court could see what was in litigation and what was adjudged." *Allred v. Smith*, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924.

58. *Lange v. Hammer*, 157 Ala. 322, 47 So. 724; *Bracken v. Atlantic Trust Co.*, 36 App. Div. 67, 55 N. Y. Supp. 506.

[a] "The court should be able to see from the pleadings what facts are relied on to work the estoppel." *Por-*

cient,<sup>59</sup> and merely attaching the records to the pleading, as exhibits is not enough, in the absence of proper recitals in the pleading itself.<sup>60</sup> The pleading must show that there has been a former judgment or adjudication,<sup>61</sup> the court in which it was rendered,<sup>62</sup> and that it was a final judgment.<sup>63</sup> While it is customary to do so,<sup>64</sup> it is not necessary to allege that the judgment remains in full force and effect, unappealed from and unreversed,<sup>65</sup> although there are some cases which seem to require such an allegation,<sup>66</sup> and a plea which shows affirmatively that a judgment has been reversed is insufficient.<sup>67</sup> That portion of the judgment which is material should be pleaded either in *hæc verba* or its substance should

ter *v. Armstrong*, 134 N. C. 447, 46 S. E. 997.

[b] "**Story on Equity Pleading** says: 'The plea should set forth with certainty the commencement of the former suit, its general nature and character, its object, and the relief prayed.'" *Mound City Co. v. Castleman*, 171 Fed. 520.

59. *Sumner v. Griffin*, 130 Ky. 323, 113 S. W. 422.

[a] **Former Case in Same Court.** A reference to "all the documents, pleadings and the judgment thereto," and a prayer that they "be taken as part of this plea as though fully and in detail set out herein," is sufficient for "the court will take judicial notice of its own records, especially when they are referred to and made part of a plea." *Pittel v. Fidelity Mut. Life Assn.*, 86 Fed. 255, 30 C. C. A. 21. But see *supra*, XVII, D, 1, h.

60. See *Sumner v. Griffin*, 130 Ky. 323, 113 S. W. 422. See generally the title "**Exhibits.**"

61. **Ga.**—*Fenwick Shipping Co. v. Clarke*, 133 Ga. 43, 65 S. E. 140. **Ky.**—*Taylor's Exrx. v. Jefferson*, 167 Ky. 454, 180 S. W. 801; *Wilson v. Sullivan*, 112 S. W. 1120. **N. H.**—*Divoll v. Atwood*, 41 N. H. 446. **Tex.**—*Holland v. Western Bank & Trust Co.* (Tex. Civ. App.), 118 S. W. 218.

[a] "The record upon this appeal does not show that any judgment was ever rendered against Roundtree, the averment that England collected and by rule compelled Roundtree to pay the amount not being an averment that he recovered a judgment." *England v. Roundtree's Admr.*, 19 Ky. L. Rep. 2003, 44 S. W. 951.

[b] It is insufficient to set out the pleadings and proof without the decree.

*Galloway v. Hamilton's Heirs*, 1 Dana (Ky.) 576.

[c] It may be insufficient to set forth the judgment, unaccompanied by the pleadings. *Campbell v. Ayres*, 6 Iowa 339.

[d] **A mere allegation of the recovery** of a judgment is insufficient; it must be pleaded as a bar. *Bryson v. St. Helen*, 79 Hun 167, 29 N. Y. Supp. 524.

62. *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.

63. **Fla.**—*Walton Land & Timb. Co. v. Louisville & N. R. Co.*, 69 Fla. 472, 68 So. 445. **Ia.**—*Cole v. Harvey*, 142 Iowa 574, 120 N. W. 97. **Mo.**—*Dean v. Toledo, St. L. & W. R. Co.*, 148 Mo. App. 428, 128 S. W. 10. **Tenn.**—*Railroad v. Brigman*, 95 Tenn. 624, 32 S. W. 762.

**As to necessity of a final judgment**, see *supra*, XVII, B, 3, e, and the title "**Res Judicata.**"

[a] A plea which shows affirmatively that the prior judgment had not become final is bad. *Scheeline v. Moshier* (Cal.), 158 Pac. 222.

64. *Moberly v. Peek*, 67 Ala. 345; *Vaden v. Ellis*, 18 Ark. 355.

65. **Ark.**—*Vaden v. Ellis*, 18 Ark. 355. **Ind.**—*Mull v. McKnight*, 67 Ind. 525; *Campbell v. Cross*, 39 Ind. 155. **Ky.** *Sumner v. Griffin*, 130 Ky. 323, 113 S. W. 422. But compare, *Mount v. Johnson*, 10 Ky. L. Rep. 40; *Bell v. Gregory & Co.*, 10 Ky. L. Rep. 636. **Ohio.**—*Eversole v. Plank*, 17 Ohio 61. **Tex.**—*Fenn v. Roach & Co.* (Tex. Civ. App.), 75 S. W. 361. **Vt.**—*Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850.

66. *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170. Compare, *Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388.

67. *Clodfelter v. Hulett*, 92 Ind. 426.



be set forth, since it is insufficient for the pleader to give merely his conclusion as to its legal effect.<sup>70</sup>

The date on which the former judgment was rendered should be given,<sup>69</sup> though this is not always considered to be necessary, at least in the absence of an objection to the uncertainty<sup>71</sup> of some issue rendering the date important or essential.<sup>72</sup> The plea of *res judicata* is not waived by independent affirmative allegations of the facts adjudicated in the previous action,<sup>73</sup> and a separate plea of setoff does not affect it,<sup>73</sup> nor is the defense of an estoppel by former judgment, specially pleaded, waived by the interposing of a separate plea to the merits of the case.<sup>74</sup>

(II.) Jurisdiction of the Court. — (A.) *In General.* — The jurisdiction of the court by which the former judgment was given must be shown by the pleadings,<sup>75</sup> but since there is a presumption that a court of general jurisdiction properly acquired and exercised jurisdiction over both the parties and the subject matter, it is not necessary to set forth

68. *Laibe v. Smolikowski*, 152 Ill. App. 256.

69. *Ludlow v. Marion Tp. Gravel Pit Co.*, 170 Ind. 173; *Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388.

[a] "We think its failure to state the time when the judgment was obtained, rendered it substantially defective. In pleading a judgment, either the term of the court at which it was recovered, or the exact date of its rendition, should always be stated, and when taken in vacation, as this one was, the time of its entry by the clerk should be stated. (Freeman on Judgments, sec. 450.) If such be the general rule, it should certainly be applied with more stringency in cases like the present where the judgment is obtained after the commencement of the suit." *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401.

[b] "If the date given, or attempted to be given is uncertain, the remedy is by motion to make the pleading more specific by supplying a certain date. *Ludlow v. Marion Tp. Gravel Pit Co.*, 170 Ind. 176.

[c] Statement that the judgment was rendered "long before the beginning of this suit" is sufficient. *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 830.

70. *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.

71. "While it is proper in pleading a judgment to allege the date thereof or the term of court at which it was rendered, yet it is not always necessary to do so. No issue was made or ques-

tion raised in the present case rendering the allegation of the date of this judgment important or essential." *United States Fed. & Guaranty Co. v. People*, 44 Colo. 557, 98 Pac. 828, 836.

72. *Averbuch v. Averbuch*, 80 Wash. 257, 141 Pac. 701.

73. "A plaintiff cannot use one plea as evidence of a fact which the defendant disputes in another plea." *Tibbetts v. Shapleigh*, 59 N. H. 319.

74. *Kelly v. Kelly*, 118 Va. 376, 87 S. E. 567. See *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066.

75. *Ala.*—*Moberly v. Peek*, 67 Ala. 345. *Ind.*—*Johnson v. Keanahan-Mercer Co. (Ind.)*, 79 N. E. 367. *Okla.*—*Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388.

[a] An allegation that due and legal notice of the time and place of such hearing was given in the manner provided by law, and said administrator caused said citation in full to be thereafter published for six consecutive weeks, etc., was not an attempt to set out the manner of service but only to recite due and legal service and therefore did not disclose a want of jurisdiction in the court. *Nolan v. Hughes*, 31 Ore. 347, 93 Pac. 504.

[b] "The allegation in each case that the action was commenced against McLeod in said court was equivalent to an averment that the complaint had been filed, and the summons served on him, thus giving to the court jurisdiction to render the said judgments." *Fisher v. Kelly*, 30 Ore. 1, 46 Pac. 146.

the facts conferring jurisdiction upon such a court,<sup>76</sup> even in cases where the existence of special facts is necessary to confer jurisdiction.<sup>77</sup> The same general rule applies to judgments rendered by foreign courts.<sup>78</sup> If the court is not one of whose jurisdiction judicial notice is taken, it should be alleged that it is a court of general jurisdiction.<sup>79</sup>

(B.) COURTS OF LIMITED JURISDICTION.—There is no presumption that a court of inferior or limited jurisdiction acquired jurisdiction in a case and it is therefore necessary that the facts establishing such juris-

76. **U. S.**—*Lynde v. Columbus, C. & I. C. Ry. Co.*, 57 Fed. 993. **Cal.**—*Ash-ton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430. **Colo.**—*Gibson v. Staghorn Cattle Co.*, 26 Colo. App. 148, 141 Pac. 507. **Ill.**—*Comrs. of Highways v. Big Four Drain-age Dist.*, 207 Ill. 17, 69 N. E. 576; *People v. Lane*, 36 Ill. App. 649. **Ind.**—*Spaulding v. Baldwin*, 31 Ind. 376; *City of Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784. **Ky.**—*Potter v. Lewis*, 23 Ky. L. Rep. 1218, 64 S. W. 958. **Md.**—*Bank of United States v. Merchants' Bank*, 7 Gill 415. **Mo.**—*Wickersham v. Johnson*, 51 Mo. 313. **Neb.**—*Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994. **Ore.**—*Ashley v. Pick*, 53 Ore. 410, 100 Pac. 1103. **Vt.**—*Bailey's Admx. v. Gleason*, 76 Vt. 115, 56 Atl. 537.

As to the presumption of jurisdiction, see *supra*, XVII, A, 7, c, (IV), (B) and (C).

[a] "It was long ago settled, that in pleading a record of a judgment, it is unnecessary to show by averments that the court had jurisdiction. This rule was founded in convenience, to avoid prolixity in pleading, though more anciently it was otherwise." *Spaulding v. Baldwin*, 31 Ind. 376.

[b] "The allegation that the judg-ment was rendered in that court [the circuit court of Cook County, Illinois] and that it was afterwards duly amended, are sufficient in the first in-stance." *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391.

[c] The judgment of the district court of the United States in bank-ruptcy proceedings is within this rule. *Bailey's Admx. v. Gleason*, 76 Vt. 115, 56 Atl. 537.

[d] That (1) the judgment was duly given or made need not be alleged where the judgment is from a court of

general jurisdiction. **Cal.**—*Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400. **Ind.**—*Hansford v. Van Auken*, 79 Ind. 302. **Neb.**—*Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994. **Ore.** See *Fisher v. Kelly*, 30 Ore. 1, 46 Pac. 146. (2) Though such an allegation is obviously sufficient where permitted by statute. *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023; *Potter v. Lewis*, 23 Ky. L. Rep. 1218, 64 S. W. 958. As to the effect of statutes permitting such an allegation, see *infra*, XVII, D, 2, b, (II), (B); and the title "Judgments and Decrees, Enforcement of."

77. *Garner v. Mills*, 92 Ky. 386, 17 S. W. 1023, where a special notice was required by statute.

[a] An averment that plaintiff was made a party defendant to the prior action by the name and style "unknown owners," is sufficient. It is unnecessary to aver that the affidavit re-quired by statute to be filed setting up want of knowledge of the names of "unknown owners" was in fact filed. *Walker v. Ogden*, 192 Ill. 314, 61 N. E. 403.

78. See *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 1003, and *infra*, XVIII. Compare, *Burnham v. Webster*, 2 Ware 240, 4 Fed. Cas. No. 2,178, p. 478.

79. *State v. Brooke*, 29 Mo. App. 286; *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994.

[a] "It appears by the complaint that the court in which the divorce action was brought, *i. e.*, the circuit court of Cook County, Illinois, was a court of general jurisdiction, as its name indicates; hence it was unneces-sary to allege any jurisdictional facts." *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 1003.

As to judicial notice generally, see 7 ENCY. OF EV. 869, et seq.; as to judicial notice that foreign court is one of gen-eral jurisdiction, see 7 ENCY. OF EV. 996.

decision over both the parties and the subject matter,<sup>80</sup> should be fully set forth.<sup>81</sup> Formerly it was held necessary to set forth the entire proceedings at length, but this is no longer required;<sup>82</sup> it is now considered to be sufficient if the facts showing that the court acquired jurisdiction are fully stated.<sup>83</sup>

By statute in many jurisdictions, it is now declared to be sufficient to allege generally that the judgment was duly given or made.<sup>84</sup> The statutory form must be substantially adopted by the pleader,<sup>85</sup> though

80. *Turner v. Roby*, 3 N. Y. 193.

As to what are inferior courts whose proceedings are not entitled to the presumption of jurisdiction, see *supra*, XVII, A, 7, c, (IV), (B), (3) to (9).

[a] Where voluntary appearance and joinder in issue is alleged jurisdiction of the person is sufficiently shown. *Nicholl v. Mason*, 21 Wend. (N. Y.) 339.

81. U. S.—*Burnham v. Webster*, 2 Ware 240, 4 Fed. Cas. No. 2,178, p. 778. Ala.—*Moberly v. Peek*, 67 Ala. 345. Ark.—*Vaden v. Ellis*, 18 Ark. 355, territorial jurisdiction of justice of the peace. Cal.—*Smith v. Andrews*, 6 Cal. 652, decided prior to the code. N. Y.—*Turner v. Roby*, 3 N. Y. 193; *Dakin v. Hudson*, 6 Cow. 221; *Nicholl v. Mason*, 21 Wend. 339; *People v. Weston*, 4 Park. Crim. 226. Tenn.—*State v. Thompson*, 2 Heisk. 147. Vt.—*Holden v. Scanlin*, 30 Vt. 177.

[a] To show the jurisdiction of a foreign justice of the peace over the subject-matter, and the extent of such jurisdiction, "a copy of the law of Ohio, authorizing such judgment and sale, would have been an appropriate mode of showing such facts." *Baker v. Flint*, 63 Ind. 137.

82. *Reeves v. Townsend*, 22 N. J. L. 396; *Peebles v. Kittle*, 2 Johns. (N. Y.) 363.

83. *Burnham v. Webster*, 2 Ware 240, 4 Fed. Cas. No. 2,178, p. 778; *Turner v. Roby*, 3 N. Y. 193.

[a] No distinction is taken between a judgment set forth in a declaration and in a plea. *Turner v. Roby*, 3 N. Y. 193.

84. Cal.—*Beans v. Emanuelli*, 36 Cal. 117. Colo.—*Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431. Ind.—*Tolledo, W. & W. Ry. Co. v. McNulty*, 34 Ind. 531. Minn.—*Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799. Mo.—*State v. Johnson*, 78 Mo. App. 569. Mont.—*Miller v. Miller*, 47 Mont. 150, 131 Pac. 23; *Harmon v. Comstock Horse &*

*Cattle Co.*, 9 Mont. 243, 23 Pac. 470. Nev.—*Keys v. Grannis*, 3 Nev. 551. Ore.—*Ashley v. Pick*, 53 Ore. 410, 100 Pac. 1103, justice's court overruling *Page v. Smith*, 13 Ore. 410, 10 Pac. 833. Wis.—*Pierstoff v. Jorge*, 86 Wis. 128, 56 N. W. 735; *Roys v. Lull*, 9 Wis. 324.

[a] Such a statute does not apply to courts of general jurisdiction but only to courts of inferior jurisdiction. *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400; *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854; *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994.

As to the application of such statutes in actions on judgments, see the title "Judgments and Decrees, Enforcement of."

85. *Hunt v. Dutcher*, 13 How. Pr. (N. Y.) 538.

[a] "Words to the same effect and substance must be used. . . . To say that a judgment is *entered*, is merely to allege the single fact of the entry of the judgment, without including an averment that it was properly or lawfully done. All this is embraced in the language of the code, that the judgment was '*duly given or made*.' The word *entered*, or *perfected*, may be equivalent to the word *made*, or *given*; but the word *duly* is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place." *Hunt v. Dutcher*, 13 How. Pr. (N. Y.) 538.

[b] *Duly Rendered*.—"Where the party resorts to this general mode of pleading, he must use, if not the precise language of the statute, at least that which has the same signification. The answer in this case avers that proceedings were had before a justice, which were terminated by a 'judgment being duly rendered,' etc. We think this language equivalent to that of the



it is not necessary that the precise language of the statute should be used.<sup>86</sup> It is necessary, however, even under such a statute, to either allege the facts conferring jurisdiction or to substantially adopt the statutory form.<sup>87</sup>

(III.) **Identity of Parties.**—A pleading of a former judgment which fails to show that the former action was between the same parties or their privies, is insufficient.<sup>88</sup> Identity of parties is ordinarily presumed from an identity of names.<sup>89</sup> Where the parties are nominally different and privity between a party to the pending action and a party to the former adjudication is relied on, the nature of the relations between the parties must be set forth.<sup>90</sup> If the judgment in the prior

statute." *Roys v. Lull*, 9 Wis. 324. But see *contra*, *Young v. Wright*, 52 Cal. 407.

[c] An averment that "judgment was rendered" is insufficient. *Kriste v. Int. Sav. & Exch. Bank*, 17 Cal. App. 301, 119 Pac. 666.

[d] But an allegation that an ordinance "was adjudged void," was held sufficient in *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106.

[e] "The word 'duly,' when used, does not refer to the regularity of the judgment, or its freedom from error, for that cannot be collaterally called in question, but it is equivalent to an allegation of facts showing jurisdiction. The allegation that the judgment was rendered in an action pending is to the same effect, and is sufficient." *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

[f] "The pleader in this instance uses the phrase 'duly adjudged,' and he also avers that the judgment was rendered 'in due form of law.' These phrases fully cover the statutory language" [of "duly given or made"]. *United States Fid. & Guar. Co. v. People*, 44 Colo. 557, 98 Pac. 828.

[g] Allegation that a judgment was recovered and was "duly docketed" is "equivalent to stating that such judgment had been 'duly given or made.'" *Pierstoff v. Jorge*, 86 Wis. 128, 56 N. W. 735.

[h] **Franchise Granted.**—In *Gurnsey v. Northern California Power Co.*, 7 Cal. App. 534, 94 Pac. 858, an allegation that "after the requirements of law had been duly complied with" the board of supervisors "granted" a franchise was held sufficient. "The word 'grant' is synonymous with 'give' (Webster's Dictionary), and we can see no substantial difference between 'duly

given' and given 'after the requirements of law had been duly complied with.'"

[i] **Judgment Obtained.**—"This averment [that judgment was *duly* rendered] is not formally made in the petition here, but the fact may be fairly inferred from the statements therein that the judgment of the justice was duly and regularly obtained." *State ex re. Dillard v. Johnson*, 78 Mo. App. 569.

86. *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799. See *Hunt v. Dutcher*, 13 How. Pr. (N. Y.) 538.

[a] "It is not necessary to literally follow the prescribed formula; it is sufficient if from the averments it appears that the ultimate fact which may be so pleaded is otherwise stated." *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431.

87. *Ind.*—*Baker v. Flint*, 63 Ind. 137. *Mont.*—*Weaver v. English*, 11 Mont. 84, 27 Pac. 396. *N. Y.*—*Schnitzer v. Fox*, 31 Misc. 28, 62 N. Y. Supp. 1127.

88. *Guyer v. Union Trust Co.*, 55 Ind. App. 472, 104 N. E. 82; *Buttorff v. Buttorff* (Ind. App.), 91 N. E. 617; *Johnson v. Knudson-Mercer Co.* (Ind.), 79 N. E. 267; *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.

As to what constitutes an identity of parties, see *supra*, XVII, B, 2, f.

89. *Kriste v. Int. Sav. & Exch. Bank*, 17 Cal. App. 301, 119 Pac. 666.

90. *U. S.*—*Greely v. Smith*, 3 Wood. & M. 236, 10 Fed. Cas. No. 5,750, p. 1077. *Conn.*—*Crandall v. Gallup*, 12 Conn. 365. *N. Y.*—*Goddard v. Benson*, 15 Abb. Pr. 191.

[a] In an action against the indorser of a promissory note, an averment that judgment had been rendered thereon is insufficient; "In construing

action was obtained against a party under a different name, that fact must be alleged.<sup>91</sup> Where the party sought to be bound was not a party of record but it is claimed that he was connected with a party and participated in the action, the facts must be stated with particular clearness and definiteness,<sup>92</sup> though a direct allegation of participation in the former action is unnecessary.<sup>93</sup>

(IV.) Identity of Issues or Causes of Action.—Where it is intended to rely on a judgment as a bar to a pending action, the plea should show

a pleading, the rule is that it must be taken most strongly against the pleader. . . . As to who the judgment was against the answer is silent. It may have been against the makers of the note alone, or even one of them, and still the answer be true. The want of an averment that the indorser was a party to the judgment compels the inference that he was not." *Gibson v. Parlin*, 12 Neb. 292, 13 N. W. 405.

[b] Party relying on the judgment must allege his privity with the parties of record: "The rule is elementary that the party asserting an estoppel by means of a former judgment, must allege facts which show his relation to the former action was such as to make the judgment therein conclusive in his favor." *Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523.

[c] Assignment.—Where a previous action by plaintiff's assignee is relied upon by defendant, an averment is insufficient which states that the plaintiff in that action sued as assignee, since it fails to state that he was in fact the assignee of the present plaintiff. *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792. And see *Brandt v. Albers*, 6 Neb. 504.

[d] An allegation that the plaintiff is an assignee of an agent of the owner of bonds sued on, such owner having been plaintiff in a former action, is sufficient without expressly alleging that the assignment was made with the owner's knowledge and consent, these facts appearing inferentially. *Abilene v. Cornell University*, 118 Fed. 379, 55 C. C. A. 205.

91. *Walker v. Ogden*, 192 Ill. 314, 61 N. E. 403, where the person was in fact an "unknown owner" as described in the former action.

92. *King v. Bender*, 116 Fed. 813.

[a] "The pleas aver merely that the plaintiff 'appeared in court' on the trial of the former suit, [which was

brought against his servant for a trespass] and this is the only connection which he is alleged to have had with that suit. We think that this averment of an appearance in court is not sufficiently definite to show that the plaintiff had any connection with the suit or took any part in the proceedings on the trial. The pleas should show not only that the plaintiff 'appeared in court,' but that he also defended the suit, or took upon himself the burden of its defense, either upon his voluntary appearance, or after being cited by the defendant in the suit to appear and make defense to it. The pleas do not show that the plaintiff took any part in conducting the defense, and the averment that he 'appeared in court' would be supported by proof that he appeared as a witness or spectator, as much as by proof that he appeared in any other character." *Goodrich v. Judevine*, 40 Vt. 190.

[b] In an action by a church it was pleaded that in a former action the "rector, wardens, and vestry-men, . . . or some of them," participated in the action. This was held insufficient: "It may be that the rector or some one not having authority to represent the plaintiff in its corporate capacity, was present as a participant in the trial. If the church is bound by the result of that action by reason of the fact that it was represented in its defense, it must appear that it was represented by those having authority to do so." *St. John's Episcopal Church v. Berg* (Miss.), 2 So. 254.

93. "It is not necessary for the complainant to allege in direct terms that the respondent had such control over the former action as to be bound by the proceedings had therein, but he is required to state such facts as will enable the court to determine whether, if true, he is so bound. *Theller v. Hershey*, 89 Fed. 575.

that the judgment was rendered on the same cause of action,<sup>94</sup> and that the same property or subject matter was involved,<sup>95</sup> but where the judgment is pleaded as *res judicata* of certain issues it is sufficient to show that these same issues were adjudicated in a former suit.<sup>96</sup> The identity of such issues must, however, be shown,<sup>97</sup> and particular-

94. Ala.—*Moberly v. Peck*, 67 Ala. 245; *Hopkinson v. Shelton*, 37 Ala. 306. Del.—*Sill v. Kentucky C. & T. Dev. Co.* (Del. Ch.), 97 Atl. 617. Ind.—*Wilson v. Vance*, 55 Ind. 584. Okla.—*Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388.

[a] That the title to relief was the same in the first as in the second case. *Lindsley v. McIver*, 51 Fla. 463; *Da Costa v. Dibble*, 40 Fla. 418, 24 So. 911; *Schneider v. Schmidt*, 84 N. J. Eq. 18, 92 Atl. 789, *affirmed* in 95 Atl. 1079.

[b] Statutory Form.—“The form of the plea of *res adjudicata*, as provided by the Code, Art. 75, sec. 23, subsec. 54, contains the allegation ‘that said judgment was rendered in the same cause of action mentioned in the plaintiff’s declaration,’ etc. The appellant’s plea contains no such averment, nor its equivalent. The averment made is that the former case was an action of ejectment between the same parties ‘to recover the same land claimed in the declaration in this case.’ But nothing is set forth as to the extent of the plaintiff’s claim in the former case; whether it was a claim of title in fee, for life, or for years; or whether the claim was for a term that has since expired.” *Brooke v. Gregg*, 89 Md. 234, 43 Atl. 38.

[c] But that the former action was the same need not be shown by the plea. *Johnson v. Knudson-Mercer Co.* (Ind.), 79 N. E. 367, “it is enough to show that the particular controversy was in issue and judicially determined between the same parties.”

[d] That the proceedings were taken for the same purpose, must be alleged. *Morton v. Harrison*, 111 Md. 536, 75 Atl. 337.

[e] Failure to allege identity of the causes of action becomes immaterial where the former judgment is introduced in evidence by consent and from it, the identity appears. *Montrose v. Wanamaker*, 134 N. Y. 590, 31 N. E. 252.

As to identity of causes of action, see *supra*, XVII, B, 2, e.

95. Ala.—*Karter v. Fields*, 140 Ala.

352, 37 So. 204. Ind.—*Cornwell v. Hungegate*, 1 Ind. 156. Ky.—*Adams v. Mineral Dev. Co.*, 116 S. W. 246.

[a] “The plea shows that the suit in the district court was for an amount alleged to be due under the same contract, and [that] plaintiff had obtained judgment thereon, and that what was sued for in that case had accrued prior to the filing of the present suit. This, in our opinion, was enough to constitute it a sufficient plea.” *Mallory v. Dawson Oil Co.*, 32 Tex. Civ. App. 294, 74 S. W. 953.

[b] Under a code provision that the allegations of a pleading “shall be liberally construed with a view to substantial justice between the parties,” the certainty as to the identity of subject-matter which might be required at common law, is not necessary. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601.

As to identity of subject-matter, see *supra*, XVII, B, 2, e.

96. U. S.—*Peachy v. Frisco Gold Mines Co.*, 204 Fed. 659; *Smith v. Mosier*, 169 Fed. 430. Tex.—*Fenn v. Roach & Co.* (Tex. Civ. App.), 75 S. W. 261. Va.—*Chesapeake & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320 (estoppel by a former verdict); *Cleaton v. Chambliss*, 6 Rand. (27 Va.) 86.

97. U. S.—*Whitaker v. Davis*, 91 Fed. 720. Ala.—*Glasser v. Meyrovitz*, 119 Ala. 152, 24 So. 514. Ind.—*State v. Page*, 63 Ind. 209. Ky.—*Cates v. Loftus Heirs*, 4 Mon. 439. Neb.—*Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170. Tex.—*Philipowski v. Spencer*, 63 Tex. 604.

[a] Allegation that the same facts were alleged in the prior action is insufficient. “To allege that the same facts were alleged in the former action as are alleged in the case at bar, does not necessarily imply that no other or additional facts were pleaded in the former action, or that the same issues were presented, or that the causes of action are the same. The same facts alleged in the complaint before us might have been alleged in the former action, and yet other and additional



ity of statement in this respect is required." It must be shown that the matter was directly in issue or necessarily involved in the prior action,<sup>99</sup> and where from the pleading it appears uncertain on what point the former judgment was rendered it will be held insufficient.<sup>1</sup> By some courts an averment that the former judgment was rendered on the same cause of action or that the issues in the two cases are the same is treated as an allegation of an ultimate fact and is held to be sufficient,<sup>2</sup> while by other courts such an allegation is treated as a mere

facts may have been pleaded which would have made an entirely different cause of action." *Crum v. Rea*, 14 Ind. App. 379, 42 N. E. 1033.

[b] Allegation "that the particular matter sued for herein" had been passed upon in a prior action is good. *Borin v. Johnson*, 4 Kan. App. 211, 45 Pac. 968.

[c] "A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second suit against the same defendant upon different causes of action in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless the party denying the estoppel makes it appear by pleading or proof that some new and material issue, question, or matter is involved in the second action, which was not or may not have been litigated or decided in the first action." *Aetna Life Ins. Co. v. Board of Comrs.*, 117 Fed. 82, 54 C. C. A. 468.

98. *Aurora v. West*, 7 Wall. (U. S.) 82, 19 L. ed. 42; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

[a] "The Plea Must Negative Intentments.—See Mitf. Ch. Pl. 349 (\*298). The meaning of an intentment is that, allowing an averment to be true, but that at the same time a case may be supposed consistent with it which would render the averment inoperative as a full defense, such case shall be presumed, unless specifically excluded by particular averment." *De-troit, L. & N. R. Co. v. McCammon*, 108 Mich. 368, 66 N. W. 471. See also *Lynde v. Columbia, C. & I. C. Ry. Co.*, 57 Fed. 993).

[b] "When the record of a former judgment is set up as establishing some collateral fact involved in a subsequent litigation, it must be pleaded strictly as an estoppel; and the rule is that

such pleading must be framed with the utmost precision, and it cannot be aided by inference or intendment. When, however, a former judgment or decree is set up in bar of a subsequent action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters set up in the antecedent pleading of the opposite party." *Lynde v. Columbus, C. & I. C. Ry. Co.*, 57 L. ed. 993.

99. *U. S.—Russell v. Place*, 94 U. S. 606, 24 L. ed. 211; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 400, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954. *Ala.—Dobson v. Hurley*, 129 Ala. 380, 30 So. 598; *Greenwood v. Warren*, 120 Ala. 71, 23 So. 686. *Ind.—Greenfield Gas Co. v. Trees*, 165 Ind. 209, 75 N. E. 2; *Krutsinger v. Brown*, 72 Ind. 466; *Griffin v. Wallace*, 66 Ind. 410; *Richardson v. Jones*, 58 Ind. 240; *Columbus S. Ry. Co. v. Watson*, 26 Ind. 50. *Neb.—Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840. *Tenn.—Pile v. Pile*, 134 Tenn. 270, 183 S. W. 1004. *Vt.—Mussey v. Bates*, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516; *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

1. *Ala.—Henderson v. Hollind*, 1 Ala. App. 400, 55 So. 323; *Gilbreath v. Jones*, 66 Ala. 129; *Chamberlain v. Gaillard*, 26 Ala. 504. *Colo.—Solly v. Clayton*, 12 Colo. 30, 20 Pac. 351. *Fla.—Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56. *Ill.—People v. Wilson*, 260 Ill. 145, 102 N. E. 1055. *Ore.—Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460.

[a] Where the former judgment was in *detinue*, which can be maintained only on proof that defendant was in possession when suit was brought, the plea must negative the idea that the defendant recovered because there was a failure to make that proof. *Gilbreath v. Jones*, 66 Ala. 129.

2. *Perkins v. Moore*, 16 Ala. 17;

conclusion of the pleader,<sup>3</sup> and it is held that so much of the former pleadings must be set forth as to show that the same point was then in issue.<sup>4</sup> Where the latter rule obtains, the issues in the former case should be clearly stated in order that their identity with those in the pending case may appear to the court.<sup>5</sup> A plea which states the substance of the pleadings and judgment, without setting forth the exact language used, will be upheld,<sup>6</sup> although the practise of stating the

*Layton v. Lawson*, 4 Boyce (Del.) 143, 86 Atl. 520.

[a] "The plaintiff claims in support of his demurrer to the portion of the answer quoted that it is insufficient because it does not set forth in detail the facts that were alleged in the complaint in the first action, so that the court may decide by comparison whether the facts claimed in the two actions were the same; that the allegation of the answer to the effect that the facts in the two cases were identical is a conclusion, and not an allegation of fact. The claim is without merit, for the answer alleges the ultimate facts to be proven on the trial, viz., that the facts set forth in the complaint in this action are the same facts alleged in the complaint in the former action, in which there was a judgment on the merits dismissing the action. These ultimate facts constituting the former adjudication are properly alleged, in form and substance, in the answer." *Whitcomb v. Hardy*, 68 Minn. 265, 71 N. W. 263.

[b] Allegation that in the prior action "the identical claims of the said defendant Parkhurst against the defendant [plaintiff] Rynearson, were tried and determined by said court, and all matters of difference between them fully tried and adjudicated," is sufficient. *Rynearson v. Parkhurst*, 88 Ind. 264.

[c] "In pleading a former adjudication at law, it is convenient and sufficient to say that the cause of action was the same or identical with that set forth in the complaint in the new action, or with some branch or feature of the case made in the bill if it be a suit in equity and the plea is only to a part of the bill, as often happens. . . . In 3 Chitty Pl. 928, a precedent is given of a plea of a former judgment, in which it is simply stated that the plaintiff impleaded the defendant in a certain term, before a certain court, in a certain plea of tres-

pass on the case on promises 'for the not performing the very same identical promises and undertakings in the said declaration mentioned,' upon which the plaintiff had judgment." *Wythe v. Salem*, 4 Sawy. 88, 30 Fed. Cas. No. 18,121.

3. *Keen v. Brown*, 46 Fla. 487, 35 So. 401; *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56 ("this is a mere legal conclusion"); *Riley v. Lyons*, 11 Heisk. (Tenn.) 246.

[a] "It is necessary that the pleadings contain such allegations of fact as to advise the court what were the issues determined or the matters adjudged in the former suit. To state simply that they are the same that are presented in this suit is the statement of a conclusion." *Heatherly v. Hadley*, 2 Ore. 269.

[b] A statement that the judgment was an adjudication of plaintiff's rights in the property is insufficient. *Uden v. Patterson*, 252 Ill. 335, 96 N. E. 852.

4. Fla.—*Lindsley v. McIver*, 51 Fla. 463, 40 So. 619; *Keen v. Brown*, 46 Fla. 487, 35 So. 401; *Da Costa v. Dibble*, 40 Fla. 418, 24 So. 911. N. Y.—*Lyon v. Tallmadge*, 14 Johns. 501. Tenn.—*Jourlmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719. W. Va.—*Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

5. Ga.—*Fenwick Shipping Co. v. Clarke*, 133 Ga. 43, 65 S. E. 140. Ind.—*Johnson v. Knudson-Mercer Co. (Ind.)*, 79 N. E. 367. Mo.—*Pond v. Huling*, 125 Mo. App. 474, 101 S. W. 115. N. J.—*Schneider v. Schmidt*, 84 N. J. Eq. 18, 92 Atl. 789.

[a] Allegations are not "in any wise aided by making reference to the minutes of the district court containing the judgment. Neither the court nor the parties were required to notice or inspect the record referred to." *Philipowski v. Spencer*, 63 Tex. 604.

6. *Gage v. Ewing*, 107 Ill. 11, "it

substance of the pleadings and judgment has been disapproved.<sup>7</sup> Where the exemplified record is set forth, no further allegations are necessary.<sup>8</sup> The testimony taken in the former suit should not be attached to the pleading as an exhibit.<sup>9</sup>

(V.) Decision on the Merits. — It must appear from the plea that the former judgment was rendered on the merits of the case.<sup>10</sup> The facts showing the nature of the decision should be stated.<sup>11</sup> An allegation that the complaint was dismissed is insufficient.<sup>12</sup> An allegation that

is a desirable object to save prolixity in pleading, as far as may be."

7. *Jourlmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719.

8. "The copies of the pleadings, findings and judgment in the first suit disclosed precisely what facts were there litigated, how they were adjudicated, and against whom the decision ran. Any statement the pleader might have made could not illumine them or add anything to the information they imparted." *Dixon v. Caster*, 65 Kan. 739, 70 Pac. 871.

9. *Lindsay v. McIver*, 51 Fla. 463, 40 So. 619.

10. U. S.—*Greely v. Smith*, 3 Wood. & M. 236, 10 Fed. Cas. No. 5,750, p. 1077. Ala.—*Perkins v. Moore*, 16 Ala. 9; *Burgess v. Sugg*, 2 Stew. & P. 341; Fla.—*Armstrong v. Manatee County*, 49 Fla. 273, 37 So. 938. Ill.—*Schwarz-schild & Sulzberger v. Shapiro*, 182 Ill. App. 40. Ind.—*Reed v. Higgins*, 86 Ind. 143. Ky.—*Jarman v. Daniel*, 1 J. J. Marsh. 198. Mich.—*Detroit, L. & N. R. R. Co. v. McCammon*, 108 Mich. 368, 66 N. W. 471. N. H.—*Taylor v. Barron*, 35 N. H. 484. Okla.—*Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388. Tenn.—*Bankhead v. Alloway*, 1 Tenn. Ch. 207. W. Va.—*Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

As to the necessity for an adjudication on the merits, see *supra*, XVII, B, 3, d, and the title "Res Judicata."

[a] Judgment for the defendant for his costs not on the merits. *Patchen v. Delaware & H. C. Co.*, 62 App. Div. 543, 71 N. Y. Supp. 122; *Dunklee v. Good-enough*, 63 Vt. 459, 21 Atl. 494.

[b] A plea that "judgment was rendered upon confession in favor of the surety, for his costs," is insufficient. *Reed v. Higgins*, 86 Ind. 143. And see *Shingley v. Kirkpatrick*, 7 Blackf. (Ind.) 359; *Wade v. Howard*, 8 Ark. (Moxy) 354.

11. *Philipowski v. Spencer*, 63 Tex. 604.

[a] An allegation that it was adjudged "that the plaintiff should take nothing by his said writ in respect of the said debt," is insufficient. *Derosia v. Ferland*, 86 Vt. 15, 83 Atl. 271.

[b] Allegation that the plaintiffs "were defeated" is insufficient. *Goff v. Wilburn*, 25 Ky. L. Rep. 1963, 79 S. W. 232.

[c] "A plea should aver that the decision was on the merits, or it should at least appear by the record vouched." *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

[d] Defect in this particular is properly allowed to be cured by amendment. *Detroit, L. & N. R. R. Co. v. McCammon*, 108 Mich. 368, 66 N. W. 471.

12. *Haldeman v. United States*, 91 U. S. 584, 23 L. ed. 433 (avermnt that the former suit was "dismissed agreed" is insufficient); *Detroit, L. & N. R. Co. v. McCamman*, 108 Mich. 368, 66 N. W. 471. Compare, *Stratton v. Essex County Park Com.*, 164 Fed. 901.

[a] "The dismissal may have been [without prejudice]." *Simpson v. Melvin*, 7 Ky. L. Rep. 681.

[b] "It may well be that the bill was dismissed because the plaintiff's remedy was thought to be at law and in just such a form of action as we now have before us. The averment in the affidavit of defense is 'that the said bill was so proceeded in that it was by the court dismissed.' This does not show us what was decided, or the reason for which the bill was not entertained." *Blood v. Crew Levick Co.*, 177 Pa. 606, 35 Atl. 871.

[c] Where the former judgment was by retraxit, a plea which substitutes the words "and dismissed the same" for the technical phrase "but from the same altogether withdrew himself," is good. *Evans v. McMahan*, 1 Ala. 45.



judgment was rendered on the verdict of a jury, is sufficient.<sup>13</sup> Where the former judgment was rendered upon a demurrer to the bill or complaint, the plea should state the ground upon which the demurrer was sustained in order that it appear that the judgment was on the merits, if that be the case.<sup>14</sup>

3. **Subsequent Pleadings.**<sup>15</sup>—In those jurisdictions in which an implied replication to matters pleaded in the answer is created by statute, the plaintiff is not required to nor in fact can he, reply to an answer or a plea of former judgment.<sup>16</sup> Where the practice is otherwise, the plaintiff, by an appropriate pleading, must put in issue the matters by which he expects to defeat or avoid the effect of the alleged prior adjudication.<sup>17</sup> A replication to a plea of former adjudication should either deny the averments of the plea or confess and avoid them.<sup>18</sup> The reply of nul tiel record may be filed to a plea of former adjudication,<sup>19</sup> as may a general,<sup>20</sup> or special<sup>21</sup> traverse. But the replication must not be double.<sup>22</sup> A reply is sufficient which sets up facts which

13. *Ellis v. Staples*, 9 *Humph.* (Tenn.) 238; *Martin v. Taylor* (Tex. Civ. App.), 141 S. W. 1009.

14. *Farmers & Mechs. Life Assn. v. Caine*, 224 Ill. 599, 79 N. E. 956.

[a] A plea need not aver that "the cause did not go off on the demurrer," because of the rule universally recognized that, if no mention is made of the demurrer in the decree disposing of the main issue, it will be taken as overruled." *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

As to denials and traverse, see the *supra*, XVII, B, 3, d, (II), (F).

15. As to answers generally, see the titles "Answers;" "Bills and Answers."

As to demurrers generally, see the title "Demurrers."

As to denials and traverse, see the title "Denials."

As to pleas generally, see the titles "Pleas;" "Pleas in Equity."

16. *Wixson v. Devine*, 67 Cal. 341, 7 Pac. 776; *Roys v. Lull*, 9 Wis. 324. See generally the title "Replication and Reply."

[a] "It was not necessary to reply, as it [the plea of *res judicata*] has none of the elements of a counterclaim." *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257.

17. See generally the title "Replication and Reply."

[a] "It was the duty of the appellee, if he wished to avoid its terms by showing that it recited the determination of issues not involved, or that there was a mistake in the extent to

which its provisions were carried between the parties, to plead such facts as he relied on for that purpose." *Robbins v. Hubbard* (Tex. Civ. App.), 108 S. W. 773; *Blagge v. Shaw* (Tex. Civ. App.), 41 S. W. 756.

[b] A defective plea is not rendered good by a failure to reply to it. *Seedig v. First Nat. Bk.* (Tex. Civ. App.), 168 S. W. 445.

18. *Smith & Shoemaker v. Atkins*, 6 Baxt. (Tenn.) 318.

19. U. S.—See *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526. Miss.—*Germain v. Harwell*, 66 So. 396. R. I.—*Flynn v. Gorman*, 22 R. I. 536, 48 Atl. 797.

[a] "Although the ordinary reply to a plea of former judgment is nul tiel record, it is not the only reply. Like any other apparent bar to an action, it may be confessed and avoided." *Flynn v. Gorman*, 22 R. I. 536, 48 Atl. 797.

20. *Lanham & Bro. v. Jacoby*, 5 Penne. (Del.) 576, 61 Atl. 871.

21. *Haviland v. Fidelity Ins. Tr. & S. Dep. Co.*, 108 Pa. 236.

22. *Burnham v. Webster*, 2 Ware 240, 4 Fed. Cas. No. 2,178. See generally the title "Duplicity."

[a] **Duplicity.**—"With the averment that 'the sole reason for the dismissal of the said bill of complaint was that the action there depending was cognizable only in a court of law and not in a court of equity,' are associated averments of what the court of chancery did not do, of conclusions of the pleader, and of matters of law.

would render the former judgment void,<sup>26</sup> which avers that a decree was not rendered on the merits,<sup>27</sup> that the judgment is no longer in force and effect,<sup>28</sup> or that the court had no jurisdiction of the person of the defendant.<sup>29</sup> Where a plaintiff has fully pleaded a former adjudication in his complaint he is not required to repeat the allegations in a reply.<sup>30</sup>

4. Trial. — a. *In General.* — The issues raised by a plea of a former judgment need not be first tried,<sup>31</sup> though this is sometimes done,<sup>32</sup> particularly where it is merely an issue of law for the court.<sup>33</sup> Where the evidence is such that the question of estoppel must be submitted to the jury, all other matters in support or defence of the action should also be submitted at the same time.<sup>34</sup> An irregularity in making premature proof of the record is harmless,<sup>35</sup> and the court in its discretion may allow a case to be reopened for the purpose of introducing evidence that certain facts have become *res judicata*.<sup>36</sup> Failure to make a finding on an issue raised by a plea of former adjudication is harmless where the judgment gives to the party all that he would be entitled to under the former adjudication.<sup>37</sup>

A replication, like a plea, must be single." *Stratton v. Essex County Park Com.*, 164 Fed. 901.

23. *Hallock v. Loft*, 19 Colo. 74, 34 Pac. 568 (fraud); *Germain v. Harwell* (Miss.), 66 So. 396. See also *Riley v. Lemieux*, 24 Colo. App. 184, 132 Pac. 699.

[a] Fraud in obtaining the judgment must be pleaded specially. *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170. But compare, *Edgell v. Sigerson*, 20 Mo. 494 (the averment that the judgment was obtained by fraud is sufficient).

24. *Stratton v. Essex County Park Com.*, 164 Fed. 901; *McBurnie v. Seaton*, 111 Ind. 56, 12 N. E. 101.

25. Ind.—*Mull v. McKnight*, 67 Ind. 525. Kan.—*Abbott v. Abbott*, 70 Kan. 423, 78 Pac. 837. R. I.—*Flynn v. Gorman*, 22 R. I. 536, 48 Atl. 797. Vt. *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850.

26. *Davis v. Green*, 57 Ind. 493.

27. *Woods v. Allen*, 122 Iowa 695, 98 N. W. 499; *Strow v. Allen* (Iowa), 98 N. W. 141.

28. *Gainesville Ry. Co. v. Austin*, 127 Ga. 120, 56 S. E. 254.

29. *Isham v. Cooper*, 56 N. J. Eq. 398, 37 Atl. 462. 39 Atl. 760, was an application for a temporary injunction; the court said: "The proper practice would seem to be, that where this preliminary question on the record is ripe for decision, on the application for preliminary injunction, and no spe-

cial reason appears for reserving the decision of the question until final hearing, the question should be disposed of as a preliminary question on the motion for preliminary injunction."

[a] Where Set Up by Plea Puis Darrein Continuance. — See *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401. As to the propriety of such plea, see *supra*, XVII, D, 2, a, (II), and the title "Puis Darrein Continuance."

30. If there is also an issue of fact the issue raised by the plea of nul tiel record should be tried first. *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

31. "Where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact; any other matters in defense or support of the action, as the case may be, should be admitted on the trial, under proper instructions. For, if the jury should find against the conclusiveness of the former trial, then this additional evidence would not only be material, but constitute the whole of the proof on which the cause of action or defense must rest." *Washington, etc. Co. v. Sickles*, 5 Wall. (U. S.) 580, 18 L. ed. 550.

32. *Clink v. Thurston*, 47 Cal. 21, 30.

33. *Standard Supply and Equipment Co. v. Merritt*, 48 Misc. 498, 96 N. Y. Supp. 181.

34. *Hoyt v. Hart*, 140 Cal. 722, 87 Pac. 569.

b. *Issues and Evidence.*—A former judgment, well pleaded, is in the case for all purposes: it broadens the issues and effect is to be given to all its provisions, both those in favor of the party pleading it and those in favor of the other party.<sup>35</sup> Where the issue of a former adjudication has been made, evidence on that issue is, of course, admissible and it is error to exclude it.<sup>36</sup> The burden of proof on such an issue is on the party claiming the benefit of the adjudication.<sup>37</sup> The record of the pleadings and former judgment is admissible,<sup>38</sup> and is generally sufficient to establish the defense.<sup>39</sup> The evidence offered to sustain the complaint in the former action may be shown.<sup>40</sup> Errors in the former judgment cannot be shown.<sup>41</sup> But parol evidence may be admissible to determine what issues were passed upon by the court in

35. *Stouffer v. Harlan*, 84 Kan. 307, 114 Pac. 385.

36. *Rose v. Eggers*, 148 Iowa 306, 127 N. W. 196.

[a] **Nothing which is not set out in the pleading can be invoked in aid of it.** *Derosia v. Ferland*, 86 Vt. 15, 83 Atl. 271.

[b] **"A general allegation of nullity does not put at issue all the facts from which any of the causes of nullity can arise, but only such as may be apparent on the face of the record."** *Williamson v. Creditors*, 5 Mart. (O. S.) (La.) 618, 620.

37. *Townesley v. Niagara Life Ins. Co.*, 218 N. Y. 228, 112 N. E. 924.

[a] **Scope of Former Adjudication.** Where it is claimed that matters not involved in the pleadings in the former action were in fact litigated, this fact must be shown by the party claiming the benefit thereof. *Silberstein v. Silberstein*, 218 N. Y. 525, 113 N. E. 495.

[b] **Jurisdiction.**—Where by statute it is sufficient to allege that a judgment was duly given or made by a court of inferior jurisdiction, if such an allegation is denied, the pleader must prove the existence of the jurisdictional elements. *Miller v. Miller*, 47 Mont. 150, 131 Pac. 23.

38. *Conn.*—*Kashman v. Parsons*, 70 Conn. 295, 39 Atl. 179. *Md.*—*Cumberland Coal & Iron Co. v. Jeffries*, 27 Md. 526. *Neb.*—*Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276. *Okla.*—*Pierce v. Barks*, 159 Pac. 323, its exclusion is error. *Tenn.*—*Mason v. Spurlock*, 4 Baxt. 554.

**As to evidence of records generally,** see 10 ENCY. OF EV. 690, et seq.; as to judicial records, see 10 ENCY. OF EV. 757, 787, 801, 816, 855, 903, 936, 1016, 1040.

[a] **An entry on the minutes of the court, setting aside a judgment cannot be received as evidence against the record of the judgment.** "A record imports verity, and can only be tried by itself. The vacatur ought to be enrolled, or entered of record, as much as the rule for judgment." *Croswell v. Byrnes*, 9 Johns. (N. Y.) 287.

[b] **"The rule as laid down in treatises upon evidence is, that when the existence of a record of a court is put in issue on the plea of nul tiel record in proceedings of the same court, it should be proved by the production of the record itself, . . . and that when the record denied by the issue is of another court, it is to be proved by the production of an exemplification of it."** *Boteler v. State*, 8 Gill & J. (Md.) 359.

[c] **"It is not sufficient to prove a judgment to offer alone the precedent for journal entry signed by the judge; the judgment must be proved by the records of the court entering the same, and not by the files thereof."** *Bouquot v. Awad* (Okla.), 153 Pac. 1104, 1107.

[d] **The memorandum of decision of the court which determined the prior action, and which is admitted to correctly state the issues which were there determined, is admissible in evidence.** *Cooke v. Weed* (Conn.), 97 Atl. 765.

39. *Kelly v. Kelly*, 118 Va. 376, 87 S. E. 567.

**As to necessity for producing the whole record,** see 10 ENCY. OF EV. 787, et seq., and supplement thereto.

40. *McTigue & Co. v. McLane*, 93 Ala. 626, 11 So. 117.

41. *C. H. Austin & Sons v. Hunter*, (Ala.), 69 So. 113. See *supra*, XVII,



the former action,<sup>42</sup> and that a matter which under the issues could have been determined was not in fact adjudicated.<sup>43</sup> Such evidence cannot, however, go to the extent of contradicting the record showing the nature and scope of the adjudication.<sup>44</sup>

*c. Variance.*—The estoppel pleaded cannot be supported by evidence tending to show another and different estoppel;<sup>45</sup> an estoppel by election of remedies cannot be shown under a pleading designed to present the issue of an estoppel by judgment.<sup>46</sup> A material variance between the judgment pleaded as an estoppel and the judgment established by the proof at the trial, is fatal to the estoppel,<sup>47</sup> but slight

A, as to collateral attack on judgments.

42. **U. S.**—*Washington, etc. Co. v. Sickles*, 5 Wall. 580, 18 L. ed. 550; *City Trust, S. D. & S. Co. v. Glencoe Granite Co.*, 113 Fed. 177, 51 C. C. A. 139. **Ala.**—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. **Fla.**—*Fulton v. Gesterding*, 47 Fla. 150, 33 So. 56. **Ky.**—*Lampton v. Jones*, 5 Mon. 235. **Me.**—*Cunningham v. Foster*, 49 Me. 68. **N. Y.**—*Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350. **Tenn.**—*Warwick v. Underwood*, 3 Head 238, 75 Am. Dec. 767. **Vt.**—*Perkins v. Walker*, 19 Vt. 144.

See 10 ENCY. OF EV. 975, et seq.

[a] "In making good the defense of res judicata, the evidence must necessarily vary with the nature of the issues presented in the first trial. Sometimes the record makes full proof of the subject-matter both of the suit and the defense, as it does of the judgment pronounced. In others, the identity and scope of the contestation do not appear on the face of the papers. When such is the case, other sources of information must be resorted to. If necessary, it is permissible to prove what testimony was given on the former trial, and the rulings of the court, as a means, and the only means of showing precisely what issues and inquiries of fact had been submitted to the trying body. This, with the view, and solely with the view, of determining the identity of the two contentions." *Haas v. Taylor*, 80 Ala. 459.

[b] It is permissible to show that a particular matter arose and was determined, which was not necessarily within the issues, if the issue was broad enough to cover it. *Chamberlain v. Gulliver*, 26 Mo. 394.

[c] As to issues outside the pleadings, see *Dime Sav. Bk. v. McAlenney*, 78 Conn. 208, 61 Atl. 476; *Silberstein*

*v. Silberstein*, 218 N. Y. 525, 113 N. E. 495.

As to parol evidence affecting judicial records generally, see 10 ENCY. OF EV. 936, et seq.

43. *State v. Morton*, 18 Mo. 53.

44. *People v. Locklin*, 273 Ill. 106, 112 N. E. 285; *New York & T. Land Co. v. Votaw* (Tex. Civ. App.), 52 S. W. 125. See 10 ENCY. OF EV. 976.

[a] "Under the common-law system, the pleadings being more accurate and precise than at the present day, and having as their object to reduce the controversy to a single issue, there was but little difficulty in determining the question adjudicated, and the rule prevailed of trying the plea of estoppel by former judgment by an inspection of the record alone; . . . but as, under the modern system of pleadings, records are sometimes vague and uncertain, this rule has been modified, but not to the extent of destroying the integrity and conclusiveness of the judgment as to matters that do appear on the record." *Cropsey v. Markham* (N. C.), 87 S. E. 950.

45. **Ga.**—*Forrester v. Vason*, 71 Ga. 49. **Ill.**—*Miller v. McManis*, 57 Ill. 126, estoppel as to other contracts than those sued on. **Mont.**—*O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049.

[a] "On the plea of nul tiel record of a judgment of the circuit court for the district of Wisconsin, it is clear a judgment of the circuit court for the eastern district of Wisconsin is not evidence of such a judgment." *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 368.

46. *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049.

47. *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526.

[a] "If the phraseology in which the judgment is narrated in the plea is to be taken as descriptive of the

divergences between the two will be disregarded.<sup>48</sup> The judgment sought to be introduced in evidence must be between the same parties as the judgment pleaded, unless privity of relationship is properly alleged in the plea.<sup>49</sup> A variance between the judgment pleaded and that proved must be taken advantage of when the evidence is offered;<sup>50</sup> it cannot be first questioned on appeal.<sup>51</sup>

d. *Province of Court and Jury*.<sup>52</sup>—Broadly speaking, a plea of estoppel by a former judgment presents an issuable fact to be left to the determination of the jury.<sup>53</sup> But if the issue is to be determined solely from the record evidence, it is for the court.<sup>54</sup> The question of

record evidencing such judgment, no departure from it in the proofs can be allowed. A record described as determining the rights of the party by the consideration and judgment of the court, and the conviction of the defendant, would not be identical with one directing the same results, but in a different way. . . . The current of the cases, and the principles on which they rest, clearly tend to show that all the particulars set forth in pleading, descriptive of the record or instrument on which the party relies, must be established by his proof, or the variance will be fatal. . . . As his [the defendant's] plea makes various allegations prout patel, or as contained upon the record, it is manifest that it assumes to describe the precise contents, so as to identify the record on which the defendant relies. The record produced not comporting with this description, the variance is fatal." *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526.

43. See generally the title "**Variance**."

[a] "It is not a variance, however, that the judgment as rendered contained further provisions than those pleaded." *State ex rel. Moore v. Board of Comrs.*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

[b] There is no variance where the plaintiff is described in the complaint by his given name and his middle name also, but in the former judgment, his given name is recited and merely the initial of his middle name. *Luce v. Dexter*, 135 Mass. 23.

[c] There is no variance because the complaint alleges the recovery of a judgment for a specified amount while the judgment roll of the former action shows a recovery of a smaller amount with a specified amount for costs which

totals the amount recited in the complaint. *Frevert v. Swift*, 19 Nev. 400, 13 Pac. 6.

49. Ill.—*Cavener v. Shinkle*, 89 Ill. 161. Ky.—But see *Lowry v. McMurry* (Ky. Dec.), 251. Ohio.—*Block v. Peebles*, 10 Ohio Dec. (Reprint) 3, 18 Wkly. L. Bul. 36.

[a] A plea setting up a judgment in favor of the defendant and against the plaintiff is not supported by evidence of a judgment in favor of defendant and another person. *Mann v. Edwards*, 138 Ill. 19, 27 N. E. 603.

As to pleading identity of parties, see *supra*, XVII, D, 2, b, (III).

50. *Schuler v. Schuler*, 209 Ill. 522, 71 N. E. 16. See generally the titles "**Objections and Exceptions**;" "**Variance**."

51. *Miner v. Reed*, 25 Ill. App. 175.

52. See generally the title "**Province of Judge and Jury**."

53. Ga.—*Stevens v. Stembridge*, 104 Ga. 619, 31 S. E. 413; *Robinson v. Wilkins*, 74 Ga. 47; *S. Cohn & Son v. Parkas*, 17 Ga. App. 572, 87 S. E. 842. N. C.—*Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257. Wash.—*Pugsley v. Stebbins*, 87 Wash. 187, 151 Pac. 501.

54. Miss.—*Miller v. Bulkley*, 85 Miss. 706, 38 So. 99. Wash.—*Weatherwax Lumb. Co. v. Ray*, 38 Wash. 545, 80 Pac. 775. W. Va.—*Brown v. Cook*, 87 S. E. 454.

[a] Where the question of identity of parties and cause of action is determinable from the record it is a question of law for the court. *Theller v. Hershey*, 89 Fed. 575; *Alfrey v. Colbert*, 44 Okla. 246, 144 Pac. 179.

[b] Issue Raised by Plea of Nul Tiel Record.—Mich.—See *Lowrie & Robinson Lumb. Co. v. Campbell*, 170 Mich. 341, 136 N. W. 364. Tex.—*Weathered v. Mays*, 4 Tex. 387. Vt.—*Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

the proper construction of the terms of a prior judgment,<sup>55</sup> or its effect,<sup>56</sup> is also for the court. The question of what issues were determined in the former action is for the jury, under proper instructions,<sup>57</sup> except where it is to be determined solely from the record,<sup>58</sup> or where the evidence is undisputed.<sup>59</sup> Whether a party appeared at the former trial<sup>60</sup> or whether an appearance was with the authority and consent of a party, is also a question for the jury.<sup>61</sup>

**XVIII. FOREIGN JUDGMENTS.**<sup>62</sup> — A. DEFINITION AND GENERAL STATEMENT.<sup>63</sup> — A foreign judgment is one pronounced or rendered by a court whose jurisdiction does not extend to the country, state or territory where the judgment or its effect is called into question.<sup>64</sup> Thus, the English courts regard the judgments of the courts of Scotland,<sup>65</sup> Ireland,<sup>66</sup> and of the various British colonies,<sup>67</sup> as foreign judg-

W. Va.—*Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397.

[c] **Vacation of Alleged Former Judgment.**—*Lowrie & Robinson Lumb. Co. v. Campbell*, 170 Mich. 341, 136 N. W. 364.

[d] Where a plaintiff introduces the record of the former adjudication as a part of his case in chief, a question solely of law is presented by a motion for a directed verdict. *Lyon v. Bursey*, 36 App. Cas. (D. C.) 235.

55. Ala.—*Shook v. Blount*, 67 Ala. 301. Ind.—*Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249. Mo.—*Charles v. St. Louis, M. & S. W. R. R. Co.*, 124 Mo. App. 293, 101 S. W. 680.

56. Ehle v. Bingham, 7 Barb. (N. Y.) 494; *Rockwell v. Langley*, 19 Pa. 502.

57. Ill.—*Baxter v. Thede*, 96 Ill. App. 499. Ind.—*James v. Lawrenceburgh Ins. Co.*, 6 Blackf. 525. Ia.—*Amsden v. Dubuque & S. C. Ry. Co.*, 32 Iowa 288. Mass.—*Richstein v. Welch*, 197 Mass. 224, 83 N. E. 417. N. C.—*Belch v. Holloman*, 3 N. C. 328 (498). Pa.—*Crotzer v. Russel*, 9 Serg. & R. 81. Tex.—*Bledsøe v. White*, 42 Tex. 130. Vt.—*Perkins v. Walker*, 19 Vt. 144. Wash.—*Pugsley v. Stebbins*, 87 Wash. 187, 151 Pac. 501.

58. Conn.—*Avon Mfg. Co. v. Andrews*, 30 Conn. 476. Ia.—*Munn v. Shannon*, 86 Iowa 363, 53 N. W. 263; *Hempstead v. Des Moines*, 52 Iowa 393, 3 N. W. 123. N. Y.—*Barber v. Ellingwood*, 137 App. Div. 704, 122 N. Y. Supp. 369. Pa.—*Bitzer v. Killinger*, 46 Pa. 44; *Finley v. Hanbest*, 30 Pa. 190.

59. *Birdseye v. Shaeffer* (Tex. Civ. App.), 57 S. W. 987.

60. *Wolverton v. Glascock*, 15 Wash. 279, 46 Pac. 253.

61. *Chambers v. Philadelphia Pickling Co.*, 83 N. J. L. 543, 83 Atl. 890.

[a] The authority of the attorney who dismissed the prior action, judgment in which is pleaded as a bar, is for the jury to determine. *Henry v. Lilley*, 42 Pa. Super. 565.

[b] Question whether attorneys had entered a consent order without authority, is for the jury. *Wipff v. Heder* (Tex. Civ. App.), 41 S. W. 164.

62. As to evidence of foreign records, see 10 ENCY. OF EV. 1037, 1040, and supplement thereto. See also 7 ENCY. OF EV. 789.

63. For definition of judgment, see 14 STANDARD PROC. 759, et seq.; of final judgment, see 14 STANDARD PROC. 770, et seq.; of interlocutory judgment, see 14 STANDARD PROC. 770; of judgment by confession, see 14 STANDARD PROC. 771; of judgment by default, see 14 STANDARD PROC. 854, et seq.; of judgment non obstante veredicto, see 14 STANDARD PROC. 953; of judgment in rem, see 14 STANDARD PROC. 969.

64. *McFarlane v. Derbyshire*, 8 U. C. Q. B. 12.

**Other Definitions.**—"A judgment of a foreign tribunal." 2 Bouv. L. Dict. 1268.

65. *Arnott v. Redfern*, 3 Bing. 353, 11 E. C. L. 177, 30 Eng. Reprint 549; *British Linen Co. v. McEwan*, 8 Manitoba 99.

66. *Houlditch v. Donegal*, 8 Bligh N. S. 301, 5 Eng. Reprint 955.

67. *Walker v. Witter*, 1 Dougl. 1, 99 Eng. Reprint 1; *Tarleton v. Tarleton*, 4 M. & S. 20, 105 Eng. Reprint 742; *Bank of Australasia v. Nias*, 16 Ad. & El. (N. S.) 717, 16 Q. B. 717, 71 E. C. L. 717, 117 Eng. Reprint 1055; *Bank of*



ments. And in Canada, the judgments rendered by the courts of one province are considered as foreign judgments in the courts of any other province,<sup>68</sup> as are judgments rendered in Great Britain.<sup>69</sup>

In the United States.—While judgments of the courts of sister states of the federal union are sometimes designated as foreign judgments,<sup>70</sup> strictly speaking, they are not foreign judgments in the same sense as a judgment of a foreign country is,<sup>71</sup> for in some respects, they are put upon the same footing as domestic judgments by the operation of the "full faith and credit" clause of the federal constitution.<sup>72</sup> But for such constitutional provision, however, it has been held that the judgments rendered by the courts of the different states would be foreign judgments in a court of any of the sister states.<sup>73</sup> State court judg-

Australasia v. Harding, 9 M. G. & S. 561, 67 E. C. L. 661; British Linen Co. v. McEwan, 8 Manitoba 99.

68. Stewart v. Guilford, 6 Ont. Law R. 262; *In re* McMillan v. Fortier, 2 Ont. Law R. 231; Solmes v. Stafford, 16 Ont. Pr. 78; McFarlane v. Derbyshire, 8 U. C. Q. B. 12; Corse v. Moon, 22 Nova Scotia 191; Martel v. Dubord, 3 Manitoba 598; McMillan v. Ritchie, 7 N. Bruns. 242.

69. International, etc. Corp. v. Great North West, etc. Ry. Co., 9 Manitoba 147; British Linen Co. v. McEwan, 8 Manitoba 99.

70. U. S.—Grover & Baker Sew. Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed. 670; Walser v. Seligman, 13 Fed. 415, 21 Blatchf. 130. Ga.—Joice v. Scales, 18 Ga. 725. La.—Brosnahan v. Turner, 16 La. 433, 439. Minn.—Karns v. Kunkle, 2 Minn. 313. N. Y.—United States Life Ins. Co. v. Hellinger, 130 App. Div. 415, 114 N. Y. Supp. 885. S. C.—Coskery v. Wood, 52 S. C. 516, 30 S. E. 475.

[a] Upon the question of jurisdiction, the judgments of sister states are regarded as foreign judgments. Karns v. Kunkle, 2 Minn. 313. And see Barney v. White, 46 Mo. 137.

[b] Distinguishing Judgments of Foreign Country and Sister State. "Judgments recovered in one state of the Union when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Wisconsin v. Pelican

Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239.

71. U. S.—Moore v. Paxton, Hempst. 51, 17 Fed. Cas. No. 9,772a. Ala. Forbes v. Davis, 187 Ala. 71, 65 So. 516. N. J.—Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711.

72. U. S.—Coble v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; Earl v. Raymond, 4 McLean 233, 8 Fed. Cas. No. 4,243. Fla. Carter v. Bennett, 6 Fla. 214. Ga. Joice v. Scales, 18 Ga. 725. Ill.—Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 109 Am. St. Rep. 249, 1 L. R. A. (N. S.) 740. Me.—Lamberton v. Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415. Mass.—Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88. N. J. Elizabeth Town Sav. Inst. v. Gerber, 34 N. J. Eq. 130; Gibbons v. Livingston, 6 N. J. L. 236. N. Y.—Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213. Tenn.—Shelton v. Johnson, 4 Sneed 672, 70 Am. Dec. 265. Vt. Eastern Tp. Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665; McGilvray & Co. v. Avery, 30 Vt. 538.

See more fully *infra*, XVIII. B.

73. Dorsey v. Maury, 10 Smed. & M. (Miss.) 298; Eastern Tp. Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665.

[a] Before the ratification of the confederation of the United States, all the courts of the several provinces, colonies or states were at common law deemed to be foreign to each other and judgments rendered by any one of them were considered by the others as foreign judgments. The confederation recognized the doctrine of full faith

ments are not regarded as foreign judgments when relied upon in a federal court.<sup>74</sup> nor are federal court judgments when relied upon in the state courts.<sup>75</sup>

**R. JUDGMENTS OF SISTER STATES.<sup>76</sup> — 1. Basis of Recognition.** Judgments and decrees of sister states are, independently of constitutional and statutory provisions declaring their effect, entitled to recognition under the well recognized rule of comity.<sup>77</sup> This rule of comity has, however, been strengthened and enlarged and the law upon the subject made definite and fixed by the full faith and credit clause of the federal constitution and the act of congress passed in furtherance thereof.<sup>78</sup> Statutes of similar import exist in some states, giving to the judicial record of a sister state the same effect as is given to it in the state where made.<sup>79</sup>

and credit and it was later adopted in the constitution. *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88.

74. See *infra*, XVIII, C.

75. See *infra*, XVIII, D.

76. As to whether foreign, see *supra*, XVIII, A.

77. **U. S.**—*Buckner v. Finley*, 2 Pet. 586, 7 L. ed. 528; *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine 501, 29 Fed. Cas. No. 17,206. **Md.**—*SeEVERS v. Clement*, 28 Md. 426. **Miss.**—*Dorsey v. Maury*, 10 Smed. & M. 298. **Mich.**—*Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90. **N. H.**—*Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281. **Pa.**—*Smith v. Lothrop*, 44 Pa. 326, 84 Am. Dec. 448. **Vt.**—*Eastern Tp. Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665.

[a] **The conflicting rulings based on comity induced positive legislation upon the subject.** "At first," says the court in *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458, "this general rule was founded upon comity alone, between the various states, and then other countries, without any fixed and definite law upon the subject, and consequently so variant and conflicting became the rulings of the courts of the various states and other countries upon the subject that the people of this country undertook to remedy that great evil and establish a uniform rule upon the subject by adopting section 1 of art. 4 of the constitution of the United States."

78. Section 1, art. 4, of the constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every

other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." In compliance with that mandate, the congress in 1790 enacted what is now section 905, U. S. Revised Statutes, as follows: "The records and judicial proceedings of the courts of any state, . . . shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, . . . together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form." As to the interpretation and application of this act of congress, see 10 ENCY. OF EV. 1005, 1015, et seq., and supplement thereto.

[a] **Nature of the Provision.**—The full faith and credit clause of the organic law of the United States and the act of congress passed in conformity therewith serve to establish a rule of evidence, rather than to fix a criterion of jurisdiction. *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755. And see *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239.

[b] Whatever interpretation the United States supreme court may put upon the clause is controlling since the construction involves a federal question. *Brigham v. Henderson*, 1 Cush. (Mass.) 430, 48 Am. Dec. 610.

79. Cal. Code Civ. Proc., §1913; *United States Fidelity & Guaranty Co. v. Martin*, 77 Ore. 369, 149 Pac. 1023; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755.

## 2. Full Faith and Credit Rule Generally.<sup>80</sup> — a. *Rule Stated.*

As a result of these constitutional and statutory provisions, the judgment of a sister state is put upon the same basis practically as a domestic judgment,<sup>81</sup> and is entitled, when sued on, pleaded, or introduced in evidence, in another state, to full faith and credit.<sup>82</sup>

80. As to basis of rule, see *supra*, XVIII, B, 1.

As to operation and effect of the rule, see *infra*, XVIII, B, 3.

81. U. S.—Amory v. Amory, 3 Biss. 266, 1 Fed. Cas. No. 334; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475. Ala.—Bogan v. Hamilton, 90 Ala. 454, 8 So. 186; Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Crawford v. Simonton's Exrs., 7 Port. 110. Ark.—Hendry v. Cline, 29 Ark. 414; Buford & Pugh v. Kirkpatrick, 13 Ark. 33. Cal.—Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423. Del.—Pritchett v. Clark, 5 Harr. 63. Fla.—Samnis v. Wightman, 31 Fla. 10, 12 So. 526. Ga.—Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279. Ill.—Glos v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Belton v. Fisher, 44 Ill. 32; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449. Ind.—Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458; Holt v. Alloway, 2 Blackf. 108. Ia.—Clemmer & Dunn v. Cooper, 24 Iowa 185, 95 Am. Dec. 720. Kan.—Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576. Ky.—Rogers v. Coleman, Hard. 413, 3 Am. Dec. 733. Me.—Lamberton v. Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Sweet v. Brackley, 53 Me. 346. Md.—Zimmerman v. Helser, 32 Md. 274; Duvall v. Fearson, 18 Md. 502; Brengle v. McClellan, 7 Gill & J. 434. Mass.—Jacobs v. Hull, 12 Mass. 25; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88. Minn.—Cone v. Hooper, 18 Minn. 531. Miss.—Miller v. Ewing, 8 Smed. & M. 421. Mo.—Tootie v. Buckingham, 190 Mo. 183, 88 S. W. 619; Barney v. White, 46 Mo. 137. Neb.—Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365. N. H.—Rogers v. Odell, 39 N. H. 452; Kittredge v. Emerson, 15 N. H. 227. N. J.—Moulin v. Trenton Mut. Life Ins. Co., 24 N. J. L. 222; Chew v. Brumagim, 21 N. J. Eq. 520; Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711. N. Y.—Gottlieb v. Alton Grain Co., 181 N. Y. 563, 74 N. E. 1117;

Meadville First Nat. Bank v. New York Fourth Nat. Bank, 89 N. Y. 412. N. C.—Haywood v. Daves, 81 N. C. 8. Ohio.—Arndt v. Arndt, 15 Ohio 33; Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197. Pa.—Guthrie v. Lowry, 84 Pa. 533; Marsh v. Pier, 4 Rawle 273, 26 Am. Dec. 131. R. I.—Rathbone v. Terry, 1 R. I. 73. S. C.—Campbell v. Home Ins. Co., 1 S. C. 158. Tenn.—Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100. W. Va.—Black v. Smith, 13 W. Va. 780.

[a] Prior to the decision in *Mills v. Duryee*, 7 Cranch (U. S.) 481, 3 L. ed. 411, many states extended no greater credit to a judgment of a sister state than if it were rendered in a foreign country. The constitutional provision and act of congress in question were interpreted as merely designating the method of getting judgments of other states in evidence. See the following cases: Ala.—Bigger v. Hutchings, 2 Stew. 445. Ky.—Rogers v. Coleman, Hard. 413, 3 Am. Dec. 733. Mass.—Gleason v. Dodd, 4 Mete. 333; Bartlet v. Knight, 1 Mass. 401, 2 Am. Dec. 36. N. Y.—Pawling v. Bird's Exrs., 13 Johns. 192; Taylor v. Bryden, 8 Johns. 173; Hitchcock v. Aicken, 1 Caines 460. Ohio.—Hazzard v. Nottingham, Tapp. 146. S. C.—Lambkin v. Nance, 2 Brev. 99; Hammon v. Smith, 1 Brev. 110.

82. U. S.—Hood v. McGehee, 237 U. S. 611, 35 Sup. Ct. 718; Supreme Council v. Green, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. ed. 1089; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. ed. 905; Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039; Mills v. Duryee, 7 Cranch 481, 3 L. ed. 411; Hampton v. McConnell, 3 Wheat. 234, 4 L. ed. 378; Parker v. Parker, 222 Fed. 186, 137 C. C. A. 626; Carpenter v. Beal-McDonnell & Co., 222 Fed. 453; Owsley v. Central Trust Co., 196 Fed. 412. Ala.—Forbes v. Davis, 187 Ala. 71, 65 So. 516; Lamkin v. Lovell, 176 Ala. 334, 58 So. 258; Peet v. Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Memphis & C. R. Co. v. Gray-



b. *Limitations of Rule.*—(I.) Generally. — The courts cannot refuse to respect the judgment of a sister state because it is founded

son, 88 Ala. 572, 7 So. 122. **Ark.**—Conway v. Ellison, 14 Ark. 360; Hensley v. Force, 12 Ark. 756. **Cal.**—Cellulose Package Mfg. Co. v. Calhoun, 166 Cal. 513, 137 Pac. 238; Weir v. Vail, 65 Cal. 466, 4 Pac. 422; Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972; Stierlen v. Stierlen, 18 Cal. App. 609, 124 Pac. 226, 228. **Colo.**—Vennum v. Holmberg, 51 Colo. 306, 117 Pac. 169; Interstate Savings & Trust Co. v. Wyatt, 27 Colo. App. 217, 147 Pac. 444; Bonfils v. Gillespie, 25 Colo. App. 496, 139 Pac. 1054. **Del.**—Lutz v. Roberts Cotton Oil Co., 3 Boyce 227, 82 Atl. 601; Pritchett v. Clark, 3 Harr. 63. **Ga.**—Hope v. First Nat. Bank, 142 Ga. 310, 82 S. E. 929; Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860; Sharman v. Morton, 31 Ga. 34. **Idaho.**—Whitley v. Spokane & I. R. Co., 23 Idaho 642, 132 Pac. 121. **Ill.**—Flexner v. Farson, 268 Ill. 435, 109 N. E. 327; Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050; Light v. Reed, 234 Ill. 626, 85 N. E. 282; Ambler v. Whipple, 139 Ill. 311, 23 N. E. 841; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Thompson v. Emmert, 15 Ill. 415; Rust v. Frothingham, 1 Ill. 331; Dickman v. Ridgely, 188 Ill. App. 252. **Ind.**—Irose v. Balla, 181 Ind. 491, 104 N. E. 851; Baltimore & O. R. Co. v. Freeze, 169 Ind. 370, 82 N. E. 761; Elliott v. Ray, 3 Blackf. 384; Buchanan v. Port, 5 Ind. 264; Cooley v. Kelley, 52 Ind. App. 687, 96 N. E. 638, 98 N. E. 653. **Ia.**—Mahoney v. State Ins. Co., 133 Iowa 570, 110 N. W. 1041; State v. Helmer, 21 Iowa 370. **Kan.**—Robinson v. Chicago, R. I. & P. R. Co., 96 Kan. 654, 153 Pac. 494; McLain v. Parker, 88 Kan. 717, 129 Pac. 1140; Illinois Title & Tr. Co. v. McCoy, 86 Kan. 588, 121 Pac. 1090; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Chicago, R. I. & P. Ry. Co. v. Campbell, 5 Kan. App. 423, 49 Pac. 321. **Ky.**—Bryant v. Shute's Exr., 147 Ky. 268, 144 S. W. 28; Davis v. Connelly's Exrs., 4 B. Mon. 136; Fletcher v. Ferrel, 9 Dana 372, 35 Am. Dec. 143. **Me.**—Damon v. Webber, 111 Me. 473, 89 Atl. 734; Mitchel v. Osgood, 4 Greenl. 124. **Md.**—Duvall v. Fearson, 18 Md. 502; Bank of United States v. Merchants Bank, 7 Gill 415. **Mass.**—Stone v. Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. 218; Richards v. Barlow, 140 Mass. 218, 6 N. E. 68. **Mich.**—Farrow v. Railway Conductors Protective Assn., 178 Mich. 639, 146 N. W. 147; Marshall v. R. M. Owen & Co., 171 Mich. 232, 137 N. W. 204; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694. **Minn.**—Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095. **Mo.**—Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Western Assur. Co. v. Walden, 238 Mo. 49, 141 S. W. 595; Randolph v. Keiler, 21 Mo. 557; Hester v. Frink, 189 Mo. App. 40, 176 S. W. 481; Jarrett v. Sippely, 175 Mo. App. 197, 157 S. W. 975. **Mont.**—Adams v. Stenehjem, 50 Mont. 232, 146 Pac. 469. **Neb.**—Peoples Nat. Bank v. Ring, 95 Neb. 376, 145 N. W. 833. **N. H.**—Hochstein v. James W. Hill Co., 76 N. H. 293, 82 Atl. 171; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281. **N. J.**—Denver City Waterworks Co. v. American Waterworks Co., 81 N. J. Eq. 139, 85 Atl. 826; Dixon v. Dixon, 76 N. J. Eq. 364, 74 Atl. 995; Elizabeth Town Sav. Inst. v. Gerber, 34 N. J. Eq. 130; Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711. **N. Y.**—Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Schwabe v. Herzog, 161 App. Div. 712, 146 N. Y. Supp. 644; Curnen v. Curnen, 155 App. Div. 536, 140 N. Y. Supp. 805; Richards v. Richards, 87 Misc. 134, 149 N. Y. Supp. 1028; Malone v. Bocker, 82 Misc. 438, 143 N. Y. Supp. 1095; *In re Akin's Est.*, 152 N. Y. Supp. 310; Barber Asphalt Pav. Co. v. Griffin Roofing Co., 150 N. Y. Supp. 1075. **N. C.**—Valivar v. Richmond Cedar Works, 152 N. C. 656, 68 S. E. 200; Mottu v. Davis, 151 N. C. 237, 65 S. E. 969. **Ohio.**—Sipes v. Whitney, 30 Ohio St. 69; Evans v. Instine, 6 Ohio 117. **Okla.**—Earl v. Earl, 149 Pac. 1179; Anderson v. Canaday, 37 Okla. 171, 131 Pac. 697; Williams v. Hirschfeld, 32 Okla. 598, 122 Pac. 539. **Ore.**—United States Fidelity & Guaranty Co. v. Martin, 77 Ore. 369, 149 Pac. 1023; De Vall v. De Vall, 57 Ore. 128, 109 Pac. 755. **Pa.**—*In re*

upon a law of that state which does not exist in the forum,<sup>83</sup> or upon a misapplication of or failure to apply a law of the forum which should have been applied to the transaction.<sup>84</sup> The fact that the judgment is founded on a transaction or obligation which is opposed to the public policy of the forum in which the judgment is sought to be enforced, does not justify a refusal to give it full faith and credit.<sup>85</sup> But "the requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice protected by other constitutional provisions which it was never intended to modify or override."<sup>86</sup> Thus a judgment in violation of the due process of law provision of the federal constitution need not be recognized,<sup>87</sup> as where

Dilworth's Est., 243 Pa. 475, 90 Atl. 356; *Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448. **S. C.**—*Napiere v. Gidere*, Speers Eq. 215. **S. D.**—*Rice v. Bennett*, 29 S. D. 341, 137 N. W. 359. **Tex.**—*Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. **Vt.**—*Eastern Tp. Bk. v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665; *Burns v. Belknap*, 22 Vt. 419; *Fullerton v. Horton*, 11 Vt. 425; *Blodget v. Jordan*, 6 Vt. 580; *Hoxie v. Wright*, 2 Vt. 263, 269. **Wash.**—*Fleming v. Langley*, 86 Wash. 346, 150 Pac. 418; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858. **W. Va.**—*Campbell v. Switzer*, 74 W. Va. 509, 82 S. E. 319; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172. **Wis.**—*Free v. Western Union Tel. Co.*, 158 Wis. 36, 147 N. W. 1040; *Halfhill v. Malick*, 145 Wis. 200, 129 N. W. 1086; *Anderson v. Chicago Title & Trust Co.*, 101 Wis. 385, 77 N. W. 710; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

[a] A liberal policy should be followed in dealing with judgments of other states. "Unless the public acts and judicial proceedings of one state invade the sovereignty of another, the courts of a sister state should not be astute to find or search for an excuse to deny that full faith and credit which they have required in the federal constitution, but each state should recognize and enforce the public acts and judgments of a sister state when not coming clearly within one or more of the exceptions." *Interstate Savings & Trust Co. v. Wyatt*, 27 Colo. App. 217, 147 Pac. 444.

83. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

84. See *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

[a] **Gambling Transaction.**—A judgment of a Missouri court allowing recovery upon a transaction in Mississippi expressly prohibited by a statute of that state as a gambling transaction, is entitled to full faith and credit in Mississippi notwithstanding the prohibitory statute, which should have been applied by the Missouri court. *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039.

85. **U. S.**—*Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039. Commenting on this case the court, in *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65, says: "This court found no impediment in the policy of a State in the way of enforcing, under the due faith and credit clause . . . , a judgment obtained in Missouri, sued upon in Mississippi." *Miss. Armstrong v. Minkus*, 93 Miss. 621, 47 So. 467. **W. Va.**—*Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

But see *Interstate Sav. & Tr. Co. v. Wyatt*, 27 Colo. App. 217, 147 Pac. 444; *Irose v. Balla*, 181 Ind. 491, 104 N. E. 851.

[a] **Transaction a Misdemeanor in Forum.**—Even though the transaction upon which the judgment was based is made a misdemeanor and unenforceable in the forum, it cannot deny full faith and credit to the judgment based thereon. *Armstrong v. Minkus*, 93 Miss. 621, 47 So. 467, following *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039.

86. *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009.

87. **U. S.**—*Wetmore v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Old Wayne Mut. Life*

the court rendering it was without jurisdiction.<sup>81</sup> And adjudications as to the title to property located in another state, need not, subject to the limitations hereinafter stated, be recognized.<sup>82</sup>

(II.) Police or Penal Regulations. — One state may and will refuse to enforce adjudications of a sister state which are in the nature of mere police regulations.<sup>83</sup> Except in a few jurisdictions,<sup>84</sup> no recognition will be given to judgments based upon statutes that are penal in an international sense.<sup>85</sup> But judgments for penalties that are purely<sup>86</sup> reme-

Assn. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 233, 51 L. ed. 345. Ill. Flexner v. Farson, 268 Ill. 435, 109 N. E. 327. Ky.—Bryant v. Shute's Exr., 147 Ky. 285, 144 S. W. 23. Mo.—Foote v. Newell, 29 Mo. 400. N. H.—Hochstein v. James W. Hill Co., 76 N. H. 293, 82 Atl. 171.

88. Bigelow v. Old Dominion Cop. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. See *infra*, XVIII, B, 4, b.

89. See *infra*, XVIII, B, 3, e.

90. U. S.—Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239. Colo.—Interstate Sav. & Tr. Co. v. Wyatt, 27 Colo. App. 217, 147 Pac. 444. D. C.—State v. Bowen, 9 Mackey 291.

91. State v. Helmer, 21 Iowa 370; Healy v. Root, 11 Pick. (Mass.) 389.

[a] **Merger Doctrine.**—The reasoning of such cases is that the cause of action having been merged in the judgment, it is no longer possible to inquire into its nature, to ascertain whether it was based upon a penal statute. Ia.—State v. Helmer, 21 Iowa 370. Mass.—Healy v. Root, 11 Pick. 389. Ohio.—Spencer v. Brockway, 1 Ohio 229, 13 Am. Dec. 615. But see *supra*, XVII, B.

[b] **Qui Tam Action.**—A judgment of a Pennsylvania court on a penal statute for usury, recovered in a qui tam action was held entitled to recognition in Massachusetts. Healy v. Root, 11 Pick. (Mass.) 389.

[c] **Bastardy.**—Though statutes imposing a penalty for failure to support a bastard child are local police regulations, and entitled to no extraterritorial force, a judgment recovered for such penalty has been accorded due recognition in another state under the full faith and credit clause. State v. Helmer, 21 Iowa 370.

92. U. S.—Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; State v. Chicago, B. & Q. R. Co., 37 Fed. 497. Conn. Cristilly v. Warner, 87 Conn. 461, 89 Atl. 711. Kan.—Dale v. Atchison, T. & S. F. R. Co., 57 Kan. 601, 47 Pac. 521. Md.—First Nat. Bank v. Price, 33 Md. 487, 3 Am. Rep. 204.

[a] “Judgments for strict penalties are excepted because of their local nature. Their purpose is to enforce only the internal public policy of the state. The laws they enforce have no extraterritorial operation.” Roller v. Murray, 71 W. Va. 161, 76 S. E. 172.

[b] In determining whether statutes are penal, so as to deprive judgments enforcing them of extraterritorial effect, the judicial decisions of the state enacting such statutes, construing them will be considered. Interstate Savings & Trust Co. v. Wyatt, 27 Colo. App. 217, 147 Pac. 444.

[c] “The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.” Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

For a review of the authorities as to what constitutes a penalty, see Interstate Sav. & Tr. Co. v. Wyatt, 27 Colo. App. 217, 147 Pac. 444.

93. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; Roller v. Murray, 71 W. Va. 161, 76 S. E. 172.

[a] **Usury.**—A judgment recovered by a private citizen for double the



dial will be enforced, even though no such penalty exists in the forum.<sup>94</sup>

**3. Operation and Effect.** — a. *Generally.* — Within the limitations herein stated,<sup>95</sup> the same force and effect will be given to the judgment of another state as is accorded to it in the jurisdiction where rendered.<sup>96</sup>

b. *By What Court Determined.* — The court in which the judgment is pleaded or proved, rather than the court in which it was rendered,

amount of usurious interest paid is entitled to full faith and credit when the law imposing the penalty is not penal in an international sense. "The statutes of Texas provide no other way to insure obedience to its usury law; and the taking of interest, more than the rate prescribed, is not denominated a crime or misdemeanor, nor is any fine imposed for its violation, nor is there any provision permitting the state to recover anything itself by reason of the law; hence it is in no sense a criminal law, nor strictly penal, in an interstate sense." *Interstate Savings & Trust Co. v. Wyatt*, 27 Colo. App. 217, 147 Pac. 444.

94. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

95. See *infra*, XVIII, B, 2, b, and *infra*, XVIII, D.

96. **U. S.**—*Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. ed. 905; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023; *Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535; *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378; *Mills v. Duryee*, 7 Cranch 481, 3 L. ed. 411; *Owsley v. Central Trust Co.*, 196 Fed. 412; *Green v. Sarmiento*, 3 Wash. C. C. 17, 10 Fed. Cas. No. 5,760. **Ala.**—*Forbes v. Davis*, 187 Ala. 71, 65 So. 516. **Colo.**—*Vennum v. Holmberg*, 51 Colo. 306, 117 Pac. 169; *Interstate Sav. & Tr. Co. v. Wyatt*, 27 Colo. App. 217, 147 Pac. 444; *Bonfils v. Gillespie*, 25 Colo. App. 496, 139 Pac. 1054. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Del.**—*Lutz v. Roberts Cotton Oil Co.*, 3 Boyce 227, 82 Atl. 601. **Ga.**—*Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247. **Ill.**—*Simmons v. Clark*, 56 Ill. 96; *Belton v. Fisher*, 44 Ill. 32; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Kimmel v. Schultz*, 1 Ill. 169. **Ind.**—*Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458. **Ia.**

*Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529. **Kan.**—*French v. Pease*, 10 Kan. 51; *Chicago, R. I. & P. Ry. Co. v. Campbell*, 5 Kan. App. 423, 49 Pac. 321. **Ky.**—*Calloway v. Glenn*, 105 Ky. 648, 49 S. W. 440; *Fletcher v. Ferrel*, 9 Dana 372, 35 Am. Dec. 143; *Rankin v. Barnes*, 5 Bush 20. **La.**—*McLaren & Co. v. Kehler*, 23 La. Ann. 80, 8 Am. Rep. 592. **Me.**—*Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415. **Mass.**—*Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Tootle v. Buckingham*, 190 Mo. 183, 88 S. W. 619. **N. J.**—*Denver City Waterworks Co. v. American Waterworks Co.*, 81 N. J. Eq. 139, 85 Atl. 826; *Gulick v. Loder*, 13 N. J. L. 68, 23 Am. Dec. 711. **N. Y.**—*Gleason v. Northwestern Mut. Life Ins. Co.*, 203 N. Y. 507, 97 N. E. 35; *Suydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254; *Taylor & Co. v. Runyan*, 3 Clarke 474. **N. C.**—*Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969. **Ohio.**—*Arndt v. Arndt*, 15 Ohio 33. **Ore.**—*United States Fidelity & Guaranty Co. v. Martin*, 77 Ore. 369, 149 Pac. 1023. **Pa.**—*Levison v. Blumenthal*, 25 Pa. Super. 55. **Tex.**—*Babeock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. **Va.**—*Piedmont, etc. Life Ins. Co. v. Ray*, 75 Va. 821. **Wash.**—*Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858. **W. Va.**—*Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172; *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006. **Wis.**—*Free v. Western Union Tel. Co.*, 158 Wis. 36, 147 N. W. 1040.

[a] No greater effect will be given to the judgment than it enjoys in the state where rendered. **Conn.**—*Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562. **N. H.**—*Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281. **N. Y.**—*Van Cleaf v. Burns*, 118

must determine as a question of fact, the effect which the judgment has where rendered.<sup>97</sup>

c. *Conclusiveness in General*.—If an adjudication is a final<sup>98</sup> and binding and conclusive determination upon the merits<sup>99</sup> in the state

N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782. **Tex.**—*Babcock v. Marshall*, 21 Tex. Civ. App. 45, 50 S. W. 728.

97. *Bigelow v. Old Dominion Cop. Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; *Adams v. Stenehjelm*, 50 Mont. 232, 146 Pac. 469.

98. *Henry v. Henry*, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024.

As to when a judgment is final, so that it may be relied upon as an estoppel, see the title "*Res Judicata*," and *supra*, XVII, B, 3, c.

[a] *Time When Enforceable*.—The full faith and credit clause applies just as soon as the foreign judgment is enforceable; it is not necessary to wait till the time for appeal has elapsed. *Sweetser v. Fox*, 43 Utah 40, 134 Pac. 599. But as to whether pendency of appeal prevents reliance upon former adjudication, see the title "*Res Judicata*," and *supra*, XVII, B, 3, e, (5).

99. **U. S.**—*Hood v. McGehee*, 237 U. S. 611, 35 Sup. Ct. 718, 59 L. ed. 1144; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Ill.**—*Belton v. Fisher*, 44 Ill. 32. **W. Va.**—*Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

[a] *An interlocutory decree is not conclusive in another state*. **Ky.** *Baugh v. Baugh*, 4 Bibb 556. **N. Y.** *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460. **Wis.**—*Griggs v. Becker*, 87 Wis. 313, 58 N. W. 396.

[b] *A judgment which denies the remedy merely is not always conclusive in a sister state for the reason that it does not reach the merits of the claim in controversy*. *Brent v. Bank*, 10 Pet. (U. S.) 596, 9 L. ed. 547; *Bank of United States v. Donnally*, 8 Pet. (U. S.) 361, 8 L. ed. 974; *Central Stockyards v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

[c] *Default*.—Judgments upon default are enforceable in another state. **Ia.**—*Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529. **La.**—*Davis v.*

*Dugas*, 11 La. Ann. 118. **Tenn.**—*Stegall v. Wyche*, 5 Yerg. 83. **Tex.**—*Norwood v. Cobb*, 20 Tex. 588.

A judgment by confession is entitled to recognition in another state. See XVIII, B, 3, f, (V).

[d] *Pendency of Appeal*.—Unless the appeal defeats the right to immediately enforce the judgment where rendered it will not prevent its enforcement elsewhere. **Cal.**—*Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 478. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Mass.**—*Clark v. Child*, 136 Mass. 344. **Nev.**—*Rogers v. Hatch*, 8 Nev. 35. **Va.**—*Piedmont, etc. Co. v. Ray*, 75 Va. 821.

[e] *Enforceable by Process*.—Before full faith and credit can be given to such a judgment it must appear that it was capable of enforcement by final process. *Adams v. Stenehjelm*, 50 Mont. 232, 146 Pac. 469.

[f] *The highest evidence* (1) of what faith and credit a judgment has in the state of its origin is the decisions of the court of last resort of that state. *Free v. Western Union Tel. Co.*, 158 Wis. 36, 147 N. W. 1040. (2) Consequently where the judgment of the sister state sought to be enforced was subsequently reversed in the supreme court of that state its validity is destroyed. *Free v. Western Union Tel. Co.*, 158 Wis. 36, 147 N. W. 1040.

[g] *The laws (1) of the state where judgment is rendered must be applied in ascertaining its validity*. **Ala.** *Forbes v. Davis*, 187 Ala. 71, 65 So. 516. **Cal.**—*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972. **Ill.**—*Wright v. Cosmopolitan Life Ins. Assn.*, 154 Ill. App. 201. **Mont.**—*Adams v. Stenehjelm*, 50 Mont. 232, 146 Pac. 469. **Ore.**—*United States Fidelity & Guaranty Co. v. Martin*, 77 Ore. 369, 149 Pac. 1023. (2) In *Wright v. Cosmopolitan Life Ins. Assn.*, 154 Ill. App. 201, it was said: "This court must adopt and enforce the construction of the Texas statute given to it by the Texas courts, and hold that by the entering of a special appearance to question the service there was a general appearance of de-

where rendered, it will be recognized as such in every other state.<sup>1</sup>

defendant at the succeeding term, and that the Texas court had jurisdiction over the defendant to render the judgment which was the cause of action sued upon in this suit. The defendant was under no obligation to have appeared by counsel in the Texas court to question the service, if it in fact was not doing business there and had no agent in that state, but when it went into a court of that state to test the question of service of summons under a statute of that state it made itself subject to the law of that state."

**Judicial Notice.**—As to how far the laws of a sister state are judicially noticed, in determining the faith and credit to be given to a judgment of that state, see the title "**Judicial Notice**," 7 ENCY. OF EV. 869.

[h] **A judgment rendered upon the statute of limitations does not bar another action in a state whose law has not yet operated to bar an action.** *Ky.* *Brand v. Brand*, 116 *Ky.* 785, 76 *S. W.* 868, 63 *L. R. A.* 206. *Mo.*—*Wernse v. McPike*, 100 *Mo.* 476, 13 *S. W.* 809; *Fulton Iron Works v. Riggins*, 14 *Mo. App.* 321. *N. H.*—*Weeks v. Harriman*, 65 *N. H.* 91, 18 *Atl.* 87, 23 *Am. St. Rep.* 21, 4 *L. R. A.* 744.

1. *U. S.*—*Converse v. Hamilton*, 224 *U. S.* 243, 32 *Sup. Ct.* 415, 56 *L. ed.* 749; *Atchison, etc. Co. v. Sowers*, 213 *U. S.* 55, 29 *Sup. Ct.* 397, 53 *L. ed.* 695; *Huntington v. Attrill*, 146 *U. S.* 657, 13 *Sup. Ct.* 224, 36 *L. ed.* 1123. *Ala.*—*Bogan v. Hamilton*, 90 *Ala.* 454, 8 *So.* 186; *Memphis R. R. Co. v. Grayson*, 88 *Ala.* 572, 7 *So.* 122; *Cannon v. Brame*, 45 *Ala.* 262. *Cal.*—*Lewis v. Adams*, 70 *Cal.* 403, 11 *Pac.* 833, 59 *Am. Rep.* 423. *Conn.*—*Freeman's Appeal*, 71 *Conn.* 708, 43 *Atl.* 185; *Bank of North America v. Wheeler*, 28 *Conn.* 433, 73 *Am. Dec.* 683. *Del.*—*Pritchett v. Clark*, 4 *Harr.* 280. *Fla.*—*Sammis v. Wightman*, 31 *Fla.* 10, 12 *So.* 526. *Ga.*—*Thompkins v. Cooper*, 97 *Ga.* 631, 25 *S. E.* 247; *Powell v. Davis*, 60 *Ga.* 70; *McCauley v. Hargroves*, 48 *Ga.* 50. *Ill.*—*Belton v. Fisher*, 44 *Ill.* 32; *Kimmel v. Schultz*, 1 *Ill.* 169. *Ind.*—*Irose v. Balla*, 181 *Ind.* 491, 104 *N. E.* 851; *Baltimore, etc. Co. v. Freeze*, 169 *Ind.* 370, 82 *N. E.* 761; *Kingman v. Paulson*, 126 *Ind.* 507, 26 *N. E.* 393; *Davis v. Lane*, 2 *Ind.* 548, 54 *Am. Dec.* 458. *Ia.*—*Fred Miller Brew. Co. v. Capital*

*Ins. Co.*, 111 *Iowa* 590, 82 *N. W.* 1023, 82 *Am. St. Rep.* 529; *Folsom v. Winch*, 63 *Iowa* 477, 19 *N. W.* 305. *Kan.*—*Chicago, R. I. & P. Ry. Co. v. Campbell*, 5 *Kan. App.* 423, 49 *Pac.* 321. *Ky.*—*Calloway v. Glenn*, 105 *Ky.* 648, 49 *S. W.* 440. *La.*—*Walworth v. Routh*, 14 *La. Ann.* 205; *West Feliciana R. R. Co. v. Thornton*, 12 *La. Ann.* 736. *Me.*—*Lamberton v. Grant*, 94 *Me.* 508, 48 *Atl.* 127, 80 *Am. St. Rep.* 415; *Whiting v. Burger*, 78 *Me.* 287, 4 *Atl.* 694; *Sweet v. Brackley*, 53 *Me.* 346. *Md.*—*Zimmerman v. Helsner*, 32 *Md.* 274; *Duvall v. Fearson*, 18 *Md.* 502; *Wernwag v. Pawling*, 5 *Gill & J.* 500, 25 *Am. Dec.* 317. *Mass.*—*Van Norman v. Gordon*, 172 *Mass.* 576, 53 *N. E.* 267; *Brainard v. Fowler*, 119 *Mass.* 262. *Mich.*—*Wilcox v. Kassick*, 2 *Mich.* 165. *Minn.*—*Cone v. Hooper*, 18 *Minn.* 531. *Miss.*—*Dorsey v. Maury*, 10 *Smed. & M.* 298. *Mo.*—*Tootle v. Buckingham*, 190 *Mo.* 183, 88 *S. W.* 619; *Wernse v. McPike*, 100 *Mo.* 476, 13 *S. W.* 809. *Neb.*—*Tunnicliff v. Fox*, 68 *Neb.* 811, 94 *N. W.* 1032; *C. Mut. F. Ins. Co. v. Hayden*, 61 *Neb.* 454, 85 *N. W.* 443. *Nev.*—*Phelps v. Duffy*, 11 *Nev.* 80. *N. H.*—*Weeks v. Harriman*, 65 *N. H.* 91, 18 *Atl.* 87, 4 *L. R. A.* 744, 23 *Am. St. Rep.* 21; *Wilbur v. Abbott*, 60 *N. H.* 40. *N. J.*—*Barnes & Drake v. Gibbs*, 31 *N. J. L.* 317, 86 *Am. Dec.* 210; *Gulick v. Loder*, 13 *N. J. L.* 68, 23 *Am. Dec.* 711. *N. Y.*—*Baker v. Rand*, 13 *Barb.* 152; *Taylor v. Bryden*, 8 *Johns.* 173. *N. C.*—*Edwards v. Jones*, 113 *N. C.* 453, 18 *S. E.* 500; *Walton v. Sugg*, 61 *N. C.* 98, 93 *Am. Dec.* 580. *Ohio.*—*Burnley v. Stevenson*, 24 *Ohio St.* 474, 15 *Am. Rep.* 621; *Arndt v. Arndt*, 15 *Ohio* 33; *Spencer v. Brockway*, 1 *Ohio* 259, 13 *Am. Dec.* 615. *Okla.*—*Blumle v. Kramer*, 14 *Okla.* 366, 79 *Pac.* 215. *Pa.*—*Guthrie v. Lowrie*, 84 *Pa.* 533; *Wetherill v. Stillman*, 65 *Pa.* 105; *Levison v. Blumenthal*, 25 *Pa. Super.* 55. *R. I.*—*Rathbone v. Terry*, 1 *R. I.* 73. *S. C.*—*Napiere v. Gidiere*, *Speers Eq.* 215. *Tenn.*—*Taylor v. Smith*, 36 *S. W.* 970; *Topp v. Branch Bank*, 2 *Swan* 184. *Tex.*—*Cherry v. Speight*, 28 *Tex.* 503; *Cook v. Thornhill*, 13 *Tex.* 293, 65 *Am. Dec.* 63. *Vt.*—*Blodget v. Jordan*, 6 *Vt.* 580. *Va.*—*Piedmont, etc. L. Ins. Co. v. Ray*, 75 *Va.* 821; *De Ende v. Wilkinson's Admr.*, 2 *Patt. & H.* 663. *W. Va.*—*Henry v. Henry*, 74



d. *Matters and Parties Concluded.*—(I.) *Generally.*—When the court has jurisdiction of the subject matter of the suit and of the parties to it, its judgment is conclusive between the parties and their privies,<sup>2</sup> in accordance with the general rules elsewhere discussed,<sup>3</sup> upon every question directly in issue and determined in the action and upon all facts, the finding of which can be inferred from the judgment itself.<sup>4</sup> The doctrine of merger applies to judgments rendered in courts of a sister state.<sup>5</sup> Hence a judgment rendered on the merits,<sup>6</sup> by a

W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024; Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 531, 29 S. E. 1006; Sayre's Admr. v. Harpold, 33 W. Va. 553, 11 S. E. 16. **Wis.**—Bradley v. Dells Lumb. Co., 105 Wis. 245, 81 N. W. 394; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

The early cases prior to the decision in *Mills v. Duryee*, 7 Cranch (U. S.) 481, 3 L. ed. 411, gave sister state judgments only prima facie effect as evidence. See XVIII, B, 2, a (note).

[a] *As Affected by Citizenship of Parties.*—The conclusiveness of a judgment rendered in one state when relied on in another is in no manner dependent upon the citizenship of the parties to it. It has equal weight whether they are American or foreigners. *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

2. **U. S.**—See *Bigelow v. Old Dominion*, etc. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. **Ill.**—*Leslie v. Bonte*, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62. **Ky.**—*Paul v. Rogers' Admr.*, 5 Mon. 164; *Thomas v. Beckman*, 1 B. Mon. 29. **La.**—*Lampton's Succession*, 35 La. Ann. 418; *Bacon v. Dahlgreen*, 7 La. Ann. 599. **Me.**—*Sweet v. Brackley*, 53 Me. 346. **Mass.**—*Welch v. Burrill*, 223 Mass. 87, 111 N. E. 774; *Washburn v. Pond*, 2 Allen 474. **N. Y.**—*Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152; *Baltimore Steam Packet Co. v. Garrison*, 6 Daly 246; *Muller v. Ferry*, 54 Hun 637, 7 N. Y. Supp. 472, 27 N. Y. St. 357, 4 Silv. 480. **Ohio.**—*Woodward v. Moore*, 13 Ohio St. 136. **Pa.**—*Bennett v. Cadwell's Exrs.*, 70 Pa. 253. **Tenn.**—*Jones v. Jones*, 8 Humph. 705.

3. See generally *supra*, XVII, B, 3, d and e, and the title "Res Judicata."

4. **U. S.**—*Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640;

*Mills v. Duryee*, 7 Cranch 481, 3 L. ed. 411; *Thomas v. Virden*, 160 Fed. 418, 87 C. C. A. 370; *Rose v. Northwest Fire & Marine Ins. Co.*, 67 Fed. 439. **Ala.**—*Lehman v. Glenn*, 87 Ala. 618, 6 So. 44. **Colo.**—*Bonfils v. Gillespie*, 25 Colo. App. 496, 139 Pac. 1054. **Conn.**—*Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185. **Del.**—*Lutz v. Roberts Cotton Oil Co.*, 3 Boyce 227, 82 Atl. 601. **Ind.**—*Lieb v. Lichtenstein*, 121 Ind. 483, 23 N. E. 284; *Union Sav. Bank & Tr. Co. v. Indianapolis Lounge Co.*, 20 Ind. App. 325, 47 N. E. 846. **Ia.**—*Cook v. Steuben County Bank*, 1 G. Gr. 447. **Mass.**—*Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88. **Mo.**—*Davidson v. Peck*, 4 Mo. 438. **N. J.**—*Denver City Waterworks Co. v. American Waterworks Co.*, 81 N. J. Eq. 139, 85 Atl. 826; *Orient Ins. Co. v. Rudolph*, 69 N. J. Eq. 570, 61 Atl. 26. **N. Y.**—*Atlanta Hill Gold Min., etc. Co. v. Andrews*, 120 N. Y. 58, 23 N. E. 987; *Taylor v. Bryden*, 8 Johns. 173; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697. **Ore.**—*United States Fid. & Guar. Co. v. Martin*, 77 Ore. 369, 149 Pac. 1023. **Tenn.**—*Peak v. Ligon*, 10 Yerg. 469. **Va.**—*Buford v. Buford*, 4 Munf. (18 Va.) 241, 6 Am. Dec. 511. **W. Va.**—*Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172, Ann. Cas. 1914B, 1139.

For a full discussion of the extent to which a judgment is available as res judicata, see the title "Res Judicata."

5. *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425; *McCadden v. Slauson*, 96 Tenn. 586, 36 S. W. 378.

6. **U. S.**—*Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425. **Ky.**—*Brand v. Brand*, 116 Ky. 785, 76 S. W. 868, 63 L. R. A. 206. **N. H.**—*Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281. **N. Y.**—*Gould v. Chicago*, etc. R. Co., 61 Hun 625, 15 N. Y. Supp. 895, 40 N. Y. St. 921. **N. C.**—*Carter v. Wilson*, 19 N. C. 276. **Pa.**—*Haws v. Tier-*

court having jurisdiction of both the parties and the subject matter,<sup>7</sup> which merges the original cause of action so as to bar another action thereon in the state in which it was recovered, will bar a subsequent suit on the same cause of action in another state,<sup>8</sup> or the further prosecution of any action which may have been previously instituted thereon in another state.<sup>9</sup>

nan, 53 Pa. 192. **Tenn.**—*Trabue v. R. H. Short*, 5 Coldw. 293.

7. **U. S.**—*Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425. See *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. **Me.**—*Middlesex Bank v. Butman*, 29 Me. 19. **N. H.**—*Rangely v. Webster*, 11 N. H. 299; *Whittier v. Wendell*, 7 N. H. 257. **N. Y.**—*Fitzsimmons v. Marks*, 66 Barb. 333. **Pa.** *Campbell v. Steele*, 11 Pa. 394.  
See *infra*, XVIII, B, 3, d, (II); XVIII, B, 4, b.

8. **U. S.**—*Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425. But see *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 237, 47 L. ed. 366, holding that a judgment in one state taxing the inheritance of a citizen therein does not merge the right of another state to enforce by suit its right to impose a transfer tax upon a part of such inheritance within its borders, although it was covered by the judgment first rendered, and that the latter does not infringe any rule of constitutional law. **Cal.**—*Morgan v. Mutual Benefit Life Ins. Co.*, 16 Cal. App. 85, 116 Pac. 385, 389. **Conn.**—*Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433. **D. C.**—*Slack v. Perrine*, 9 App. Cas. 128. **Ill.**—*Walters v. Walters*, 116 Ill. App. 24. **Ia.**—*Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 N. W. 1023, 22 Am. St. Rep. 529. **Kan.**—*Cackley v. Smith*, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311. **La.** *Denistoun & Co. v. Payne*, 7 La. Ann. 333; *Oakey v. Murphy*, 1 La. Ann. 372. **Me.**—*North Bank v. Brown*, 50 Me. 214, 79 Am. Dec. 609; *Cleaves v. Lord*, 43 Me. 290. **Md.**—*Harryman v. Roberts*, 52 Md. 64. **Mass.**—*Harrington v. Harrington*, 154 Mass. 517, 28 N. E. 903; *Stevens v. Gaylord*, 11 Mass. 256. **Mich.**—*Niles v. Lee*, 169 Mich. 474, 135 N. W. 274. **Mo.**—*Grimm v. Barrington*, 109 Mo. App. 35, 84 S. W. 357. **N. H.**—*Lomas v. Hilliard*, 60 N. H. 148; *Child v. Eureka Powder Works*, 45 N. H. 547. **N. J.**—*Barnes & Drake*

*v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210. *Compare, Kennealy v. Leary*, 67 N. J. L. 435, 51 Atl. 475. **N. Y.**—*Gray v. Richmond Bicycle Co.*, 167 N. Y. 348; 60 N. E. 663, 82 Am. St. Rep. 720; *Merritt v. Fowler*, 76 Hun 424, 27 N. Y. Supp. 1047. **Ohio.**—*Sloo v. Lea*, 18 Ohio 279. **Pa.**—*Evans v. Cleary*, 125 Pa. 204, 17 Atl. 440, 11 Am. St. Rep. 886; *Hogg v. Charlton*, 25 Pa. 200; *Baxley v. Linah*, 16 Pa. 241, 55 Am. Dec. 494, 13 L. R. A. 55; *Downing v. Phillips*, 4 Yeates 274; *Brace v. Johnson*, 19 Pa. Dist. 595. **S. C.**—*Napier v. Gidiere, Speers Eq.* 215, 40 Am. Dec. 613. **Tenn.**—*McCadden v. Slau-son*, 96 Tenn. 586, 36 S. W. 378. **Vt.** *Green v. Starr*, 52 Vt. 426. **W. Va.** *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172, Ann. Cas. 1914B, 1139.

But see *Hays v. Cage*, 2 Tex. 501; *Drane v. Gunymere*, 2 Pos. Unrep. Cas. 496; *Davis v. Morris' Exrs.*, 76 Va. 21.

[a] "It is not the note or account sued on in the state from which the transcript comes, but the judgment rendered upon it, that is the plaintiff's cause of action," where suit has been brought and judgment rendered in another state. *Brace v. Johnson*, 19 Pa. Dist. 595.

[b] But under a statute permitting a civil arrest notwithstanding the previous recovery of a judgment on the debt in another state, an action and an arrest may be maintained upon the previous judgment or the original cause of action. *Pitt v. Freed*, 78 Hun 614, 28 N. Y. Supp. 863, 60 N. Y. St. 247.

9. **Ala.**—*Memphis, etc. R. Co. v. Grayson*, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Kan.**—*Union Pac. R. Co. v. Baker*, 5 Kan. App. 253, 47 Pac. 563. **Me.**—*Whiting v. Burger*, 78 Me. 287, 4 Atl. 694; *North Bank v. Brown*, 50 Me. 214, 79 Am. Dec. 609. **Md.** *United States Bank v. Merchants' Bank*, 7 Gill 415. **Mass.**—*Graef v. Bernard*, 162 Mass. 300, 38 N. E. 503. **N. H.**—*Child v. Eureka Powder Works*,

Under the foregoing rules, a judgment recovered in another state merges the cause of action sued on, and is a bar to an action on any claims or items, which either were or might and should have been, adjudicated therein,<sup>10</sup> and is conclusive of all defenses which actually were, or might and should have been set up therein.<sup>11</sup> But such judgment is not conclusive of a counterclaim or set-off which by the laws of that state the defendant was not required to set up in such action,<sup>12</sup> nor does a judgment in a proceeding in rem in one state bar an action in personam<sup>13</sup> or against other property<sup>14</sup> in another state, upon the same obligation for any part of the indebtedness not satisfied by the previous proceedings.

A judgment on the merits against the plaintiff in one state, will bar another action against the same defendant on the same cause of action in another state.<sup>15</sup>

**Judgment on Judgment.** — The cases are in conflict as to whether the unsatisfied judgment rendered in an action on a judgment previously obtained in another state merges the latter so as to bar an action thereon, or prevent the enforcement thereof in the state where it was rendered. On the ground that the two securities or indebtedness are of equal degree, some courts hold that there is no merger in such case.<sup>17</sup> The

45 N. H. 547; *Rogers v. Odell*, 39 N. H. 452. **R. I.**—*Paine v. Schenectady Ins. Co.*, 11 R. I. 411. **Vt.**—*McGilvray v. Avery*, 30 Vt. 538.

10. *Montford v. Hunt*, 3 Wash. 28, 17 Fed. Cas. No. 9,725; *Baker v. Rand*, 13 Barb. (N. Y.) 152. *Compare*, *Bailey v. O'Connor*, 19 N. H. 202.

11. **Cal.**—*Meredith v. Sta. Clara Min. Assn.*, 56 Cal. 178. **N. Y.**—*Patrick v. Shaffer*, 94 N. Y. 423. **N. C.**—*Morris v. Burgess*, 116 N. C. 40, 21 S. E. 27.

12. **Ala.**—*Roach v. Privett*, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819. **Ia.**—*Price v. Macomber*, 163 Iowa 406, 144 N. W. 1020; *Folsom v. Winch*, 63 Iowa 477, 19 N. W. 305. **La.**—*Glass v. Wheeliss*, 24 La. Ann. 397; *McFarland v. White*, 13 La. Ann. 394, 396. **Vt.**—*See Carver v. Adams*, 38 Vt. 500, holding that a statute requiring a defendant to set off a counter-claim is local in its operation, and will not bar an action on such counter-claim in another state.

13. See generally *supra*, XVII, B, 3, b, (I).

[a] A judgment foreclosing a mortgage against a non-resident, without provision for any personal judgment because of failure to get personal service, will not bar an action against defendant in the state of his domicile to recover for the deficiency. *Spencer v. Stoo*, 8 La. 290; *Howard v. Me-*

*Naught*, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837.

14. *Jones v. Gerock*, 59 N. C. 190; *Beall's Admr. v. Taylor's Admr.*, 2 Gratt. (43 Va.) 532, 44 Am. Dec. 398.

15. **Ia.**—*Scott v. Luther*, 44 Iowa 570. **Me.**—*Sweet v. Brackley*, 53 Me. 346. **Mass.**—*Green v. Sanborn*, 150 Mass. 454, 23 N. E. 224. **N. J.**—*Brown v. Lexington, etc. R. Co.*, 13 N. J. Eq. 191. **N. Y.**—*Baker v. Rand*, 13 Barb. 152. **Pa.**—*Sevison v. Blumenthal*, 9 Kulp 392. **Va.**—*Low v. Mussey*, 41 Vt. 393.

**Necessity for identity of causes of action**, see *supra*, XVII, B, 2, e, (I).

17. **Cal.**—*Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 126 Pac. 483. **Colo.**—*Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 537, 48 Pac. 809. **N. H.**—*Weeks v. Pearson*, 5 N. H. 324. **N. J.**—*See Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400. **N. Y.**—*Andrews v. Smith*, 9 Wend. 53; *Bates v. Lyons*, 7 Paige 85, expressly overruling the contrary dictum in *Mitchell v. Bunch*, 2 Paige 620.

[a] **Receivership proceedings** against the judgment debtor may be instituted in a state where the judgment is procured, notwithstanding another judgment has been obtained thereon in another jurisdiction. *Armour Bros. Bkg. Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100.



contrary view proceeds upon the ground that the allowance of a new suit would entail a vexatious encouragement of litigation.<sup>18</sup> But it has been held that an action may be brought in the state of the rendition of the first judgment on the foreign judgment recovered on the first.<sup>19</sup>

(II.) **Defendants Non-Resident or Not Served.**—(A.) **IN GENERAL.** A judgment in personam against a non-resident without actual service or voluntary appearance but based on constructive service by publication will not be given force and credit in the courts of another state,<sup>20</sup> but this does not prevent due recognition being given to a

[b] **A creditor's bill** may be based upon the first judgment, even after a judgment has been obtained thereon in another state. *Bates v. Lyons*, 7 Paige (N. Y.) 85. And see *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809.

[c] "A second judgment obtained upon the first is of no higher security than the first. Both should stand until the debt which is evidenced by them is fully paid off and satisfied. The first judgment is neither satisfied, merged, nor extinguished by a second judgment, on the same cause of action, or by an affirmation thereof by a superior court." *Armour Bros. Bkg. Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100.

[d] "The reason why a former recovery for the same cause is a bar to a second action is, that the cause of action has passed in rem judicatum, and is determined by the judgment. But this reason does not exist where there has been a recovery in another state in debt upon a judgment rendered here. For one judgment being of as high a nature as another, a judgment in another state, cannot extinguish or determine a judgment rendered here." *Weeks v. Pearson*, 5 N. H. 324.

[e] "We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a cause of action is merged in the judgment." *Springs v. Pharr*, 131 N. C. 191, 193, 42 S. E. 590.

18. *Gould v. Hayden*, 63 Ind. 443, 450.

[a] In *Gould v. Hayden*, 63 Ind. 443, 450, the court said: "We are aware that there are respectable authorities, which are in conflict with our conclusion in this case; but it has seemed to us, after a careful consideration of the main question in-

volved, that our decision thereof is in harmony with and supported by the weight of modern authority, that it is just and right in principle, and that, as a rule of law, it will best subserve and protect the rights of all parties."

19. *Merritt v. Fowler*, 76 Hun 424, 27 N. Y. Supp. 1047.

20. **U. S.**—*Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. **Ark.**—*Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545. **Cal.**—*Kane v. Cook*, 8 Cal. 449. **Conn.**—*Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345, 41 Atl. 1057; *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562. **Del.** *Mitchell v. Garrett*, 5 Houst. 34. **Ga.** *Ponce v. Underwood*, 55 Ga. 601. **Ill.** *Zepp v. Hager*, 70 Ill. 223; *Coe v. Garvey*, 130 Ill. App. 221. **Ky.**—*Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Williams v. Preston*, 3 J. J. Marsh. 600. **La.**—*Feltus v. Starke*, 12 La. Ann. 798. **Md.**—*Garner v. Garner*, 56 Md. 127. **Mass.**—*Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747. **Mich.**—*Howard v. Coon*, 93 Mich. 442, 53 N. W. 513; *Tyler v. Peatt*, 30 Mich. 63. **Minn.**—*Boyle v. Musser-Sauntry Land, etc. Co.*, 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 538. **Mo.**—*Western Assur. Co. v. Walden*, 238 Mo. 49, 141 S. W. 595; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502; *Wilson v. St. Louis, etc. R. Co.*, 108 Mo. 588, 599, 18 S. W. 286; *Abbott v. Sheppard*, 44 Mo. 273; *Smith v. McCutcheon*, 38 Mo. 415. **N. Y.**—*Ward v. Boyce*, 152 N. Y. 191, 46 N. E. 180; *In re James*, 146 N. Y. 78, 40 N. E. 876; *White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482. **Ohio.**—*Arndt v. Arndt*, 15 Ohio 33. **Pa.**—*Scott v. Noble*, 72 Pa.

judgment confessed on warrant of attorney in the state of its execution and where it is made payable, though the defendant is a non-resident.<sup>21</sup>

The mere seizure of property of a non-resident defendant will not authorize the rendition of a personal judgment against him which the courts elsewhere would enforce.<sup>22</sup>

(B.) JOINT DEBTORS OR TORT-FEASORS. — A personal judgment against two or more joint debtors upon notice served upon one, though authorized by the laws of the state where rendered has no operation outside that state as against the defendants not served, and who did not appear,<sup>23</sup> where judgment recovered in an action against joint debtors in which only one is served, the other over whom jurisdiction was not obtained, cannot plead such recovery in bar of a subsequent action against him in another state;<sup>24</sup> nor will a recovery in one state against a joint debtor residing therein, bar an action in another state against one of the debtors residing therein.<sup>25</sup> A judgment in favor of one joint tort-feasor in one state will not bar an action in another state against another tort-feasor who was not served and did not appear in the first action, regardless of the effect of the judgment in the state where rendered.<sup>26</sup>

115, 13 Am. Rep. 663. **Vt.**—Price v. Hickok, 39 Vt. 292; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340.

21. Vennum v. Holmberg, 51 Colo. 306, 117 Pac. 169.

22. **U. S.**—Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Thompson v. Emmert, 4 McLean 96, 23 Fed. Cas. No. 13,953; Lincoln v. Tower, 2 McLean 473, 15 Fed. Cas. No. 8,355. **Ala.** Joseph & Bros. Co. v. Hoffman & McNeill, 173 Ala. 568, 56 So. 216. **Ia.** Melhop v. Doane & Co., 31 Iowa 397. **Kan.**—Hes v. Elledge, 18 Kan. 296. **Mo.**—Sevier v. Roddie, 51 Mo. 580. **N. Y.**—Bates v. Delavan, 5 Paige 299; Kilburn v. Woodworth, 5 Johns. 37, 41, 4 Am. Dec. 321; Robinson v. Ward's Exrs., 8 Johns. 86, 5 Am. Dec. 327. **Ohio.**—Arndt v. Arndt, 15 Ohio 33. **Tex.**—Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261.

23. **U. S.**—Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Public Works v. Columbia College, 17 Wall. 521, 527, 21 L. ed. 687; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648. **Ark.** Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545. **Ia.**—Newlon v. Heaton, 42 Iowa 593. **Mass.**—Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Odom v. Denny, 16 Gray 114; Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56. **Pa.**—Rogers v. Burns, 27 Pa. 525;

Steel v. Smith, 7 Watts & S. 447, 451. **Va.**—Bowler v. Huston, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673.

See *supra*, XVII, B, 4, b, (I).

[a] "A member of a partnership firm, residing in one state, cannot be rendered personally liable in a suit brought in another state against him and his co-partners, although the latter be duly served with process, and although the law of the state where the suit is brought authorizes judgment to be rendered against him." Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271, and see to the same effect, Clein v. Diamond, 17 Ga. App. 652, 87 S. E. 1101.

[b] As *prima facie* evidence against defendant not served, see Swift v. Stark, 2 Ore. 97.

24. **Mich.**—Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90. **N. Y.** Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254; Reed v. Girty, 6 Bosw. 567. **Pa.**—Campbell v. Steele, 11 Pa. 394.

25. Dennett v. Chick, 2 Greenl. (Me.) 191, 11 Am. Dec. 59; Brown v. Birdsall, 29 Barb. (N. Y.) 549.

26. Bigelow v. Old Dominion, etc. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009, since there was no jurisdiction as to the second tort-feasor, who was not privy to the first action.

(C.) FOREIGN CORPORATION. — A judgment against a foreign corporation doing business in the state based on service of process on an agent appointed to receive service is accorded recognition in another state.<sup>27</sup>

e. *Extraterritorial Effect on Property*. — The full faith and credit clause does not extend the jurisdiction of the courts of one state to property situated in another but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit. A decree as to the title to land located in another state will not be recognized beyond the jurisdiction in so far as it attempts to directly affect the title,<sup>28</sup> nor will a deed executed by an officer of the court pursuant to such a decree, be recognized.<sup>29</sup> The court, however, acting in personam

27. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451; *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 209.

[a] Service on one not an agent of the corporation does not confer jurisdiction so as to entitle the judgment to respect elsewhere. *Famobrosis Soc. v. Royal Benefit Soc.*, 166 App. Div. 593, 152 N. Y. Supp. 84.

[b] *Agent Casually Within the Jurisdiction*. — Service on the managing agent of a foreign corporation who was passing through the state is void where there was no place of business, property or agent in the state. Such judgment is not due process of law and will not be enforced extraterritorially. U. S. — See *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517. Mich. — *Matthews v. Montreal Mining Co.*, 183 Mich. 541, 150 N. W. 127. N. H. — *Hochstein v. James W. Hill Co.*, 76 N. H. 293, 82 Atl. 171. N. J. — *Moulin v. Trenton Mut. Life Ins. Co.*, 24 N. J. L. 222.

As to actions against foreign corporations, see 5 STANDARD PROC. 724.

28. U. S. — *Hood v. McGehee*, 237 U. S. 611, 35 Sup. Ct. 718, 59 L. ed. 1144; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. ed. 1028; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640; *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437; *Lynde v. Columbus, etc. R. Co.*, 57 Fed. 993. Conn. — *Clark's Appeal*, 70 Conn. 195, 39 Atl. 155. Del. — *Pritchard v. Henderson*, 2 Penne. 553, 47 Atl. 376. Ill. — *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348. Ind. — *Cooper v. Hayes*, 96 Ind. 386; *Billan v. Hereklebrath*, 23 Ind. 71. Ia.

*Blackman v. Wright*, 96 Iowa 541, 65 N. W. 843. Ky. — *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168. Mich. — *Niles v. Lee*, 169 Mich. 474, 135 N. W. 274. N. J. — *Davis v. Headley*, 22 N. J. Eq. 115. Ohio. — *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Price v. Johnston*, 1 Ohio St. 390. Pa. — *Smith v. Eyre*, 149 Pa. 272, 24 Atl. 288; *Pittsburgh, etc. R. Co.'s Appeal*, 8 Sad. 83, 4 Atl. 385. Tex. — *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210. W. Va. — *Piedmont Coal, etc. Co. v. Green*, 3 W. Va. 54, 98 Am. Dec. 799.

[a] A probate decree cannot affect the title to lands situated in another state. Del. — *Pritchard v. Henderson*, 2 Penne. 553, 47 Atl. 376; *Pennell's Lessee v. Weyant*, 2 Harr. 501. Ill. — *McGarvey v. Darnall*, 134 Ill. 367, 25 N. E. 1005. N. J. — *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375. Tex. — *Acklin v. Paschal*, 48 Tex. 147. W. Va. — *Hull's Admr. v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

[b] Where children adopted in other states are excluded by the statute of descents of the state where they claim deceased's property, a refusal to allow them to inherit is not a denial of the full faith and credit clause. *Hood v. McGehee*, 237 U. S. 611, 35 Sup. Ct. 718, 59 L. ed. 1144.

29. U. S. — *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437. Ky. — *Page v. McKee*, 3 Bush 135, 96 Am. Dec. 201. N. J. — *Davis v. Headley*, 22 N. J. Eq. 115. Ohio. — *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

[a] A commissioner's deed to real estate made in Washington pursuant to a decree of that jurisdiction, con-



upon defendant, may compel him to comply with its decree affecting title to land elsewhere situated, and tribunals of other states will give faith and credit to the proceeding so far as it operates in personam.<sup>30</sup>

f. *Judgments Operative in Other States.*—(I.) **Judgments of Inferior Courts.**—Judgments of justices of the peace and other inferior tribunals of sister states, when rendered by courts having jurisdiction over the parties and the subject-matter, are entitled to the same sanctity as the judgments of courts of superior and general jurisdiction,<sup>31</sup> though in some of the earlier cases judgments of courts not of record were denied full faith and credit because the act of congress providing the method of authentication was not broad enough to include them.<sup>32</sup>

veying real estate in Nebraska, does not operate to convey the legal title, since the court rendering the decree had no jurisdiction of the res. *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65.

30. **U. S.**—*Watkins v. Holman's Lessee*, 16 Pet. 25, 10 L. ed. 873; *Massie v. Watts*, 6 Cranch 148, 3 L. ed. 181. **Fla.**—*Winn v. Strickland*, 34 Fla. 610, 16 So. 606. **Ia.**—*Blackman v. Wright*, 96 Iowa 541, 65 N. W. 843. **Mich.** *Niles v. Lee*, 169 Mich. 474, 135 N. W. 274. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. **N. Y.** *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

[a] "The territorial limitation of the jurisdiction of courts of a State over property in another State has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity having authority to act upon the person may indirectly act upon real estate in another State, through the instrumentality of this authority over the person. Whatever it may do through the party it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to effect it with liens or burdens. . . . In *French, Trustee v. Hay*, 22 Wall. 250, 252, this court said that a court of equity having jurisdiction in personam has power to require a defendant 'to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.' " *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65.

31. **Ala.**—*Forbes v. Davis*, 187 Ala.

71, 65 So. 516. **Ark.**—*Glass v. Blackwell*, 48 Ark. 50, 2 S. W. 257. **Cal.** *Banister v. Campbell*, 138 Cal. 455, 71 Pac. 504, 703. **Conn.**—*Bissell v. Edwards*, 5 Day 363, 5 Am. Dec. 166. **Ill.**—*Cavanaugh v. Morris*, 160 Ill. App. 55. **Ia.**—*Morrison Mfg. Co. v. Rimmerman*, 127 Iowa 719, 104 N. W. 279; *Danforth v. Thompson*, 34 Iowa 243; *Gay v. Lloyd*, 1 G. Gr. 78, 46 Am. Dec. 499. **Kan.**—*Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344, 44 Am. St. Rep. 282. **Ky.**—See *Bryant v. Shute's Exr.*, 147 Ky. 268, 144 S. W. 28. **Mo.**—*Howland v. Chicago, R. I. & P. Ry.*, 134 Mo. 474, 36 S. W. 29. **N. J.**—*Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903. **N. C.**—*Ludwick v. Fair*, 29 N. C. 422. **Ohio.** *Stockwell v. Coleman*, 10 Ohio St. 33; *Silver Lake Bank v. Harding*, 5 Ohio 545. **Pa.**—*Rowley v. Carron*, 117 Pa. 52, 11 Atl. 435; *Kean v. Rice*, 12 Serg. & R. 203. **S. C.**—*Lawrence v. Gaultney, Cheves* 7. **Tenn.**—*J. S. Menken & Co. v. Brinkley*, 94 Tenn. 721, 31 S. W. 92. **Tex.**—*Beal v. Smith*, 14 Tex. 305. **Vt.**—*Carpenter v. Pier*, 30 Vt. 81, 73 Am. Dec. 288; *Starkweather v. Loomis*, 2 Vt. 573.

32. **Del.**—*Graham v. Grigg & Meredith*, 3 Harr. 408. **Ky.**—*Wood v. Wood*, 78 Ky. 624, 1 Ky. L. Rep. 358; *McElfratrik v. Taft & Son*, 10 Bush 160. **Mass.**—*Warren v. Flagg*, 2 Pick. 448. **N. H.**—*Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281 (because not within the act of congress as to mode of authentication); *Robinson v. Prescott*, 4 N. H. 450.

As to whether the act of congress providing the method of authenticating such judgments includes courts not of record, see 10 ENCY. OF EV. 1019, et seq.

(II.) **Decrees in Equity.** — Decrees in equity, as well as judgments at law, are included within the constitutional and statutory provisions and will be accorded full faith and credit in other states.<sup>33</sup>

(III.) **Probate Decrees.** — The rule extending full faith and credit to judgments and decrees of sister states applies to probate decrees of every kind.<sup>34</sup>

(IV.) **Attachment and Garnishment.** — A judgment in attachment or garnishment proceedings, conducted in accordance with the laws of the jurisdiction where the judgment was rendered, will be enforced in another state,<sup>35</sup> and when such a judgment is rendered against a

33. **U. S.**—*Nations v. Johnson*, 24 How. 195, 16 L. ed. 628. **Fla.**—*Winn v. Strickland*, 34 Fla. 610, 16 So. 606. **Ia.**—*Blackman v. Wright*, 96 Iowa 541, 65 N. W. 843. **Kan.**—*McLain v. Parker*, 88 Kan. 717, 129 Pac. 1140. **Ky.** *Fletcher v. Ferrel*, 9 Dana 372, 35 Am. Dec. 143. **Me.**—*McKim v. Odom*, 12 Me. 94. **Mass.**—*Howard v. Howard*, 15 Mass. 196. **Mich.**—*Niles v. Lee*, 169 Mich. 474, 135 N. W. 274. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. **N. Y.**—*Dobson v. Pearce*, 12 N. Y. 156, 1 Ab. Pr. 97, 62 Am. Dec. 152. **Tenn.**—*Hunt v. Lyle*, 6 Yerg. 412. **Tex.**—*Patrick v. Gibbs*, 17 Tex. 275.

34. **Ala.**—*Humes v. Bernstein*, 72 Ala. 546; *Brock's Admr. v. Frank*, 51 Ala. 85. **Ga.**—*Thomas v. Morrisett*, 76 Ga. 384. **Ill.**—*Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227. **Ind.**—*Cooley v. Kelley* (Ind. App.), 96 N. E. 638. **Ia.** *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349. **Mo.**—*Napton v. Leaton*, 71 Mo. 358; *Haile v. Hill*, 13 Mo. 612. **Ohio.**—*In re Crawford*, 21 Ohio Cir. Ct. 554. **Ore.**—*Wells v. Neff*, 14 Ore. 66, 12 Pac. 84, 88. **Tenn.**—*Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100.

See more fully the title "**Probate Courts.**"

[a] **Lack of jurisdiction** may be shown. *Dickinson v. Ridgely*, 188 Ill. App. 252; *Baker v. Baker*, *Eccles & Co.*, 162 Ky. 683, 173 S. W. 109. See *infra*, XVIII, B, 4, b.

35. **U. S.**—*Baltimore & O. Railroad v. Hostetter*, 240 U. S. 620, 36 Sup. Ct. 475, 60 L. ed. 829; *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. ed. 426; *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. ed. 1144; *Lyon v. Ber-*

*tram*, 20 How. 149, 15 L. ed. 847. **Ala.** *Joseph & Bros. Co. v. Hoffman & McNeill*, 173 Ala. 568, 56 So. 216; *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484. **Ark.**—*St. Louis S. W. R. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 993. **Ga.**—*Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662. **Ill.**—*Allen v. Watt*, 79 Ill. 284; *Baltimore & O. S. W. R. Co. v. McDonald*, 112 Ill. App. 391. **Ind.**—*Baltimore & Ohio R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761; *Baltimore & O., etc. Ry. Co. v. Hollenbeck*, 161 Ind. 452, 69 N. E. 136; *Baltimore & Ohio S. W. R. Co. v. Adams*, 159 Ind. 688, 68 N. E. 43, 60 L. R. A. 396; *Chicago, St. L. & P. Ry. Co. v. Meyer*, 117 Ind. 563, 19 N. E. 320; *Pittsburgh, C. C. & St. L. Co. v. Cox*, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. Rep. 377. **Ia.**—*Steltzer v. Chicago, M. & St. P. Ry. Co.*, 134 N. W. 573; *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385. **Ia.**—*Williams v. St. Louis, etc. Ry. Co.*, 109 La. 90, 33 So. 94. **Md.**—*Cole v. Flitcraft*, 47 Md. 312. **Mass.**—*Bayer v. Lovelace*, 204 Mass. 327, 90 N. E. 538; *Barrow v. West*, 23 Pick. 270; *Meriam v. Rundlett*, 13 Pick. 511. **Mo.**—*Western Assur. Co. v. Walden*, 238 Mo. 49, 141 S. W. 595. **Neb.**—*Hadacheck v. Chicago, B. & Q. R. Co.*, 74 Neb. 385, 104 N. W. 878; *Chicago, B. & Q. Ry. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475, 28 Am. St. Rep. 534. **N. J.**—*National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663. **N. Y.** *Williams v. Ingersoll*, 89 N. Y. 508; *Robarge v. Central Vermont R. R. Co.*, 18 Abb. N. C. 363; *Gray v. Delaware, etc. Canal Co.*, 5 Abb. N. C. 131; *Drake v. De Silva*, 124 App. Div. 95, 108 N. Y. Supp. 1039. **N. C.**—*Wright v. Southern R. Co.*, 141 N. C. 164, 53 S. E. 831. **Pa.**—*Morgan v. Neville*, 74 Pa. 52. **R. I.**—*Cross v. Brown*,

unsuccessful upon constructive service, it is valid and binding to the extent of the property previously seized in the hands of persons within the jurisdiction.<sup>32</sup>

(V.) **Judgments Upon Confession.**—A money judgment rendered in another state upon confession will be given recognition under the full faith and credit clause.<sup>37</sup> The rule applies to judgments rendered without process but upon the authorization of a warrant of attorney to appear and confess judgment for defendant.<sup>38</sup> providing the author-

19 R. I. 220, 32 Atl. 147. **Tex.**—Berry v. Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

[a] Notice to the employe is not necessary in a garnishment proceeding under the laws of Virginia. Where an employe residing in West Virginia, was given no notice of proceedings in Virginia to garnish his wages, the ensuing judgment is nevertheless valid, and may be pleaded by the employer in a suit brought by the employee in West Virginia to collect the wages. *Baltimore & Ohio R. R. v. Hostetter*, 240 U. S. 620, 36 Sup. Ct. 475, 60 L. ed. 829.

[b] If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in the state, and process be personally served upon him therein the court acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, provided the garnishee could himself be sued by his creditor in that state. *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023.

[c] **Jurisdiction To Garnish.**—Garnishment may be made in any state where the garnishee may be found, and the judgment against the garnishee must be given full faith and credit in every other state. *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023.

[d] **Seizure of Goods From Carrier.** In a suit brought against a carrier for the value of goods shipped, the carrier may plead a judgment of another state by virtue of which the goods were seized from the carrier's possession and sold; the carrier being free from fraud or collusion. *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525.

36. **U. S.**—*Green v. Van Buskirk*, 7 Wall. 180, 19 L. ed. 100. **Del.**—*Lea v. Roberts Cotton Oil Co.*, 3 Boyce 227, 82 Atl. 601. **Ga.**—*Molyneux v. Sey-*

*mour*, 30 Ga. 440, 76 Am. Dec. 662. **Ia.**—*Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385; *Melhop v. Doane & Co.*, 31 Iowa 397, 7 Am. Rep. 147. **Mass.**—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Mo.**—*Western Assur. Co. v. Walden*, 238 Mo. 49, 141 S. W. 595. **Neb.**—*Hadacheck v. Chicago, B. & Q. R. Co.*, 74 Neb. 385, 104 N. W. 878. **Pa.**—*Moore v. Spackman*, 12 Serg. & R. 287.

As to the validity of a judgment in personam in such proceedings, see *supra*, XVIII, B, 3, d, (II), (A).

37. *Barber Asphalt Paving Co. v. Griffin Roofing Co.*, 150 N. Y. Supp. 1075; *Tourtelot v. Booker* (Tex. Civ. App.), 160 S. W. 293.

38. **U. S.**—*National Exchange Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. ed. 184. **Colo.**—*Vennum v. Holmberg*, 51 Colo. 306, 117 Pac. 169. **Ind.**—*Irose v. Balla*, 181 Ind. 491, 104 N. E. 851. **Mass.**—*Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304; *Henry v. Estes*, 127 Mass. 474. **Mo.**—*First Nat. Bank v. White*, 220 Mo. 717, 120 S. W. 36; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502; *Jarrett v. Sippely*, 175 Mo. App. 197, 157 S. W. 975; *Central Pennsylvania Conference, etc. v. Larue*, 164 Mo. App. 93, 148 S. W. 152. **N. J.**—*Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903; *Shelmerdine v. Lippincott*, 69 N. J. L. 82, 54 Atl. 237; *Hendrickson v. Fries*, 45 N. J. L. 555. **N. Y.**—*Malone v. Becker*, 82 Misc. 438, 143 N. Y. Supp. 1095.

[a] Where entered by the clerk in vacation such a judgment is just as binding as though the authority were exercised by the court acting in term time. *Vennum v. Holmberg*, 51 Colo. 306, 117 Pac. 169.

[b] The clerk's power must be given by the instrument. Thus in *Grover & Baker S. M. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed.



ity to thus enter the judgment is strictly pursued.<sup>39</sup>

g. *Method of Enforcement of Judgment.*—Since the sister state judgment does not operate directly upon property of the forum, it is not there enforceable by means of process upon the judgment itself,<sup>40</sup> nor generally by a creditor's bill.<sup>41</sup> Its benefits can be secured only by using it as the basis of an action,<sup>42</sup> or a defense, or as evidence upon some issue to which it is relevant.<sup>43</sup>

670, it was held that a power to confess judgment given to "any attorney of any court of record" was not authority to a prothonotary in Pennsylvania to enter such confession, which would be recognized outside Pennsylvania, although authorized by the laws of that state.

[c] The instrument must clearly show the sum to be confessed. As was said in *Central Pennsylvania Conference Educational Society v. La Rue*, 164 Mo. App. 93, 148 S. W. 152: "While a prothonotary in a foreign state may enter a judgment as by confession, when duly authorized in the writing evidencing the defendant's debt, and such judgment will be given full faith and credit in a suit upon it in this state (*Randolph v. Keiler*, 21 Mo. 557; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521), yet, if the duty of the prothonotary cannot be ascertained from the provisions of the obligatory paper, and the precise sum for which judgment should be rendered cannot be ascertained from the paper, and an inquiry aliunde the paper is required, it must pass under judicial scrutiny and direction and cannot be acted upon by the prothonotary."

[d] *Affidavit Wanting or Defective.* As between the parties a confession of judgment without affidavit or upon defective affidavit is good and will be enforced in another state. *Irose v. Balla*, 181 Ind. 491, 104 N. E. 851.

39. **U. S.**—*Grover & Baker S. M. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed. 670; *National Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. ed. 184. **Ill.**—*Cavanaugh v. Morris*, 160 Ill. App. 55. **Mo.**—*First Nat. Bank v. White*, 220 Mo. 717, 120 S. W. 36; *Hester v. Frink*, 189 Mo. App. 40, 176 S. W. 481; *Central Pennsylvania Conference, etc. v. La Rue*, 164 Mo. App. 93, 148 S. W. 152. **N. J.**—*Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903.

[a] Where entry in favor of the holder of a promissory note was authorized by the instrument, it could be shown in an action upon the judgment elsewhere that appearance was by one not a holder. *National Ex. Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. ed. 185.

[b] Power given to an attorney only to confess the judgment will not authorize the entry of such judgment without the appearance of an attorney. *Grover & Baker, etc. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed. 670.

40. **U. S.**—*Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; *Chicago, etc. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 27 L. ed. 636. **Fla.**—*Carter v. Bennett*, 6 Fla. 214. **Ill.**—*Leathe v. Thomas*, 109 Ill. App. 434, 475; *Dunham v. Dunham*, 57 Ill. App. 475. **La.**—*Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 So. 641; *Turley v. Dreyfus*, 35 La. Ann. 510. **Me.**—*Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415. **Md.**—*Zimmerman v. Helser*, 32 Md. 274. **Mass.**—*Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389; *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657. **Mo.**—*Barney v. White*, 46 Mo. 137. **Neb.**—*Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478. **N. J.**—*Elizabeth Town Sav. Inst. v. Gerber*, 34 N. J. Eq. 130; *Chew v. Brumagim*, 21 N. J. Eq. 520. **N. C.**—*McLure v. Beneeni*, 37 N. C. 513, 40 Am. Dec. 437. **Tex.**—*Jones v. Boulware*, 39 Tex. 367.

41. See 6 STANDARD PROC. 183, n. 32.

42. See cases in preceding notes.

As to actions on judgments, see the title "Judgments and Decrees, Enforcement of," and *supra*, XVII, D.

43. **Fla.**—*Carter v. Bennett*, 6 Fla. 214. **La.**—*Turley v. Dreyfus*, 35 La. Ann. 510. **Neb.**—*Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478. **N. J.**

h. *Equitable Relief Against*. — A ground of equitable relief against a judgment available where the judgment is rendered is available in another state,<sup>44</sup> providing the courts of the latter state are not wanting in jurisdiction to enforce the particular remedy.<sup>45</sup> Thus if fraud in procuring the judgment authorizes the courts of the sister state to restrain its enforcement, it will likewise be restrained in the courts of the state where it is sought to be enforced.<sup>46</sup>

4. *Impeachment of Judgment*. — a. *Grounds in General*. — The grounds upon which judgments may be impeached, have been elsewhere discussed with respect to judgments generally,<sup>47</sup> and these grounds, with some limitations, as will hereafter appear, are equally available in case of judgments of sister states.

b. *Jurisdictional Inquiries*. — (I.) *Generally*. — The requirement that full faith and credit be given to a judgment of a sister state does not preclude an inquiry into the jurisdiction of the court rendering the same. It is always permissible to impeach the judgment by showing that the court in which it was recovered had no jurisdiction of the parties or the subject-matter or, when it assumes the character of an action or proceeding in rem, that jurisdiction of the res was

Elizabeth Town Sav. Inst. v. Gerber, 34 N. J. Eq. 130. N. C.—McLure v. Benceni, 37 N. C. 513, 40 Am. Dec. 437.

44. Ill.—Allen v. Watt, 79 Ill. 284. N. J.—Davis v. Headley, 22 N. J. Eq. 115. W. Va.—Roller v. Murray, 71 W. Va. 161, 76 S. E. 172.

As to equitable relief generally, see *supra*, XV, and the title "Judgments and Decrees, Enforcement of."

45. Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

46. Conn.—Stanton v. Embry, 46 Conn. 65; Pearce v. Olney, 20 Conn. 544. Ill.—Allen v. Watt, 79 Ill. 284; Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442. Mo.—Payne v. O'Shea, 84 Mo. 129; Ward v. Quinlwin, 57 Mo. 425. Neb.—Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365. N. J.—Davis v. Headley, 22 N. J. Eq. 115. N. Y. Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720. Tenn.—Winchesfer v. Jackson, 3 Hayw. 305; Wilson v. Robertson, 1 Overt. 266. Tex.—Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

[a] *Preventing a Meritorious Defense*. — Fraudulent conduct of plaintiff in violation of an agreement to dismiss the suit, whereby the defendant was deprived of a meritorious defense, if ground for restraining the enforcement of the judgment in the state where rendered, will justify the courts of a

different state in restraining it. Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728. Upon this subject the court in this case said: "Now, it is clear that the judgments of a sister state are entitled to no more respect or credit than is given to the domestic judgments of the state where they are afterwards sought to be enforced, and, as said in the opinion quoted, they do not carry with them the rights that flow from domestic judgments. Equity acts upon the person; and where the owner of a domestic judgment, which was obtained by fraud in the courts of this state, seeks to enforce it, they will, in a proper case, where the complainant has not been guilty of laches, interpose their remedial relief by injunction, and restrain the person guilty of the fraud from consummating his wrong. And in cases of this character, it is upon the person of the wrongdoer that equity fastens its restraining power; and, if the courts of this state have the power—which they undoubtedly have — to restrain the fraudulent owner of a domestic judgment from enforcing it, a like power could be exercised to restrain one who comes into the courts of this state, and seeks to enforce the judgment of another state."

*Impeachment for fraud*, see *infra*, XVIII, B. 4, c.

47. See *supra*, XVI.

wanting.<sup>48</sup> It is sometimes stated that the inquiry into jurisdiction

48. **U. S.**—*Priest v. Trustees of Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751; *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347; *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65; *Wetmore v. Karrick*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Old Wayne Life Assn. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; *National Exch. Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. ed. 184; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Parker v. Parker*, 222 Fed. 186, 137 C. C. A. 626; *Thomas v. Virden*, 160 Fed. 418, 87 C. C. A. 370; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Parker v. Kelley*, 166 Fed. 968; *Davis v. Davis*, 164 Fed. 281. **Ala.**—*Gunn v. Howell*, 27 Ala. 663, 35 Ala. 144, 73 Am. Dec. 484. **Cal.**—*Kane v. Cook*, 8 Cal. 449; *Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972; *Stierlen v. Stierlen*, 18 Cal. App. 609, 124 Pac. 226, 228. **Conn.**—*Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236; *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562; *Dennison v. Hyde*, 6 Conn. 508. **Del.**—*Lutz v. Roberts Cotton Oil Co.*, 3 Boyce 227, 82 Atl. 601. **Ga.**—*McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660; *Frank v. Wolf*, 17 Ga. App. 468, 87 S. E. 697. **Idaho.**—*Thum v. Pyke*, 8 Idaho 11, 66 Pac. 157. **Ill.**—*Flexner v. Farson*, 268 Ill. 435, 109 N. E. 327; *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710; *Forrest v. Fey*, 218 Ill. 165, 75 N. E. 789, 109 Am. St. Rep. 249, 1 L. R. A. (N. S.) 740; *Field v. Field*, 215 Ill. 496, 74 N. E. 443; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *Zepp v. Hager*, 70 Ill. 223; *Dickinson v. Ridgely*, 188 Ill. App. 252; *Coe v. Garvey*, 130 Ill. App. 221. **Ind.**—*Irose v. Balla*, 181 Ind. 491, 104 N. E. 851; *Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Risley v. Indianapolis*, etc. R. Co., Wils. 572; *Roberts v. Leutzke*, 39 Ind. App. 577, 78 N. E. 635. **Ia.** *O'Rourke v. Chicago, etc. Ry. Co.*, 55 Iowa 332, 7 N. W. 582; *McBride v. Harn*, 48 Iowa 151. **Kan.**—*Robinson v. Chicago, R. I. & P. R. Co.*, 96 Kan. 137, 150 Pac. 636; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588; *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145; *Chicago, R. I. & P. Ry. Co. v. Campbell*, 5 Kan. App. 423, 49 Pac. 321. **Ky.**—*Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109; *Rogers v. Rogers*, 15 B. Mon. 364. **La.**—*McLaren & Co. v. Kehler*, 23 La. Ann. 80, 8 Am. Rep. 592; *Morris v. Bailey*, 15 La. Ann. 2. **Md.**—*Mundy v. Jacques*, 116 Md. 11, 81 Atl. 289; *Grover, etc. Co. v. Radcliffe*, 66 Md. 511, 8 Atl. 265. **Mass.**—*Wright v. Andrews*, 130 Mass. 149; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Bissell v. Briggs*, 9 Mass. 462, 468, 6 Am. Dec. 88; *Bartlet v. Knight*, 1 Mass. 401, 2 Am. Dec. 36; *Hall v. Williams*, 6 Pick. 232, 240; *Gillespie v. Com. Mut. Ins. Co.*, 12 Gray 201. **Mich.**—*Mathews v. Montreal Min. Co.*, 183 Mich. 541, 150 N. W. 127; *Farrow v. Railway Conductors' Co-op. Protective Assn.*, 178 Mich. 639, 146 N. W. 147; *Marshall v. R. M. Owen & Co.*, 171 Mich. 232, 137 N. W. 204; *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59. **Miss.**—*Miller v. Ewing*, 8 Smed. & M. 421. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Sevier v. Roddie*, 51 Mo. 580; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Hester v. Frink*, 189 Mo. App. 40, 176 S. W. 481. **Neb.**—*C. Mut. F. Ins. Co. v. Hayden*, 61 Neb. 454, 85 N. W. 443. **N. H.**—*Hochstein v. James*, 76 N. H. 293, 82 Atl. 171; *Downer v. Shaw*, 22 N. H. 277. **N. J.**—*Jardine v. Reichert*, 39 N. J. L. 165; *Chew v. Brumagim*, 21 N. J. Eq. 520. **N. Y.**—*Gleason v. Northwestern Mut. Life Ins. Co.*, 203 N. Y. 507, 97 N. E. 35; *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569; *Vilas v. Plattsburgh & M. R. R. Co.*, 123 N. Y. 440, 25 N. E. 941; *Kerr v. Kerr*, 41 N. Y. 272; *Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374; *Famobrosis Soc. v. Royal Benefit Soc.*, 166 App. Div. 593, 152 N. Y. Supp. 84; *Malone v. Bocker*, 82 Misc. 438, 143 N. Y. Supp. 1095; *In re Akins' Est.*, 152 N. Y. Supp. 310; *Smith v. Oliver*, 120 N. Y. Supp. 73; *Holcomb*



is permitted to the same extent to which it could be had in respect to a domestic judgment,<sup>49</sup> but as a rule, the record of a foreign judgment may be contradicted in respect to jurisdictional facts to an extent not allowed in case of a domestic judgment,<sup>50</sup> and even though the process upon which the judgment was based may be valid in the sister state it will not necessarily be considered so in the forum.<sup>51</sup>

(II.) Presumptions. — As with domestic judgments of courts of general jurisdiction,<sup>52</sup> so in case of judgments of sister states rendered by such tribunals, it will be presumed, where nothing to the contrary appears upon the record that the court possessed jurisdiction of the parties and the subject-matter.<sup>53</sup> Such presumption, however, is mere-

*v. Kelly*, 114 N. Y. Supp. 1048; *Grider v. Corbin*, 116 App. Div. 818, 102 N. Y. Supp. 181. **N. C.** *Davidson v. Sharpe*, 28 N. C. 14; *Irby v. Wilson*, 21 N. C. 568. **N. D.**—*Marin v. Augedahl*, 32 N. D. 536, 156 N. W. 101. **Okla.**—*Earl v. Earl*, 149 Pac. 1179; *Anderson v. Canaday*, 37 Okla. 171, 131 Pac. 697. **Ore.**—*United States Fidelity & Guaranty Co. v. Martin*, 77 Ore. 369, 149 Pac. 1023. **Pa.**—*McNutt v. Bakewell*, 223 Pa. 364, 72 Atl. 639; *Wissler v. Herr*, 162 Pa. 552, 29 Atl. 862; *Noble v. Thompson Oil Co.*, 79 Pa. 354, 21 Am. Rep. 66. **S. D.**—*Rice v. Bennett*, 29 S. D. 341, 137 N. W. 359. **Tenn.**—*Barrett v. Oppenheimer*, 12 Heisk. 298. **Tex.**—*Stuart v. Cole*, 42 Tex. Civ. App. 478, 92 S. W. 1040; *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154. **Vt.**—*Carpenter v. Pier*, 30 Vt. 81, 73 Am. Dec. 288. **W. Va.**—*Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172; *Stewart v. Stewart*, 27 W. Va. 167.

As to judgment against non-residents or persons over whom jurisdiction has not been acquired, see *supra*, XVIII, B, 3, d, (II), and *infra*, XVIII, B, 5.

49. **U. S.**—*Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494. **Ind.**—*Citizens' State Bank v. Read*, 45 Ind. App. 158, 90 N. E. 492. **Kan.**—*Robinson v. Chicago, R. I. & P. Ry. Co.*, 96 Kan. 137, 150 Pac. 636. **N. Y.**—*White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482; *Swing v. Mooney*, 139 App. Div. 821, 124 N. Y. Supp. 545. **Ore.**—*De Vall v. De Vall*, 57 Ore. 123, 109 Pac. 753, 110 Pac. 705.

50. **U. S.**—*Parker v. Parker*, 222 Fed. 186, 137 C. C. A. 626. **Ky.**—*Bryant v. Shute's Exr.*, 147 Ky. 268, 144 S. W. 28. **N. H.**—*Hochstein v. James W. Hill Co.*, 76 N. H. 293, 82 Atl. 171.

As to contradicting the record of

domestic judgments with respect to jurisdictional matters, see *supra*, XVII, A, 7, c, (IV), (C), (5), (b).

See *infra*, XVIII, B, 4, b, (III).

51. *Hochstein v. James W. Hill Co.*, 76 N. H. 293, 82 Atl. 171.

[a] Service upon a managing agent of a foreign corporation, who was casually in New York, though sufficient in New York to confer jurisdiction upon the court over such corporation was, by the courts of New Hampshire, considered insufficient, and a default judgment based thereon refused recognition. *Hochstein v. James W. Hill Co.*, 76 N. H. 293, 82 Atl. 171.

52. See *supra*, XVII, A, 7, c, (IV), (B).

53. **Ala.**—*Forbes v. Davis*, 187 Ala. 71, 65 So. 516; *Bogan v. Hamilton*, 90 Ala. 454, 8 So. 186; *Mills & Co. v. Stewart*, 12 Ala. 90. **Ark.**—*Lockhart v. Locke*, 42 Ark. 17. **Cal.**—*Collins v. Maude*, 144 Cal. 289, 77 Pac. 945. **Ga.** *Shands & Co. v. Howell*, 28 Ga. 222. **Ill.**—*Light v. Reed*, 234 Ill. 626, 85 N. E. 282; *Glos v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; *Rendleman v. Rendleman*, 118 Ill. 257, 8 N. E. 773; *Rosenthal v. Renick*, 44 Ill. 202. **Ind.**—*Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Roberts v. Leutzke*, 39 Ind. App. 577, 78 N. E. 635. **Kan.**—*Robinson v. Chicago, R. I. & P. Ry. Co.*, 96 Kan. 137, 150 Pac. 636; *Ward v. Baker*, 16 Kan. 31; *Dodge v. Coffin*, 15 Kan. 277; *Butcher v. Bank*, 2 Kan. 70, 83 Am. Dec. 446. **Ky.**—*Scott v. Coleman*, 5 Litt. 349, 15 Am. Dec. 71; *Biesenthal v. Williams*, 1 Duv. 329, 85 Am. Dec. 629. **La.**—*Graydon v. Justus*, 24 La. Ann. 222. **Md.**—*Mundy v. Jacques*, 116 Md. 11, 81 Atl. 289; *United States Bank v. Merchants Bank*, 7 Gill 415. **Mass.**—*Van Norman v. Gordon*, 172

ly *prima facie* and may be overcome by evidence to the contrary.<sup>54</sup> The jurisdiction of inferior courts and special tribunals must usually appear of record, consequently no presumption of jurisdiction can be invoked in aid of the judgments of such courts of sister states.<sup>55</sup>

(III.) **Conclusiveness of Record.**—(A.) **GENERALLY.**—Though there are some early cases to the contrary,<sup>56</sup> it is now a generally accepted rule<sup>57</sup> that the record of a sister state judgment may be contradicted

Mass. 576, 53 N. E. 267. **Mich.**—Wilcox v. Kassick, 2 Mich. 165. **Minn.** Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385. **Mo.**—Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; Wilson v. Jackson, 10 Mo. 329. **N. Y.**—Smith v. Central Trust Co., 154 N. Y. 333, 502, 48 N. E. 553; White v. Glover, 138 App. Div. 797, 123 N. Y. Supp. 482; Hodge v. International Registry Co., 54 Misc. 442, 105 N. Y. Supp. 1067. **Ohio.** Wilhelm v. Parker, 17 Ohio Cir. Ct. 234. **Pa.**—Reber v. Wright, 68 Pa. 471; Veite v. McFadden, 3 W. N. C. 63. **R. I.**—Paine v. Schenectady Ins. Co., 11 R. I. 411. **S. C.**—Coskery v. Wood, 52 S. C. 516, 30 S. E. 475. **Tex.**—Reid v. Boyd, 13 Tex. 241, 65 Am. Dec. 61.

But see Coit v. Havens, 30 Conn. 190; Gebhard v. Garnier, 12 Bush (Ky.) 321, 23 Am. Rep. 721.

[a] It will be presumed that the court is one of general jurisdiction where the evidence shows it was a court of record with a judge presiding, a clerk and a seal. Western Assur. Co. v. Walden (Mo.), 141 S. W. 595. See also American Mut. L. Ins. Co. v. Mason, 159 Ind. 15, 64 N. E. 525.

As to judicial notice that court is one of general jurisdiction, see 7 ENCY. OF EV. 996.

54. French v. Pease, 10 Kan. 51.

55. **Ill.**—Shufeldt v. Buckley, 45 Ill. 223; Cavanaugh v. Morris, 160 Ill. App. 55. **Ind.**—Louisville, etc. R. Co. v. Parish, 6 Ind. App. 89, 33 N. E. 122. **Ia.**—Gay v. Lloyd, 1 G. Gr. 78, 45 Am. Dec. 499. **Mich.**—Campbell v. Wallace, 46 Mich. 320, 9 N. W. 432. **Mo.**—Hofheimer v. Losen, 24 Mo. App. 652. **N. H.**—Russell v. Perry, 14 N. H. 152. **N. J.**—Godfrey v. Myers, 23 N. J. L. 197. **N. Y.**—Cole v. Stone, Lalor 360. **Ohio.**—Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197. **Pa.**—Perry v. Northern Ins. Co., 5 Phila. 188.

[a] **Notice in Attachment.**—In favor of a judgment of attachment in a justice court, it will be presumed that the notice required by statute was given, where the fact of such notice

need not appear of record. Since the justice in such cases need only satisfy himself by the oath of the plaintiff or by other evidence that the notice was given, it will be presumed that he elicited such proof and that all things had been done to authorize the judgment. Morgan v. Neville, 74 Pa. 52.

56. **U. S.**—Westerwelt v. Lewis, 2 McLean 511, 29 Fed. Cas. No. 17,446; Thompson v. Emmert, 4 McLean 96, 23 Fed. Cas. No. 13,953; Jacqueline v. Hugunot, 2 McLean 129, 13 Fed. Cas. No. 7,169; Logansport Gas Co. v. Knowles, 2 Dill. 421, 15 Fed. Cas. No. 8,467. **Ark.**—Hensley v. Force & Co., 12 Ark. 756. **Del.**—Pritchett v. Clark, 5 Harr. 63. **Ill.**—Lawrence v. Jarvis, 32 Ill. 304; Bimeler v. Dawson, 5 Ill. 536. **Ind.**—Westcott v. Brown, 13 Ind. 83. **Ky.**—Roberts v. Caldwell, 5 Dana 512. **Mich.**—Wilcox v. Kassick, 2 Mich. 165. **Mo.**—Harbin v. Chiles, 20 Mo. 314; Warren & Dalton v. Lusk, 16 Mo. 102. **Ohio.**—Spencer v. Brockway, 1 Ohio 259, 13 Am. Dec. 615. **Pa.**—Wetherill v. Stillman, 65 Pa. 105. **Vt.**—Lapham v. Briggs, 27 Vt. 26; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340.

57. **U. S.**—American Exp. Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525; Simmons v. Saul, 138 N. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054; Old Wayne Mut. Life Assn. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608; Grover & B. S. Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed. 670; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271; Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616; Knowles v. Logansport Gaslight & C. Co., 19 Wall. 58, 22 L. ed. 70; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897. **Ala.**—Kingsbury v. Yniestra, 59 Ala. 320. **Cal.**—Greenzweig v. Strelinger, 103 Cal. 278,

upon any statement of fact upon which the jurisdiction of the court which rendered the judgment depended, even though such facts appear in the return or proof of service.<sup>58</sup>

37 Pac. 398; *Kane v. Cook*, 8 Cal. 449; *Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972. Conn.—*Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151. Ill.—*Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710. Ind.—*Brown v. Eaton*, 98 Ind. 591; *Duringer v. Moschino*, 93 Ind. 495. Ind. Ter.—*Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766. Ia.—*Pollard v. Baldwin*, 22 Iowa 328. Kan.—*Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588. Ky.—*Bryant v. Shute's Exr.*, 147 Ky. 268, 144 S. W. 28; *Wood v. Wood*, 78 Ky. 624. Mass.—*Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *McDermott v. Clary*, 107 Mass. 501; *Carleton v. Bickford*, 13 Gray 591, 74 Am. Dec. 652; *Finneran v. Leonard*, 7 Allen 54, 83 Am. Dec. 665. Mo.—*Napton v. Leaton*, 71 Mo. 358; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432. N. Y.—*Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 71 N. E. 10; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 440, 25 N. E. 941; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Noyes v. Butler*, 6 Barb. 613; *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Malone v. Boeker*, 82 Misc. 438, 143 N. Y. Supp. 1095. R. I.—*Frothingham v. Barnes*, 9 R. I. 474. Tenn.—*Chaney v. Bryan*, 15 Lea 589. Tex.—*Easley v. McClinton*, 33 Tex. 288; *Norwood v. Cobb*, 24 Tex. 551. Wis.—*Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269.

[a] A decree of divorce may be impeached collaterally in the courts of another state when it appears that the party obtaining the divorce was not domiciled in the state wherein he instituted the proceedings and this notwithstanding any record recitals of jurisdiction. *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. ed. 373.

[b] In the leading case upon this subject, *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897, the court said that if it once be conceded that "the validity of a judgment may be attacked collaterally by evidence show-

ing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent."

[c] "A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state in one material respect, viz., that it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. If such lack of jurisdiction in one or the other of these respects is not made to appear, the judgment is as final and conclusive on collateral attack as would be a judgment of one of our own superior courts; but, if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity." *In re Hancock's Est.*, 156 Cal. 804, 106 Pac. 58.

For the rule as to domestic judgments, see *supra*, XVII, A, 7, c, (IV), (A).

58. U. S.—*Knowles v. Gaslight, etc. Co.*, 19 Wall. 58, 22 L. ed. 70. Ia.—*Webster v. Hunter*, 50 Iowa 215; *Lowe v. Lowe*, 40 Iowa 220. Ky.—*Bryant v. Shulte's Exr.*, 147 Ky. 268, 144 S. W. 28. N. J.—*Patterson v. Taylor*, 78 N. J. L. 10, 73 Atl. 225.

[a] In respect to the manner of service the sheriff's return is not conclusive. *Patterson v. Taylor*, 78 N. J. L. 10, 73 Atl. 225.

[b] Though conclusive in the state where made, the return of the officer



(B.) JUDGMENT RECITALS. — Recitals of jurisdictional facts in the judgment are not conclusive but are open to contradiction by any competent evidence.<sup>59</sup> Thus recitals of appearance whether in person or by attorney, may be overcome by extrinsic evidence showing no appearance to have in fact been made, or that the attorney assuming to appear did so without authority.<sup>60</sup>

(C.) ADJUDICATION OF JURISDICTION. — The court may have expressly passed upon its own jurisdiction, in which case its determination, like every other adjudication which it had jurisdiction to make, is res judicata and cannot be questioned in proceedings on the judgment in another state.<sup>61</sup> The foregoing statement applies, however, only

to the effect that the defendant had a residence there and that he served the writ by leaving it at her last and usual place of abode, may be contradicted when it is sought to enforce the judgment in another state. *Bryant v. Shute's Exr.*, 147 Ky. 268, 144 S. W. 28.

59. U. S.—*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Gaslight, etc. Co.*, 19 Wall. 58, 22 L. ed. 70; *Holmes v. Oregon R. Co.*, 9 Fed. 229, 7 Sawy. 380. Cal.—*In re Hancock's Estate*, 156 Cal. 804, 106 Pac. 58; *Greenzweig v. Strelinger*, 103 Cal. 278, 37 Pac. 398; *In re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. Ill.—*Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710. Ind. Ter.—*Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766. Ia.—*Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349. Mich.—*Farrow v. Railway Conductors' Co-op. Protective Assn.*, 178 Mich. 639, 146 N. W. 147; *Marshall v. R. M. Owen & Co.*, 171 Mich. 232, 137 N. W. 204. N. Y.—*White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482. S. D.—*Rice v. Bennett*, 29 S. D. 341, 137 N. W. 359.

60. U. S.—*Arnott v. Webb*, 1 Dill. 362, 1 Fed. Cas. No. 562; *Thomas v. Virden*, 160 Fed. 418, 87 C. C. A. 370; *Graham v. Spencer*, 14 Fed. 603. Conn.—*Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151. Ill.—*Lawrence v. Jarvis*, 32 Ill. 304; *Whittaker v. Murray*, 15 Ill. 293; *Thompson v. Emmert*, 15 Ill. 415; *Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689. Ind.—*Boylan v. Whitney*, 3 Ind. 140; *Sherrard v. Nevius*, 2 Ind. 241. Ia.—*Harshey v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Baltzell v. Nosler*, 1 Iowa 588, 63 Am. Dec. 466. Kan.—*Brinkman v. Shaffer*, 23 Kan. 375. Mass.—*Wright v. Andrews*,

130 Mass. 149; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. Mich.—*Farrow v. Railway Conductors' Co-op. Protective Assn.*, 178 Mich. 639, 146 N. W. 147. Mo.—*Napton v. Leaton*, 71 Mo. 358; *Central Pa. Conference Educational Soc., etc. v. La Rue (Mo. App.)*, 148 S. W. 152. N. J.—*Price v. Ward*, 25 N. J. L. 225. N. Y.—*Vilas v. Plattsburgh, etc. R. R. Co.*, 123 N. Y. 440, 25 N. E. 941; *Kerr v. Kerr*, 41 N. Y. 272; *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Howard v. Smith*, 42 How. Pr. 300, 1 Jones & S. 124; *Famobrosis Soc. v. Royal Benefit Soc.*, 166 App. Div. 593, 152 N. Y. Supp. 84; *White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482; *Prichard v. Sigafus*, 103 App. Div. 535, 93 N. Y. Supp. 152. N. C.—*Koonce v. Butler*, 84 N. C. 221. Va.—*Fisher v. March*, 26 Gratt. (67 Va.) 765.

61. U. S.—*Jaster v. Currie*, 198 U. S. 144, 25 Sup. Ct. 614, 49 L. ed. 988; *Thomas v. Virden*, 160 Fed. 418, 87 C. C. A. 370; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158. Ind. Ter.—*Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766. Okla.—*Earl v. Earl*, 149 Pac. 1179.

[a] In *Sipe v. Copwell*, 59 Fed. 970, 8 C. C. A. 419, where the defense was that the judgment was void because jurisdiction was obtained by service of process upon defendants thereto when they were in attendance upon the supreme court of Rhode Island as parties defendant to a suit then pending for trial it was said: "This presented an issue for adjudication. It was decided adversely to the contention then and now urged by appellants. The determination of that question was clearly within the jurisdiction of the Rhode Island court. Its solution depended upon the statute or

where the facts found by the court would, if true, give it jurisdiction; for the court's determination that it has jurisdiction upon a state of facts which though true, would not confer jurisdiction is not entitled to any faith and credit in other courts.<sup>62</sup>

c. *Fraud*.—Fraud which would suffice to impeach a domestic judgment<sup>63</sup> may be successfully urged against the judgment when sought to be enforced in another state. It must be fraud practiced in the very procurement of the judgment depriving the court of jurisdiction to render the same,<sup>64</sup> and not fraud inherent in the cause of

common law of that state. It decided that the Rhode Island statute, exempting witnesses from arrest or summons while in attendance as witnesses, did not apply to any other than witnesses. . . . Whether these questions were rightly or wrongly decided is a matter of no importance in the present aspect of the question. The court had jurisdiction to determine these issues. The soundness of the adjudication cannot be questioned in a collateral attack."

[b] In *Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766, the language was: "The finding of the Missouri court that the plaintiff had not fraudulently induced the defendant to enter its jurisdiction, or that he was not there for the purpose of taking depositions, or that he had had time to leave, or that, under the Missouri law, he was not entitled to an exemption because there voluntarily as a party, is a final adjudication of the whole question, and the only remedy left to the defendant was an appeal to the higher courts of Missouri."

[c] Where there is a dispute between the return of the sheriff showing a proper service and affidavits in opposition showing irregularity in the service, the decision of the court is binding and cannot again be litigated in an action on the judgment in another jurisdiction. *Chinn v. Foster-Milburn Co.*, 195 Fed. 158.

62. *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707. And see *Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766.

63. See *supra*, XVII, A, 7, d.

64. U. S.—*Maxwell v. Stewart*, 21 Wall. 71, 22 Wall. 77, 22 L. ed. 564; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Warrington v. Ball*, 90 Fed. 464, 33 C. C. A. 609; *Rose v. Northwest Fire & Marine Ins. Co.*, 67 Fed. 439; *Danville First Nat. Bank v. Cunningham*, 48 Fed. 510. See *Hanley v.*

*Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535. Ala.—*Lucas v. Cope-land*, 2 Stew. 151. Conn.—*Sanford v. Sanford*, 28 Conn. 6. Ind.—*Brown v. Eaton*, 98 Ind. 591. Ia.—*Crawford v. White*, 17 Iowa 560. Me.—*Granger v. Clark*, 22 Me. 128. Md.—*Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115. Mass.—*Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484; *Engstrom v. Sherburne*, 137 Mass. 153. Miss.—*Smedes v. Ilsley*, 68 Miss. 590, 10 So. 75. Mo.—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458; *Hester v. Frink*, 189 Mo. App. 40, 176 S. W. 481. Neb.—*Cox v. Barnes*, 45 Neb. 172, 63 N. W. 394. N. Y.—*Gilpin v. Baltimore, etc. R. Co.*, 17 N. Y. Supp. 520, 44 N. Y. St. 298. N. C.—*Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969. Ohio.—*Anderson v. Anderson*, 8 Ohio 108. Pa.—*Benton v. Burgot*, 10 Serg. & R. 240. Tex.—*Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. Vt.—*Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

[a] The term fraud in the procurement of a judgment includes all such facts and circumstances as would induce and enable the courts of equity or courts having jurisdiction of the matter in the state where the judgment was rendered to interfere to prevent the enforcement of an unconscionable recovery. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

[b] *Judgment Confessed on Paid Note*.—Where the note upon which judgment was confessed by warrant of attorney had been paid by those who were jointly and severally bound to pay it, it was extinguished by payment as was also its incident, the warrant of attorney, which could not survive it. Consequently the proceedings which ended in the procurement of the judgment by confession were without authority and were a patent fraud

action and which could be interposed as a defense.<sup>65</sup> Mere perjury is not sufficient.<sup>66</sup>

d. *Errors and Irregularities.*—Since the validity of the sister state judgment is, in general, tested by the laws of the jurisdiction where it is rendered, any inquiry into the question of how far irregularities in the procedure effect the binding force of the judgment would involve the same matter treated elsewhere in discussing collateral impeachment of judgments.<sup>67</sup> If, as there shown, mere errors and irregularities, not jurisdictional, do not invalidate the domestic judgment collaterally, no more will such errors and irregularities render the judgment subject to impeachment in a sister state.<sup>68</sup> Where, however, the irregularities are such that under the

upon the defendant and the administration of justice. *Hester v. Frink*, 189 Mo. App. 40, 176 S. W. 481.

[c] In *Malone v. Bocker*, 82 Misc. 438, 143 N. Y. Supp. 1095, the defendant, in defense to a judgment confessed in accordance with power contained in a lease to appear and confess judgment, was permitted to show that he was induced to sign the lease by false representations that it did not contain such a provision. *Malone v. Bocker*, 82 Misc. 438, 143 N. Y. Supp. 1095.

[d] *Service Procured by Fraud.*

(1) Defendant has been permitted to show in defense to an action on a sister state judgment, that he was induced by fraudulent representations to enter the jurisdiction of the court rendering the judgment and in that way served with process. *Ind.*—*Duringer v. Moschino*, 93 Ind. 495. *Ia.*—*Dunlap v. Cody*, 31 Iowa 260, 7 Am. Rep. 129. *Kan.*—*Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539. *Ohio.*—*Pilcher v. Graham*, 18 Ohio Cir. Ct. 5, 9 Ohio Cir. Dec. 825. (2) But in some jurisdictions this defense is only available where the defendant can show that he has exhausted his legal remedies in the court whose judgment is being enforced. *Ark.*—*Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27. *Mass.*—*Cook v. Brown*, 125 Mass. 503, 28 Am. Rep. 259. *Wis.*—*Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439.

Equitable relief for fraud, see *supra*, XVIII, B, 3, i.

Impeachment of divorce decree for fraud, see *infra*, XVIII, B, 5, c.

65. *U. S.*—*Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535. *Ill.*—*Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841. *Kan.*—*McLain v. Parker*,

88 Kan. 717, 129 Pac. 1140. *La.* *Hockaday v. Skeggs*, 18 La. Ann. 681. *Mo.*—*Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502. *Neb.*—*Packer v. Thompson*, 25 Neb. 688, 41 N. W. 650. *N. Y.* *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. *Pa.*—*Jeter v. Fellowes*, 32 Pa. 465.

66. *Ind.*—*Riley v. Murray*, 8 Ind. 354. *Mass.*—*Engstrom v. Sherburne*, 137 Mass. 153. *Miss.*—*Smedes v. Ilsley*, 68 Miss. 590, 10 So. 75. *Mo.* *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458. *N. H.*—*Metcalf v. Gilmore*, 59 N. H. 417, 47 Am. Rep. 217.

[a] *False Testimony of Plaintiff's Attorney.*—The fact the plaintiff bribed his attorney to swear falsely in a divorce suit is not ground for equitable relief against the divorce decree when relied upon in another state. *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458.

67. See *supra*, XVII, A, 7, e.

68. *Ala.*—*Forbes v. Davis*, 187 Ala. 71, 65 So. 516. *Ga.*—*Ragan v. Cuyler*, 24 Ga. 397. *Ind.*—*Anderson v. Fry*, 6 Ind. 76. *Ia.*—*Milne v. Van Buskirk*, 9 Iowa 558; *Olds v. Glaze*, 7 Iowa 86; *Edmonds v. Montgomery*, 1 Iowa 143. *Kan.*—*French v. Pease*, 10 Kan. 51. *Ky.*—*Biesenthal v. Williams*, 1 Duv. 329, 85 Am. Dec. 629. *La.*—*Muncaster v. Bland*, 11 La. Ann. 507. *Miss.*—*Barringer v. Boyd*, 27 Miss. 473. *Mo.* *Howland v. Chicago, etc. Ry. Co.*, 134 Mo. 474, 36 S. W. 29. *N. Y.*—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Curnen v. Curnen*, 155 App. Div. 536, 140 N. Y. Supp. 805. *N. J.*—*Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903. *N. C.*—*Miller v. Leach*, 95 N. C. 229. *Wash.*—*Fleming v. Langley*, 86 Wash. 346, 150 Pac. 418.

[a] The illegality of the original



law of the state whence it comes the alleged judgment would not be operative as such, it is not entitled to recognition elsewhere.<sup>69</sup>

5. **Divorce Decrees.**—a. *Generally.*—Domicil of one of the parties, presumably the plaintiff, within the state in which the decree is rendered, is generally held to be essential to jurisdiction to decree a divorce which will be given extraterritorial recognition. A divorce granted in a state where neither of the parties is domiciled, will not be enforced in another state,<sup>70</sup> even though valid in the state where procured.<sup>71</sup> However, a deserted wife may acquire a domicil in another state sufficient to give the courts of that state jurisdiction of the subject-matter of the divorce, within the meaning of the foregoing rule.<sup>72</sup> The protection of the full faith and credit clause of the con-

cause of action upon which the judgment is based cannot be relied upon to defeat the judgment in another state. *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194.

[b] **Gaming Transaction.**—If the equity courts of the state where the judgment was rendered would not grant relief against it as having been based upon a gambling transaction, it must be accorded the same conclusive effect in other states. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

[c] **An erroneous construction of a statute or other law of one state by the courts of another affords no ground for denying its judgment faith and credit.** *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. ed. 1039; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172.

[d] **Irregularities in the form of the judgment may not be urged.** *Forbes v. Davis*, 187 Ala. 71, 65 So. 516.

[e] **Judgment Nunc Pro Tunc.** Where the judgment of the sister state put in evidence was entered nunc pro tunc, the power of the court to enter such a judgment is not open to question. *Curnen v. Curnen*, 155 App. Div. 536, 140 N. Y. Supp. 805.

69. *Adams v. Stenehjem*, 49 Mont. 232, 146 Pac. 469, as where it has not been entered so as to become operative as a judgment.

70. **U. S.**—*Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366; *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. ed. 807; *Parker v. Parker*, 222 Fed. 186, 137 C. C. A. 626. Ala.—*Harrison v. Harrison*, 20 Ala.

629, 56 Am. Dec. 227. **D. C.**—*Strait v. Strait*, 3 MacArthur 415. **Ind.**—*Watkins v. Watkins*, 125 Ind. 163, 25 N. E. 175; *Hood v. State*, 56 Ind. 263, 23 Am. Rep. 21. **Me.**—*Gregory v. Gregory*, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792. **Md.**—*Walker v. Walker*, 125 Md. 649, 94 Atl. 346. **Mass.**—*Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203. **Mich.**—*Reed v. Reed*, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260. **Minn.**—*Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108. **N. H.**—*Leith v. Leith*, 39 N. H. 20. **N. Y.**—*Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Jackson v. Jackson*, 1 Johns. 424; *In re Akins' Est.*, 152 N. Y. Supp. 310. **Pa.**—*Com. v. Parker*, 59 Pa. Super. 74.

71. **U. S.**—See *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366. **Ind.**—*Hood v. State*, 56 Ind. 263, 23 Am. Rep. 21. **Kan.**—*Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145. **Mich.**—*People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260. **Minn.**—*State v. Armington*, 25 Minn. 29. **Neb.**—*Smith v. Smith*, 19 Neb. 706, 28 N. W. 296. **N. Y.**—*People v. Smith*, 13 Hun 414. **Ohio.**—*Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507. **Tenn.**—*Gettys v. Gettys*, 3 Lea 260, 31 Am. Rep. 637. **Tex.**—*Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154.

72. **U. S.**—*Cheever v. Wilson*, 9 Wall. 103, 19 L. ed. 604. Ala.—*Turner v. Turner*, 44 Ala. 437. Cal.—*Moffatt v. Moffatt*, 5 Cal. 280. Ill.—*Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806; *Bowman v. Bowman*, 24 Ill. App. 165; *Derby v. Derby*, 14 Ill. App. 645; *Lazovert v. Lazovert*, 14 Ill. App. 653.

stitution and the auxiliary act of congress, extends to a decree of divorce procured in a sister state court having jurisdiction.<sup>73</sup> Jurisdiction in this connection, exists where both husband and wife are domiciled in the state,<sup>74</sup> or where one of the parties has a bona fide domicile there and personal jurisdiction is obtained over the other party by service within the state,<sup>75</sup> or by voluntary appearance.<sup>76</sup> And a divorce granted at the matrimonial domicile is entitled to full faith and credit in another state even though jurisdiction of the person of the defendant was obtained only by constructive or substituted service.<sup>77</sup> There seems to have been no final and authoritative deter-

**Ky.**—*Rhym v. Rhym*, 7 Bush 316. **La.**—*Benton's Succession*, 106 La. Ann. 494, 31 So. 123; *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248. **Me.**—*Harding v. Alden*, 9 Greenl. 140, 23 Am. Dec. 549. **Mass.**—*Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740; *Watkins v. Watkins*, 135 Mass. 83; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372. **N. H.**—*Frery v. Frery*, 10 N. H. 61, 32 Am. Dec. 395. **Ohio.**—*Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507. **R. I.**—*Ditson v. Ditson*, 4 R. I. 87. **Wis.**—*Craven v. Craven*, 27 Wis. 418.

**73. U. S.**—*Haddock v. Haddock*, 201 U. S. 562, 570, 26 Sup. Ct. 525, 50 L. ed. 867; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794; *Parker v. Parker*, 222 Fed. 186, 137 C. C. A. 626. **Cal.**—*In re Hancock's Estate*, 156 Cal. 804, 106 Pac. 58. **Ga.**—*Schroeder v. Schroeder*, 144 Ga. 119, 86 S. E. 224. **Mo.**—*Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458. **Mont.**—*State v. District Court*, 46 Mont. 425, 128 Pac. 590. **Neb.**—*Bodie v. Bates*, 99 Neb. 253, 156 N. W. 8; *Bodie v. Bates*, 95 Neb. 757, 146 N. W. 1002. **N. J.**—*Bolton v. Bolton*, 86 N. J. L. 622, 92 Atl. 389; *Freund v. Freund*, 72 N. J. Eq. 943, 73 Atl. 1117. **N. Y.**—*Guggenheim v. Wahl*, 203 N. Y. 390, 96 N. E. 726; *Curnen v. Curnen*, 155 App. Div. 536, 140 N. Y. Supp. 805; *Post v. Post*, 149 App. Div. 452, 133 N. Y. Supp. 1057; *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056; *Tiedemann v. Tiedemann*, 92 Misc. 417, 156 N. Y. Supp. 111; *Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028; *French v. French*, 131 N. Y. Supp. 1053. **N. C.**—*Ex parte Alderman*, 157 N. C. 507, 73 S. E. 126. **Tex.**—*Ogg v. Ogg* (Tex. Civ. App.), 165 S. W. 912. **Wash.**—*Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945; *Douglas v. Teller*, 53 Wash. 695,

102 Pac. 761. **W. Va.**—*Campbell v. Switzer*, 74 W. Va. 509, 82 S. E. 319; *Anderson v. Anderson*, 74 W. Va. 124, 81 S. E. 706.

**74. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867.**

**75. Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604. See *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867.**

[a] *Mere residence* as distinguished from legal domicile is not sufficient. *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. ed. 807; *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804.

**76. Kan.**—*Bledsoe v. Seaman*, 77 Kan. 679, 95 Pac. 576. **N. Y.**—*French v. French*, 131 N. Y. Supp. 1053. **Ohio.**—*Gilbert v. Gilbert*, 83 Ohio St. 265, 94 N. E. 421. **Pa.**—*Com. v. Parker*, 59 Pa. Super. 74.

**77. U. S.**—*Haddock v. Haddock*, 201 U. S. 562, 570, 26 Sup. Ct. 525, 50 L. ed. 867; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Parker v. Parker*, 222 Fed. 186, 137 C. C. A. 626. **Kan.**—*Carter v. Carter*, 89 Kan. 367, 131 Pac. 561; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546. **N. Y.**—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Post v. Post*, 149 App. Div. 452, 133 N. Y. Supp. 1057; *Benham v. Benham*, 69 Misc. 442, 125 N. Y. Supp. 923; *In re Akins' Est.*, 152 N. Y. Supp. 310. **Tex.**—*Montmorency v. Montmorency* (Tex. Civ. App.), 139 S. W. 1168, 1171. **Wash.**—*Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079.

[a] A decree obtained in Kentucky against a wife resident in New York with the consent of her husband is

mination of the meaning of "matrimonial domicile" as here used, though it has been held by the United States supreme court that a husband who has never changed the domicile which he had when married may obtain a divorce against his deserting wife residing in another state, upon constructive service, which is entitled to full faith and credit in the latter state.<sup>78</sup> And other courts have held that the husband deserted by his wife may change the matrimonial domicile and obtain a decree of divorce binding everywhere, without personal service or appearance,<sup>79</sup> though a similar right has not been accorded the deserted wife.<sup>80</sup> And the rule is now definitely settled that mere domicile of one of the parties, as distinguished from matrimonial domicile, does not give the court jurisdiction, upon constructive service or upon personal service beyond the jurisdiction, to grant a divorce which will be entitled to any obligatory recognition in other states.<sup>81</sup>

entitled to full faith and credit in New York, where it appears from the facts in the case that the matrimonial domicile was in Kentucky notwithstanding the residence of the wife in New York. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794.

78. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794.

[a] "Where the domicile of the husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause." *Haddock v. Haddock*, 201 U. S. 562, 571, 26 Sup. Ct. 525, 50 L. ed. 867.

[b] A husband who abandoned his wife in New York and acquired a domicile in Connecticut in good faith, obtained a divorce in the latter state upon constructive service. Such divorce, though enforceable perhaps in Connecticut, was not entitled to obligatory enforcement in other states by virtue of the full faith and credit clause. *Haddock v. Haddock*, 201 U. S. 562, 572, 26 Sup. Ct. 525, 50 L. ed. 867.

[c] **Matrimonial Domicil Same as**

**Domicil of Innocent Party.**—Referring to the *Haddock* case, the court says in *Montmorency v. Montmorency* (Tex. Civ. App.), 139 S. W. 1168, 1171: "The decision impresses us with the belief that the reasoning of that decision gives the court of the domicile of the innocent party jurisdiction to render a judgment binding everywhere, and deprives the court of the domicile of the guilty party of jurisdiction to render a judgment binding save in the state where rendered."

[d] "This matrimonial domicile may be distinct from the present domicile of both husband and wife. Presumptively it is identical with the domicile of the husband. But where the wife has acquired a separate domicile it is the place where they last lived together as husband and wife with the intent of making that place their fixed home." *Callahan v. Callahan*, 65 Misc. 172, 121 N. Y. Supp. 39.

79. *Harry v. Dodge*, 66 Misc. 302, 123 N. Y. Supp. 37; *Callahan v. Callahan*, 65 Misc. 172, 121 N. Y. Supp. 39.

80. *Berney v. Adriance*, 157 App. Div. 628, 142 N. Y. Supp. 748, where the wife, after having been abandoned by her husband in New York, went to South Dakota, and after residing there the jurisdictional period, obtained a divorce based upon service made upon the defendant in the state of New York. In an action for criminal conversation the New York court refused to recognize such divorce.

81. **U. S.**—*Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed.



Notwithstanding this rule, however, each state still possesses the right to give faith and credit to such decrees in accordance with rules of comity,<sup>82</sup> or public policy,<sup>83</sup> or by statute,<sup>84</sup> and some states are in-

867. **Ga.**—*Solomon v. Solomon*, 140 Ga. 379, 78 S. E. 1079; *Matthews v. Matthews*, 139 Ga. 123, 76 S. E. 855. **Me.** See *Stilphen v. Stilphen*, 58 Me. 508, 4 Am. Rep. 305. **N. J.**—*Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669; *Doughty v. Doughty*, 28 N. J. Eq. 581. **N. Y.**—*Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192; *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273; *McGown v. McGown*, 164 N. Y. 558, 58 N. E. 1089; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979; *Bell v. Bell*, 157 N. Y. 719, 53 N. E. 1123; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Bradshaw v. Heath*, 13 Wend. 407; *Gouch v. Gouch*, 69 Misc. 436, 127 N. Y. Supp. 476; *People ex rel. Catlin v. Catlin*, 69 Misc. 191, 126 N. Y. Supp. 350; *Hal-ter v. Van Camp*, 64 Misc. 366, 118 N. Y. Supp. 545; *In re Akin's Est.*, 152 N. Y. Supp. 310; *Hall v. Hall*, 122 N. Y. Supp. 401; *Ransom v. Ransom*, 125 App. Div. 915, 109 N. Y. Supp. 1143. **Pa.**—*Reed v. Elder*, 62 Pa. 308, 1 Am. Rep. 414; *Colvin v. Peed*, 55 Pa. 375. **S. C.**—*McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655. **Vt.**—*Blon- din v. Brooks*, 83 Vt. 472, 76 Atl. 184; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132.

82. **Ala.**—*Turner v. Turner*, 44 Ala. 437; *Thompson v. State*, 28 Ala. 12. **Conn.**—*Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684. **Ga.**—*Joyner v. Joyner*, 131 Ga. 217, 62 S. E. 182. **Kan.**—*Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779; *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071. **La.**—*Butler v. Washington*, 45 La. Ann. 279, 12 So. 356, 19 L. R. A. 814; *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248; *Edwards v. Green*, 9 La. Ann. 317. **Me.** *Harding v. Alden*, 9 Greenl. 140, 23 Am. Dec. 549. **Md.**—*Garner v. Garner*, 56 Md. 127. **Mich.**—*Van Inwagen v. Van Inwagen*, 86 Mich. 333, 49 N. W. 154; *Wright v. Wright*, 24 Mich. 180. **Minn.**—*Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017. **Neb.**—*Smith v.*

*Smith*, 19 Neb. 706, 28 N. W. 296. **N. H.**—*Leith v. Leith*, 39 N. H. 20. **N. J.**—*Wallace v. Wallace*, 62 N. J. Eq. 509, 50 Atl. 788; *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 83 Am. St. Rep. 612, 47 L. R. A. 546. **N. Y.**—*Rupp v. Rupp*, 156 App. Div. 389, 141 N. Y. Supp. 484; *In re Higgins*, 68 Misc. 259, 124 N. Y. Supp. 1005. See *Hall v. Hall*, 122 N. Y. Supp. 401. **Ohio.**—*Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415; *Mansfield v. McIntyre*, 10 Ohio 27. **Wis.**—*Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; *Shafer v. Bushnell*, 24 Wis. 372.

[a] "And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy." *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867.

[b] For a review of the state authorities upon this matter and a statement of the theories or rules followed in various states, see *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867.

83. *Hood v. State*, 56 Ind. 263, 23 Am. Rep. 21; *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792.

84. **Kan.**—*Carter v. Carter*, 89 Kan. 367, 131 Pac. 561; *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546. **Mass.**—*White v. Warren*, 214 Mass. 204, 100 N. E. 1103; *Burden v. Shannon*, 115 Mass. 438. **N. J.**—*Jung v. Jung* (N. J. Eq.), 96 Atl. 499. **N. Y.** See *Moore v. Moore*, 208 N. Y. 97, 101 N. E. 711.

[a] By statute in Kansas the recognition of foreign divorce decrees based on substituted service is made obligatory. *Laws 1907*, p. 297, c. 184. Commenting upon this statute the court in *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546, said: "It is perfectly

clined to extend such decrees recognition at least in so far as the dissolution of the marriage status is involved.<sup>85</sup>

b. *Impeachment for Want of Jurisdiction.*—Inquiry may always be made into the jurisdiction of the court rendering the decree even to the extent of contradicting record recitals of jurisdictional facts.<sup>86</sup>

c. *Fraud.*—Divorce decrees, like other adjudications may be impeached in another state by showing that they were procured through fraud going to the jurisdiction of the court.<sup>87</sup> A decree obtained upon colorable residence is a fraud upon the court and will not be enforced as to the other party.<sup>88</sup>

clear that this statute was intended to make the recognition and enforcement of foreign divorce decrees based upon substituted service obligatory in this state. The option left by the decision in *Haddock v. Haddock*, to each state to give to such decrees within its own borders whatever efficacy they may be entitled to consistent with its public policy was exercised by the legislature, and such decrees were placed upon the same basis as the judgments of our own courts."

85. *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423; *Gould v. Crow*, 57 Mo. 200; *Ditson v. Ditson*, 4 R. I. 87.

And see *Cal.*—*In re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

86. *Ill.*—*Field v. Field*, 215 Ill. 496, 74 N. E. 443; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70. *Ky.*—*Hawkins v. Ragsdale*, 80 Ky. 353, 4 Ky. L. Rep. 184, 44 Am. Rep. 483; *Maguire v. Maguire*, 7 Dana 181. *Tenn.*—*Toneray v. Toneray*, 123 Tenn. 476, 131 S. W. 977; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983.

[a] *Wife's Rights in Property of Forum Not Affected.*—(1) "Since there was no personal service upon her or appearance in the court rendering the decree, and she was not a resident of that state, although the decree may have restored plaintiff to the status of an unmarried man, the court was without jurisdiction by its decree to affect the rights his wife and family had acquired in the property he may have owned in this state." *Gooch v. Gooch*, 38 Okla. 300, 133 Pac. 242. (2) To the same effect see *Carter v. Carter*, 89 Kan. 367, 131 Pac. 561; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546; *Toneray v. Toneray*, 123 Tenn. 476, 131 S. W. 977.

86. See *supra*, XVIII, B, 4, b.

87. *Ala.*—*Thompson v. State*, 28 Ala.

12. *Ga.*—*Matthews v. Matthews*, 139 Ga. 123, 76 S. E. 855, 865. *Ill.*—*Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81. *Ia.*—*Graves v. Graves*, 36 Iowa 310, 14 Am. Rep. 525. *Mich.*—*Reed v. Reed*, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247. *Mo.*—*Howard v. Strode*, 242 Mo. 210, 146 S. W. 792, 799. *N. J.*—*Jung v. Jung* (N. J. Eq.), 96 Atl. 499; *Dumont v. Dumont* (N. J. Eq.), 45 Atl. 107; *Supreme Council v. Carley*, 52 N. J. Eq. 642, 29 Atl. 813; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669; *Doughty v. Doughty*, 28 N. J. Eq. 581. *N. Y.* *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Stanton v. Crosby*, 9 Hun 370; *Vischer v. Vischer*, 12 Barb. 640; *Hall v. Hall*, 122 N. Y. Supp. 401.

See *supra*, XVIII, B, 4, c.

88. *U. S.*—*Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366; *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226. *Conn.*—*Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684. *Md.*—*Walker v. Walker*, 125 Md. 649, 94 Atl. 346. *N. J.*—*Jung v. Jung* (N. J. Eq.), 96 Atl. 499; *Carling v. Carling*, 78 N. J. Eq. 42, 81 Atl. 565. *Pa.*—*Com. v. Parker*, 59 Pa. Super. 74.

But see *Carter v. Carter*, 89 Kan. 367, 131 Pac. 561; *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681.

[a] *Residence for Divorce Only.* Where a husband goes to Nevada and takes up residence there for the jurisdictional period prescribed by the statutes of that state solely for the purpose of obtaining a divorce and with no intention of remaining there after the divorce is obtained, he does not acquire a bona fide residence there so as to give the court jurisdiction to grant him a divorce which will be

d. *Alimony*.—The courts of one state will enforce a decree obtained in another, for the payment of alimony, the amount of which is definitely fixed,<sup>89</sup> unless the right to receive the alimony is so discretionary with the court rendering the decree that even in the absence of an application to modify the same no vested right exists.<sup>90</sup>

recognized in another state. *Walker v. Walker*, 125 Md. 649, 94 Atl. 346.

[b] **Equity will annul a divorce** fraudulently procured in another state before the plaintiff had been a bona fide resident there for a year as required by statute. *Jung v. Jung* (N. J. Eq.), 96 Atl. 499.

89. **U. S.**—*Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. ed. 905, 28 L. R. A. (N. S.) 1068; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Cotter v. Cotter*, 225 Fed. 471, 139 C. C. A. 453. **Colo.**—*McGregor v. McGregor*, 52 Colo. 292, 122 Pac. 390. **Ga.**—*Schroeder v. Schroeder*, 144 Ga. 119, 86 S. E. 224. **Ill.**—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. **Ky.**—*Rogers v. Rogers*, 15 B. Mon. 364. **Mass.**—*Taylor v. Stowe*, 218 Mass. 248, 105 N. E. 890; *Allen v. Allen*, 100 Mass. 373. **N. J.** *Bullock v. Bullock*, 57 N. J. L. 508, 31 Atl. 1024; *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501. **N. Y.**—*Williamson v. Williamson*, 169 App. Div. 597, 155 N. Y. Supp. 423; *Moore v. Moore*, 142 App. Div. 459, 126 N. Y. Supp. 936; *Tiedemann v. Tiedemann*, 92 Misc. 417, 156 N. Y. Supp. 111. **Okla.** *Campbell v. Campbell*, 28 Okla. 838, 115 Pac. 1111. **W. Va.**—*Stewart v. Stewart*, 27 W. Va. 167.

[a] **Effect of Full Faith and Credit Clause.**—In *Sistare v. Sistare*, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. ed. 905, Chief Justice White sums up the authorities as follows: "First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber* case, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however,

does not obtain where by the law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

[b] **Effect of Re-marriage.**—Where the statute of a sister state provides that upon a new marriage being contracted by either of the parties, a new trial may be granted as to alimony, the original decree remains in full force, and as such has the protection of the full faith and credit clause. *Taylor v. Stowe*, 218 Mass. 248, 105 N. E. 208, 890; *Bolton v. Bolton*, 86 N. J. L. 622, 92 Atl. 389.

[c] **The power to annul, vary or modify** a judgment as to alimony given to the court by the statute of the state where rendered, confers no retroactive power to alter the judgment as to past-due installments, and the annulment, variation or modification can only affect installments which have not fallen due, and such decree as to past-due installments is entitled to faith and credit in other states. *Bolton v. Bolton*, 86 N. J. L. 622, 92 Atl. 389.

[d] **Suit for Alimony Out of Real Estate in Forum.**—An independent suit to recover alimony out of real estate of the husband situated in the forum, is not barred by a decree for alimony rendered in a sister state, when in rendering such decree the court could not without consent of the parties consider the extraterritorial real estate and such consent not having been given, a reasonable sum only was allowed, based upon the property owned by the husband, situated within the jurisdiction of the court. *Bodie v. Bates*, 95 Neb. 757, 146 N. W. 1002. And see *Pinkley v. Pinkley*, 155 Ky. 203, 159 S. W. 795.

90. **U. S.**—*Lynde v. Lynde*, 181 U. S.



c. *Custody of Children*.—A provision in a divorce decree establishing a right to the custody of a minor child will be given force and effect in another state.<sup>91</sup> But such award of custody is only conclusive as to facts and conditions before the court upon the rendition of the decree.<sup>92</sup> It is, therefore, not a bar to a proceeding in another state to modify it upon proof that the situation and character of the respective parties has so changed as to render it to the interest of the infant that it be committed to the care of the other party.<sup>93</sup>

6. **Judgments of Confederate States**.—In so far as a judgment rendered in a confederate state during the period of rebellion could

183, 21 Sup. Ct. 555, 45 L. ed. 810; Valiquet v. Valiquet, 177 Fed. 994. **Ga.**—Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65. **Mass.**—Wells v. Wells, 209 Mass. 282, 95 N. E. 845. **Okla.**—Bleuer v. Bleuer, 27 Okla. 25, 110 Pac. 736. **Ore.**—Rowe v. Rowe, 76 Ore. 491, 149 Pac. 523; De Vall v. De Vall, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. **Tex.**—Ogg v. Ogg (Tex. Civ. App.), 165 S. W. 912.

[a] It must appear from the petition or complaint that the decree for alimony is final. See Ogg v. Ogg (Tex. Civ. App.), 165 S. W. 912.

[b] **Alimony Pendente Lite**.—An order awarding temporary alimony which is in effect a mere interlocutory decree subject to modification and vacation by the court which entered it, is not enforceable in other states even as to installments of such alimony due and unpaid. Henry v. Henry, 74 W. Va. 563, 82 S. E. 522.

91. **Conn.**—Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1. **Ga.**—Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045; Hammond v. Hammond, 90 Ga. 527, 16 S. E. 265; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202. **Ill.**—Umlauf v. Umlauf, 27 Ill. App. 375. **Ind.**—DuBois v. Johnson, 96 Ind. 6; Teter v. Teter, 88 Ind. 494. **Ia.**—White v. White, 75 Iowa 218, 39 N. W. 277; Sherwood v. Sherwood, 56 Iowa 608, 10 N. W. 98; Jennings v. Jennings, 56 Iowa 288, 9 N. W. 222; Wakefield v. Ives, 35 Iowa 238. **Me.**—Stetson v. Stetson, 80 Me. 483, 15 Atl. 60. **Minn.**—State v. Bechdel, 37 Minn. 360, 34 N. W. 334. **Mont.** State ex rel. Nipp v. District Court, 46 Mont. 425, 128 Pac. 590. **N. M.**—Mylius v. Cargill, 19 N. M. 278, 142 Pac. 918. **N. Y.**—Mercein v. People, 25 Wend. 64, 25 Am. Dec. 653. **Tex.**—Wilson v. Elliott, 96 Tex. 472, 73 S. W. 946, 97 Am. St. Rep. 928. **W. Va.**—Anderson

v. Anderson, 74 W. Va. 124, 81 S. E. 706.

[a] That the child is beyond the jurisdiction of the court at the time of the rendition of the decree awarding its custody, does not affect the conclusiveness of such decree in another state. Schroeder v. Schroeder, 144 Ga. 119, 86 S. E. 224; Anderson v. Anderson, 74 W. Va. 124, 81 S. E. 706.

[b] **Fraud** in procuring the provision disposing of the child may be shown to defeat its enforcement. Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045.

[c] **Decree Void as to Divorce**.—Though so much of the decree as grants the divorce may be void, the award of custody of the children will bind the parties in other states. Anderson v. Anderson, 74 W. Va. 124, 81 S. E. 706.

92. **Ga.**—Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860. **Neb.**—Ex parte Clarke, 118 N. W. 472. **N. M.**—Mylius v. Cargill, 19 N. M. 278, 142 Pac. 918. **N. Y.**—People ex rel. Allen v. Allen, 40 Hun 611; Ex parte Stewart, 77 Misc. 524, 137 N. Y. Supp. 202. **Tex.**—Ex parte Boyd (Tex. Civ. App.), 157 S. W. 254.

[a] **Decree Modified as to Custody**.—Where upon the death of the mother to whom custody of a child had been given upon divorce, the decree was modified so as to give such child into the custody of the father, the court's action in thus modifying the decree, while competent evidence in habeas corpus proceedings in another state, is not conclusive as to the father's fitness to have such custody. Pinney v. Sulzen, 91 Kan. 407, 137 Pac. 987.

93. **Ga.**—Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045. **N. M.**—Martinez v. Vigil, 19 N. M. 306, 142 Pac. 920.

be deemed an act in furtherance thereof, it is void and entitled to no faith and credit in the courts of the union.<sup>94</sup> Respect and recognition is, however, extended to confederate judgments touching matters in no wise involving the supremacy of the national authority.<sup>95</sup>

C. JUDGMENTS OF STATE COURTS IN FEDERAL COURTS. — Judgments and decrees of state courts are by virtue of congressional enactment<sup>96</sup> accorded such faith and credit in the United States courts,<sup>97</sup> and in

Tex.—*Wilson v. Elliott*, 96 Tex. 472, 73 S. W. 946, 97 Am. St. Rep. 928.

94. *Sprott v. United States*, 20 Wall. (U. S.) 459, 22 L. ed. 371; *Horn v. Lockhart*, 17 Wall. (U. S.) 570, 21 L. ed. 657; *Kanawha Coal Co. v. Kanawha & O. Coal Co.*, 7 Blatchf. 391, 14 Fed. Cas. No. 7,606; *The Lilla*, 2 Spr. 177, 15 Fed. Cas. No. 8,348.

[a] In *Horn v. Lockhart*, 17 Wall. (U. S.) 570, 21 L. ed. 657, Mr. Justice Field said: "We admit that the acts of the several states in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution."

95. U. S.—*United States v. Home Ins. Co.*, 22 Wall. 99, 22 L. ed. 816; *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 657; *French v. Tumlin*, 14 Int. Rev. Rec. 140, 9 Fed. Cas. No. 5,104; *Cook v. Oliver*, 1 Woods C. C. 437, 6 Fed. Cas. No. 3,164. Ala.—*Hill v. Armistead*, 56 Ala. 118. N. Y.—*Pepin v. Lachenmeyer*, 45 N. Y. 27.

96. Act Cong. May 26, 1790, U. S.

Rev. St., 1878, sec. 905; U. S. Comp. St., 1901, p. 677.

97. *Baltimore & Ohio R. Co. v. Hostetter*, 240 U. S. 620, 36 Sup. Ct. 475, 60 L. ed. 829; *Union & Planters' Bank v. City of Memphis*, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. ed. 712; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. ed. 627; *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. ed. 783; *Forsyth v. Hammond*, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. ed. 1095; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. ed. 1038; *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. ed. 520; *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Montgomery v. Samory*, 99 U. S. 482, 25 L. ed. 375; *Parrish v. Ferris*, 2 Black 606, 17 L. ed. 317; *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Knowles v. Gaslight, etc. Co.*, 19 Wall. 58, 22 L. ed. 70; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *United States Oil & Land Co. v. Bell*, 219 Fed. 785, 135 C. C. A. 455; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194; *Mazzariello v. Doherty*, 204 Fed. 245, 122 C. C. A. 513; *Foster Milburn Co. v. Chinn*, 202 Fed. 175, 122 C. C. A. 577; *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 120 C. C. A. 354; *Handlan v. Walker*, 200 Fed. 566, 119 C. C. A. 46; *Venner v. Chicago City R. Co.*, 200 Fed. 1023, 118 C. C. A. 210; *Converse v. Stewart*, 197 Fed. 152, 118 C. C. A. 212; *Willeox v. Jones*, 177 Fed. 870, 101 C. C. A. 84; *Stewart v. Board of Trustees*, 156 Fed. 773, 84 C. C. A. 451; *Bailey v. Willeford*, 136 Fed. 382, 69 C. C. A. 226; *Cooper v. Brazelton*, 135 Fed. 476, 68 C. C. A. 188; *Glen-cove Granite Co. v. City Trust, Safe Dep. & S. Co.*, 118 Fed. 386, 55 C. C. A. 212; *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293; *Warrington v. Ball*, 90 Fed. 464, 33 C. C. A. 609; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 21 C.

those of the territories,<sup>98</sup> and the District of Columbia,<sup>99</sup> as they have in the state where rendered. No greater force and effect need be accorded such judgments by the federal courts than they are entitled to in the state where rendered or in sister states.<sup>1</sup> Final<sup>2</sup> judgments

C. A. 468; *Clay v. Deskins*, 63 Fed. 330, 11 C. C. A. 229; *Billing v. Gilmer*, 62 Fed. 661, 10 C. C. A. 579; *Byrd v. Hall*, 211 Fed. 182; *In re Wenatchee-Stratford Orchard Co.*, 205 Fed. 964; *Detroit & M. R. Co. v. Michigan R. R. Commission*, 203 Fed. 864; *Irvine v. Blackburn*, 198 Fed. 360; *In re Seavey*, 195 Fed. 825; *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006; *Susquehanna Coal Co. v. Mayor, etc. of South Amboy*, 184 Fed. 941; *Burt & Brabb Lumb. Co. v. Bailey*, 175 Fed. 131; *Smith v. Mosier*, 169 Fed. 430; *Pundt v. Pendleton*, 167 Fed. 997; *The Ira M. Hedges*, 163 Fed. 587; *Gunning System v. Buffalo*, 157 Fed. 249; *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441; *Israel v. Israel*, 130 Fed. 237; *Wood v. Mobile*, 99 Fed. 615; *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526; *Green v. Sarmiento*, Pet. C. C. 74, 3 Wash. C. C. 17, 10 Fed. Cas. No. 5,760; *Field v. Gibbs*, Pet. C. C. 155, 9 Fed. Cas. No. 4,766; *State of West Virginia v. United States*, 45 Ct. Cl. 576.

[a] In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, it was said: "Whilst they" (the federal courts) "are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them."

[b] Where concurrent jurisdiction exists between the state courts and the federal courts, the judgment in the one is binding on the other. *Reynolds v. Lyon County*, 121 Iowa 733, 96 N. W. 1096.

[c] Law Involved.—This rule holds true whether the question determined was one of federal, general or local law. *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 120 C. C. A. 354.

[d] Judgment based on State Employers' Liability Act is conclusive on the federal courts. *Mazzariello v. Doherty*, 204 Fed. 245, 122 C. C. A. 513.

[e] No greater effect need be given

to the state judgment when sued on in the federal courts than it enjoys in the state where rendered. *Higgins v. Eaton*, 188 Fed. 938.

[f] Bankruptcy.—A judgment of a state court against a bankrupt is conclusive on the federal courts unless want of jurisdiction, or fraud or collusion appears. *In re Wenatchee-Stratford Orchard Co.*, 205 Fed. 964.

98. See *Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766; and Act of Congress, March 27, 1804, U. S. Rev. St., §906; U. S. Comp. St., 1901, p. 677.

[a] In Indian Territory.—By Act May 2, 1890, c. 182, 26 St. at L. 96, the federal constitution was given "the same force and effect in the Indian Territory as elsewhere in the United States." The full faith and credit clause of the constitution, therefore, applies to the courts of the Indian Territory. *Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766.

99. *Magruder v. Drury*, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. ed. 151; *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347; *Slack v. Perrine*, 9 App. Cas. (D. C.) 128; *Richmond & D. R. Co. v. Gorman*, 7 App. Cas. (D. C.) 91.

[a] The expression "every court within the United States," appearing in Rev. St. U. S., sec. 905, includes the courts of the District of Columbia. *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347.

1. *Hekking v. Pfaff*, 91 Fed. 60, 33 C. C. A. 328; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468.

2. *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; *Homer v. Brown*, 16 How. 354, 14 L. ed. 970; *Shelton v. Tiffin*, 6 How. 163, 12 L. ed. 387; *Coram v. Ingersoll*, 148 Fed. 169, 78 C. C. A. 303; *Texas & P. Railway Co. v. Smith*, 91 Fed. 483, 33 C. C. A. 648; *Barry v. Friel*, 114 Fed. 989; *Gabrielson v. Waydell*, 67 Fed. 342.

[a] A judgment on demurrer is as conclusive as one rendered on proof. *Sperry & Hutchinson Co. v. Blue*, 202



on the merits, of every kind,<sup>3</sup> procured in the state courts are, therefore, generally conclusive in the federal courts, whether the question determined was one of federal, general or local law.<sup>4</sup> A judgment rendered in a state court will be given the same force and effect as

Fed. 82, 120 C. C. A. 354; *Stewart v. Board of Trustees*, 156 Fed. 773, 84 C. C. A. 451. See *supra*, XVII, B, 3, d, (II), (F).

[b] A judgment (1) of dismissal when on the merits, is conclusive upon the federal court. Thus a judgment rendered on motion to dismiss because the complaint does not state a cause of action can be set up as *res judicata* to an action subsequently brought in the federal court. *Coram v. Ingersoll*, 148 Fed. 169, 78 C. C. A. 303; *Eau Claire Nat. Bank v. Benson*, 128 Fed. 277, 63 C. C. A. 591; *Haug v. Great Northern Railroad*, 102 Fed. 74, 42 C. C. A. 167; *In re Reynolds*, 133 Fed. 585, 760. (2) But a judgment dismissing a writ of certiorari to review a sentence of imprisonment is, when not on the merits, no bar to a petition for a release on a writ of habeas corpus. *Pundt v. Pendleton*, 167 Fed. 997.

[c] A judgment of non suit is not a judgment on the merits and, therefore, the entry of such a judgment in a state court is no bar to another suit in the federal court on the same cause of action. *Bixler v. Pennsylvania R. Co.*, 201 Fed. 553. See *supra*, XVII, B, 3, d, (II), (H).

[d] That (1) an appeal is pending in the United States supreme court from the judgment of the state court does not suspend its operation as an estoppel (*Straus v. American Pub. Assn.*, 201 Fed. 306, 119 C. C. A. 544); (2) unless by the law of the state whose judgment is in question, the perfection of an appeal deprives the judgment of its effect as an estoppel. *Contra Costa Water Co. v. Oakland*, 165 Fed. 518. See *supra*, XVII, B, 3, e, (V).

3. See generally *supra*, XVII, B, 3, d.

[a] **Assessing Stockholder's Liability.**—A judgment of a state court, assessing defendant for the benefit of creditors of an insolvent corporation will be enforced in the United States courts. *Irvine v. Blackburn*, 198 Fed. 360.

[b] **A forfeiture of land for unpaid**

taxes adjudicated in state courts is conclusive upon the federal courts. *Snyder v. Upper Elk Coal Co.*, 228 Fed. 21, 142 C. C. A. 477.

[c] A judgment confirming an order of the state railroad commission is within the rule. *Detroit & M. R. Co. v. Michigan R. R. Commission*, 203 Fed. 864.

4. *Wright v. Georgia R. & Banking Co.*, 216 U. S. 420, 30 Sup. Ct. 242, 54 L. ed. 544; *Covington v. First Nat. Bank*, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. ed. 963; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. ed. 712; *Mitchell v. First Nat. Bank of Chicago*, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. ed. 627; *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. ed. 783; *Forsyth v. Hammond*, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. ed. 1095; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369; *Snyder v. Upper Elk Coal Co.*, 228 Fed. 21, 142 C. C. A. 477; *United States Oil & Land Co. v. Bell*, 219 Fed. 785, 135 C. C. A. 455; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194; *Canton-Hughes Pump Co. v. Llera*, 205 Fed. 209, 123 C. C. A. 397; *Mazzariello v. Doherty*, 204 Fed. 245, 122 C. C. A. 513; *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 120 C. C. A. 354; *Straus v. American Publishers' Assn.*, 201 Fed. 306, 119 C. C. A. 544; *Handlan v. Walker*, 200 Fed. 566, 119 C. C. A. 46; *Wilcox v. Jones*, 177 Fed. 870, 101 C. C. A. 84; *The J. R. Langdon*, 163 Fed. 472, 90 C. C. A. 18; *Stewart v. Board of Trustees*, 156 Fed. 773, 84 C. C. A. 451; *National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479; *Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co.*, 136 Fed. 27, 68 C. C. A. 577; *Casey v. Pennsylvania Asphalt Pav. Co.*, 114 Fed. 189, 52 C. C. A. 145; *Sherman v. American Congregational Assn.*, 113 Fed. 609, 51 C. C. A. 329; *State Trust Co. v. De La Vergne Refrigerating Mach. Co.*, 105 Fed. 468, 44 C. C. A. 556; *Harper v. Harper*, 53 Fed. 35, 3 C. C. A. 415; *Continental Tr. Co. v. Tallassee Falls Mfg. Co.*, 222 Fed. 694;

a bar in a federal court as is given to it in the courts where rendered. Such state judgment will there merge the original claim or demand,<sup>5</sup> and bar a subsequent suit in a federal court between the same parties and upon the same cause of action.<sup>6</sup>

The question of jurisdiction of the state court is not concluded by its judgment. When it is sought to enforce the judgment in a federal court, the same may be impeached by showing that the court rendering it had no jurisdiction over the parties or the subject-matter.<sup>7</sup> It will

*Swift v. McFarland*, 215 Fed. 452; *Sharp v. Bouham*, 213 Fed. 660; *Puget Sound Electric Ry. v. Lee*, 207 Fed. 860; *Detroit & M. R. Co. v. Michigan R. R. Commission*, 203 Fed. 864; *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006; *Susquehanna Coal Co. v. Mayor, etc. of South Amboy*, 184 Fed. 941; *Jenkins v. Atlantic Coast Line R. Co.*, 179 Fed. 535; *Burt & Brabb Lumb. Co. v. Bailey*, 175 Fed. 131; *Smith v. Mosier*, 169 Fed. 430; *The Ira M. Hedges*, 163 Fed. 587; *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441; *Eastern Building & Loan Assn. v. Welling*, 116 Fed. 100; *State Trust Co. v. Kansas City, P. & G. R. Co.*, 115 Fed. 367; *Montgomery v. McDermott*, 87 Fed. 374; *Bryar v. Bryar*, 78 Fed. 657; *Fuller v. Hamilton County*, 53 Fed. 411; *Duden v. Maloy*, 43 Fed. 407.

See also the title "Res Judicata."

[a] **Matters neither pleaded nor litigated** in the state court are not concluded. *De Chambrun v. Schermerhorn*, 59 Fed. 504.

[b] **Judgment Against Federal Receiver.**—A judgment of a state court having jurisdiction of the parties and the subject-matter against a federal receiver in his official capacity, in respect of any act or transaction of his in carrying on the business connected with the receivership property, is final and conclusive as to the existence and amount of the liability. *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006; *Central Trust Co. v. St. Louis, etc. R. Co.*, 41 Fed. 551.

5. *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; *Green v. Sarmiento*, Pet. C. C. 74, 3 Wash. C. C. 17, 10 Fed. Cas. No. 5,760.

6. *Venner v. Chicago City Ry. Co.*, 200 Fed. 1023, 118 C. C. A. 210; *Board of Comrs. v. Home Savings Bank*, 200 Fed. 28, 118 C. C. A. 256; *Delaware, L. & W. R. Co. v. Troxell*,

200 Fed. 44, 118 C. C. A. 272; *Stewart v. Board of Trustees*, 156 Fed. 773, 84 C. C. A. 451; *Eau Claire Nat. Bank v. Benson*, 128 Fed. 277, 63 C. C. A. 591; *Gorham v. Broad River Tp.*, 118 Fed. 1016, 56 C. C. A. 140; *Fayerweather v. Ritch*, 91 Fed. 721, 34 C. C. A. 61; *Jenkins v. Atlantic Coast Line R. Co.*, 179 Fed. 535; *Pundt v. Pendleton*, 167 Fed. 997; *John D. Park & Sons Co. v. Bruen*, 139 Fed. 698; *Nugent v. Philadelphia Traction Co.*, 87 Fed. 251; *United States v. Dewey*, 6 Biss. 501, 25 Fed. Cas. No. 14,956; *Slack v. Perrine*, 9 App. Cas. (D. C.) 128.

[a] **Based on Different Statute.** "The fact that the judgment in the state court depended upon the state statutes and that the complaint in this case is founded on the federal statute, which is not within the jurisdiction of the state court, makes no difference." *Straus v. American Publishers' Assn.*, 201 Fed. 306, 119 C. C. A. 544.

[b] **An action for wrongful death** is barred in the federal courts by a judgment in the state court denying a recovery upon the same claim in an action for personal injuries. *Freseohn v. Puget Sound Traction, Light & Power Co.*, 225 Fed. 441.

[c] **A suit to surcharge and correct** an administrator's account, in the federal court, is not barred by a settlement of accounts by a decree of a state court. *Bertha Zinc Mineral Co. v. Vaughan*, 88 Fed. 566.

7. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. ed. 808; *Lytle v. Town of Lansing*, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. ed. 78; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. ed. 101; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, 13 L. ed. 648; *Hickey v. Stewart*, 3 How. (U. S.) 750, 11 L. ed. 814; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194; *Davis*

be presumed that the court, if of general jurisdiction, had jurisdiction and power to proceed in the case and render the judgment in question.<sup>8</sup> The record is not conclusive as to jurisdictional facts therein stated. Evidence aliunde may be introduced in contradiction thereof,<sup>9</sup> and particularly to overcome a return showing proper service,<sup>10</sup> or a record recital of due service by publication,<sup>11</sup> or of appearance in person or by attorney.<sup>12</sup> Where the court, however, expressly adjudicates the question of its jurisdiction and finds the existence of facts which if true would confer jurisdiction, the matter cannot be relitigated in a federal court.<sup>13</sup>

**Errors and Irregularities.**—Where jurisdiction of the state court over the parties and the subject-matter has attached, its judgment cannot

*v. Bessemer City Cotton Mills*, 178 Fed. 784, 102 C. C. A. 232; *Cooper v. Brazelton*, 135 Fed. 476, 68 C. C. A. 188; *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175, 65 C. C. A. 481; *Wood v. Mobile*, 107 Fed. 846, 47 C. C. A. 9; *Hekking v. Pfaff*, 91 Fed. 60, 33 C. C. A. 328, 43 L. R. A. 618; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Higgins v. Eaton*, 188 Fed. 938; *Burt & Brabb Lumb. Co. v. Bailey*, 175 Fed. 131; *Israel v. Israel*, 130 Fed. 237; *L'Engle v. Gates*, 74 Fed. 513; *Swift v. Meyers*, 13 Sawy. 583, 37 Fed. 37; *Downs v. Allen*, 23 Blatchf. 54, 22 Fed. 805; *Graham v. Spencer*, 14 Fed. 603.

*Compare supra*, XVII, A; XVIII, B, 3, a.

[a] **Non-residence.**—It may be shown, even in contradiction of the record, that defendant was a non-resident of the state when suit was brought, was not served with process and did not appear and that an attorney who made appearance for him was not authorized to do so. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. ed. 808.

[b] "The courts of the United States only regard judgments of the state courts establishing personal demands as having validity, or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance." *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

8. *Higgins v. Eaton*, 188 Fed. 938.

*Compare supra*, XVII, A, 7, c, (IV), (B) and (C); XVIII, B, 4, b, (II).

9. *Cooper v. Newell*, 173 U. S. 555,

19 Sup. Ct. 506, 43 L. ed. 808; *Knowles v. Logansport Gas Light, etc. Co.*, 19 Wall. (U. S.) 58, 22 L. ed. 70; *Dunsmuir v. Scott*, 217 Fed. 200, 133 C. C. A. 194; *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784, 102 C. C. A. 232; *Hazeltine v. Miss. Valley Fire Ins. Co.*, 55 Fed. 743; *Citizens Bank v. Brooks*, 23 Blatchf. 137, 23 Fed. 21; *Downs v. Allen*, 23 Blatchf. 54, 22 Fed. 805.

*Compare supra*, XVII, A, 7, c, (IV), (A) and (C); XVIII, B, 4, b, (III).

[a] **Certain earlier cases** denied the right to thus contradict the record. *Todd v. Crumb*, 5 McLean, 172, 23 Fed. Cas. No. 14,073; *Lincoln v. Tower*, 2 McLean 473, 15 Fed. Cas. No. 8,355; *Field v. Gibbs*, Pet. C. C. 155, 9 Fed. Cas. No. 4,766.

10. *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784, 102 C. C. A. 232; *Burt & Brabb Lumb. Co. v. Bailey*, 175 Fed. 131.

11. *Howard v. De Cordova*, 177 U. S. 609, 20 Sup. Ct. 817, 44 L. ed. 908.

12. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. ed. 808.

[a] **Unauthorized Attorney.**—It may be shown that a pretended appearance by attorney was unauthorized and without defendant's knowledge. *Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. ed. 808.

13. *United States Oil & Land Co. v. Bell*, 219 Fed. 785, 135 C. C. A. 455; *Sipe v. Copwell*, 59 Fed. 970, 8 C. C. A. 419; *Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Hubbard v. American Investment Co.*, 70 Fed. 808.

*Compare supra*, XVII, A, 7, c, (IV), (C), (6); XVIII, B, 4, b, (III), (C).



be collaterally assailed in a federal court for mere errors and irregularities that are not jurisdictional.<sup>14</sup>

**Creditor's Bills.**—There is a difference of opinion as to whether a creditor's bill will lie in a federal court upon a judgment rendered in a state court. There are cases permitting such a bill,<sup>15</sup> as well as cases refusing such remedy.<sup>16</sup>

**D. JUDGMENTS OF FEDERAL COURTS IN STATE COURTS.—1. Operation and Effect in General.**—Judgments and decrees rendered by the various federal tribunals are operative in state courts.<sup>17</sup> The judg-

14. *Det. & M. R. Co. v. Mich. R. R. Comm.*, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288; *Magruder v. Drury*, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. ed. 151; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054; *In re Seavey*, 195 Fed. 825.

[a] A railroad company cannot maintain a suit in a federal court to restrain the enforcement of an order of the state railroad commission which has been sustained by the state courts. *Blythe v. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. ed. 783; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054; *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. ed. 520; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617, 27 L. ed. 636; *Straus v. American Pub. Assn.*, 201 Fed. 306, 119 C. C. A. 544; *Wood v. Mobile*, 107 Fed. 846, 47 C. C. A. 9; *Little Rock June Ry. Co. v. Burke*, 66 Fed. 83, 13 C. C. A. 341; *Puget Sound Electric Ry. v. Lee*, 207 Fed. 860; *Higgins v. Eaton*, 188 Fed. 938; *Philbrook v. Newman*, 85 Fed. 139; *Siddall v. Bregy*, 64 Fed. 610; *Russell & Co. v. Lamb*, 49 Fed. 770; *Smith v. Schwed*, 9 Fed. 483; *Slack v. Perrine*, 9 App. Cas. (D. C.) 128.

*Compare supra*, XVII, A, 7, e; XVIII, B, 4, d.

15. *Bidwell v. Huff*, 103 Fed. 362; *Alkire Grocery Co. v. Richesin*, 91 Fed. 79; *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. 314; *Wilkinson v. Yale*, 6 McLean 16, 29 Fed. Cas. No. 17,678.

*Compare supra*, XVIII, B, 3, g.

16. *Claffin v. McDermott*, 20 Blatchf. 522, 12 Fed. 375; *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. 415.

17. **U. S.**—*Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619; *Pittsburgh, C. C. & St. L. Ry. Co. v. Long Island Loan & Trust Co.*, 172 U. S. 493, 19 Sup.

Ct. 238, 43 L. ed. 529; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. ed. 807; *Cornue v. Ingersoll*, 176 Fed. 194, 99 C. C. A. 548. **Ala.**—*Butler v. Watrous*, 185 Ala. 130, 64 So. 346; *Womack v. Dearman*, 7 Port. 513. **Ark.**—*Garland County v. Hot Spring County*, 68 Ark. 83, 56 S. W. 636; *State v. Adler*, 67 Ark. 469, 55 S. W. 851; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731. **Cal.**—*Swinnerton v. Oregon Pac. Railroad Co.*, 123 Cal. 417, 56 Pac. 40; *Semple v. Hagar*, 27 Cal. 163. **Conn.**—*Appeal of Buckingham*, 60 Conn. 143, 22 Atl. 509; *Dennison v. Hyde*, 6 Conn. 508. **Fla.** *Hull v. Burr*, 64 Fla. 83, 59 So. 787. **Ga.**—*Smith v. Walker*, 77 Ga. 289, 3 S. E. 256; *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660. **Ill.**—*Bermudez Asphalt Pav. Co. v. Gibson*, 106 Ill. App. 6. **Ind.**—*Bruce v. Osgood*, 154 Ind. 375, 56 N. E. 25; *Harmon v. Best*, 144 Ind. 323, 91 N. E. 19; *Harrison v. Phenix Mut. Life Ins. Co.*, 83 Ind. 575; *Souers v. Stahl*, 59 Ind. App. 543, 109 N. E. 796; *Larimer v. Krau*, 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936. **Ia.**—*Moore v. Jeffers*, 53 Iowa 202, 4 N. W. 1084; *Scully v. Chicago, B. & Q. R. Co.*, 46 Iowa 528; *Doran v. Davis*, 43 Iowa 86; *Thomson v. Lee*, 22 Iowa 206. **Kan.**—*Hyatt v. Challiss*, 59 Kan. 422, 53 Pac. 467; *Leitzbach v. Jackman*, 28 Kan. 524. **Ky.**—*Tyson's Admx. v. Illinois Cent. R. Co.*, 151 Ky. 185, 151 S. W. 404; *Barnett v. Bauer Cooperage Co.*, 145 Ky. 163, 140 S. W. 146; *Clinger's Admx. v. Chesapeake & O. Ry. Co.*, 138 Ky. 615, 128 S. W. 1055; *Thoms v. Southard*, 2 Dana 475, 26 Am. Dec. 467; *Reed v. Whitlow*, 19 Ky. L. Rep. 1538, 43 S. W. 686. **La.**—*Keene v. McDonough*, 8 La. 185; *Lowry v. Erwin*, 6 Rob. 192, 39 Am. Dec. 556; *Pasteur v. Lewis*, 39 La. Ann. 5, 1 So. 307; *Bouchard v. Parker*, 32 La.

ments of such courts held within the jurisdictions of the various states are not to be considered as foreign judgments by the courts of the states wherein they are rendered;<sup>18</sup> nor are they to be considered as foreign judgments by the courts of other states.<sup>19</sup> When treated as state judgments they are governed, as to their effect in other states, by the same limitations upon the operation of the full faith and credit clause, as apply in the case of state judgments.<sup>20</sup> Such faith and credit must be accorded them as would be given to adjudications of a state tribunal in a like case and under similar circumstances.<sup>21</sup>

Ann. 535. **Mass.**—Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193; Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 125 Mass. 292; Brown v. Bridge, 106 Mass. 563; Durant v. Essex Co., 8 Allen 103, 85 Am. Dec. 685. **Minn.**—Connecticut Mut. Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Turrell v. Warren, 25 Minn. 9. **Mo.**—City of St. Louis v. United Rys. Co., 263 Mo. 387, 174 S. W. 78; Kahn v. Mercantile Town Mut. Ins. Co., 150 Mo. 393, 130 S. W. 492; *In re Copenhagen*, 118 Mo. 377, 24 S. W. 161; *State ex rel. Hudson v. Trammel*, 106 Mo. 510, 17 S. W. 502; *State ex rel. Wilson v. Rainey*, 74 Mo. 229; Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Cobe v. Ricketts, 111 Mo. App. 105, 85 S. W. 131; Bracken v. Milner, 99 Mo. App. 187, 73 S. W. 225. **Mont.**—Dunseth v. Butte Electric Ry. Co., 41 Mont. 14, 108 Pac. 567. **Neb.**—Haas v. Mutual Life Ins. Co., 90 Neb. 808, 134 N. W. 937; Mead v. Weaver, 42 Neb. 149, 60 N. W. 385. **N. Y.**—Baldwin v. Rice, 184 N. Y. 523, 76 N. E. 1088; Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987; Hoyt v. Gelston, 13 Johns. 141; Griswold v. Sedgwick, 6 Cow. 456; *In re Eaton's Estate*, 159 App. Div. 7, 144 N. Y. Supp. 254; Buchholz-Hill Transp. Co. v. Baxter, 142 App. Div. 25, 126 N. Y. Supp. 514. **N. C.**—Pigot v. Davis, 10 N. C. 25. **Ohio.**—Voorhees v. Minor, 20 Ohio Cir. Ct. 54. **Pa.**—*In re Williamson*, 26 Pa. 9, 2 Am. L. Reg. (O. S.) 741, 12 Leg. Int. 246, 67 Am. Dec. 374. **R. I.**—Rounds v. Providence, etc. Steamship Co., 14 R. I. 344. **S. C.**—Gillett v. Powell, Spears Eq. 142. **Tex.**—Batjer v. Roberts (Tex. Civ. App.), 148 S. W. 841.

[a] The judgments of consular courts of China established to effectuate the treaty with China are as binding on the state courts as are the judgments of other federal courts. *Newman v. Basch*, 89 Misc. 622, 152 N. Y. Supp. 456.

18. **U. S.**—*Earl v. Raymond*, 4 McLean 233, 8 Fed. Cas. No. 4,243. **Md.**—*Barney v. Patterson's Lessee*, 6 Har. & J. 182. **Vt.**—*St. Albans v. Bush*, 4 Vt. 58, 23 Am. Dec. 246. **Va.**—*Draper's Exrs. v. Gorman*, 8 Leigh 628. **W. Va.**—*Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390.

[a] The judgments (1) of such courts are in many respects domestic judgments, for they are rendered by courts which, although they administer the laws of the United States in the several states, also administer the laws of each state, and follow, to a very great extent, the systems of judicature of each, in their respective districts. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390. And see **U. S.**—*Earl v. Raymond*, 4 McLean 233, 8 Fed. Cas. No. 4,243. **Md.**—*Barney v. Patterson's Lessee*, 6 Har. & J. 182. **Va.**—*Draper's Exrs. v. Gorman*, 8 Leigh 628. (2) In so far as these judgments are based upon the constitution and laws of the United States, they may be considered foreign, in a limited sense. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390.

19. **U. S.**—*Earl v. Raymond*, 4 McLean 233, 8 Fed. Cas. No. 4,243. **Ia.**—*Thomson v. Lee*, 22 Iowa 206. **La.**—*Niblett v. Scott*, 4 La. Ann. 246. **Va.**—See *Draper's Exrs. v. Gorman*, 8 Leigh 628. **W. Va.**—*Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390.

20. *Bigelow v. Old Dominion Copper, etc. Co.*, 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009. See *supra*, XVIII, B.

21. **U. S.**—*Riverdale Cotton Mills v. Alabama, etc. Mfg. Co.*, 198 U. S.

But in so far as they involve adjudications upon any federal question they are conclusive in another state court, regardless of the effect which a judgment of a state court might have.<sup>22</sup>

The foregoing general rule extends to judgments recovered in the courts of the District of Columbia,<sup>23</sup> and to those of the territories.<sup>24</sup>

**2. Conclusiveness.**—a. *Generally.*—If the judgment is a final enforceable one in the federal court,<sup>25</sup> it will constitute an estoppel in the state court as to the parties and their privies, barring them from there maintaining another action on the same subject-matter,<sup>26</sup> and concluding them upon the merits of the controversy.<sup>27</sup>

188, 25 Sup. Ct. 629, 49 L. ed. 1008; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619; Pittsburgh C. & St. L. Ry. Co. v. Long Island Co. & Trust Co., 172 U. S. 493, 19 Sup. Ct. 238, 43 L. ed. 528; Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. ed. 614. **Conn.**—Dennison v. Hyde, 6 Conn. 508. **Ga.**—McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660. **Ill.**—Ruegger v. Indianapolis, etc. R. Co., 103 Ill. 449. **Ia.**—Thomson v. Lee, 22 Iowa 206. **Ky.** Dudley v. Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522. **La.**—Pasteur v. Lewis, 39 La. Ann. 5, 1 So. 307; Niblett v. Scott, 4 La. Ann. 246. **Md.**—Barney v. Patterson's Lessee, 6 Har. & J. 182. **Mo.**—Copenhaver v. Stewart, 118 Mo. 377, 24 S. W. 161, 4 Am. St. Rep. 382. **N. Y.**—Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334. **W. Va.** Wandling v. Straw, 25 W. Va. 692.

[a] **Question a Federal One.**—Whether due faith and credit has been given to such federal court judgments, is a federal question. Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. ed. 614.

22. Deposit Bank v. Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. ed. 276.

23. Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. ed. 346; Johnson v. Dobbins, 12 Phila. (Pa.) 518.

24. **Ia.**—Coughran v. Gilman, 81 Iowa 442, 46 N. W. 1005. **La.**—Brosnahan v. Turner, 16 La. 433. **Md.** Hughes v. Davis, 8 Md. 271. **Minn.** Suesenbach v. Wagner, 41 Minn. 108, 42 N. W. 925. **Utah.**—Ehrngren v. Gronlund, 19 Utah 411, 57 Pac. 268.

25. **Cal.**—Wills v. Pauly, 116 Cal. 575, 48 Pac. 709. **Ia.**—Foley v. Cudahy Packing Co., 119 Iowa 216, 93 N. W.

284; Weyand v. Atchison, T. & S. F. R. Co., 75 Iowa 573, 39 N. W. 899; Scully v. Chicago, B. & Q. R. Co., 46 Iowa 528. **Ky.**—Dawson v. Dawson, 9 Ky. L. Rep. 935, 5 S. W. 539. **Wash.** Hennessey v. Tacoma Smelting, etc. Co., 33 Wash. 423, 74 Pac. 584.

*Compare supra*, XVII, B, 3, e; XVIII, B, 3, e.

[a] **A judgment dismissing the action without determining the merits does not operate as a bar in a state court.** **Cal.**—Wills v. Pauly, 116 Cal. 575, 48 Pac. 709. **Ia.**—Weyand v. Atchison, T. & S. F. R. Co., 75 Iowa 573, 39 N. W. 899. **Ky.**—Dawson v. Dawson, 9 Ky. L. Rep. 935, 5 S. W. 539. **N. Y.**—MacArdell v. Olcott, 62 App. Div. 127, 70 N. Y. Supp. 930.

[b] **If an appeal is pending from the judgment its effect as res judicata is suspended.** Hennessey v. Tacoma Smelting, etc. Co., 33 Wash. 423, 74 Pac. 584. *Compare supra*, XVII, B, 3, e, (V).

26. **Ind.**—Cincinnati, etc. Ry. Co. v. Wynne, 14 Ind. 385. **Ky.**—Reed v. Whitlow, 19 Ky. L. Rep. 1538, 43 S. W. 686. **Mass.**—Durant v. Essex Co., 8 Allen 103, 85 Am. Dec. 685. **N. Y.** Steinback v. Relief Fire Ins. Co., 77 N. Y. 498; Baldwin v. Rice, 44 Misc. 64, 89 N. Y. Supp. 738. **R. I.**—Rounds v. Providence, etc. Steamship Co., 14 R. I. 344. **Tex.**—Henderson v. Cabell, 83 Tex. 541, 19 S. W. 287. **Vt.**—Hill v. Barre Nat. Bank, 56 Vt. 582.

27. **U. S.**—Riverdale Cotton Mills v. Alabama, etc. Mfg. Co., 198 U. S. 188, 25 Sup. Ct. 629, 49 L. ed. 1008; Chicago, etc. Bridge Co. v. Anglo-American Packing, etc. Co., 46 Fed. 584; United States v. Lee, 2 Biss. 77, 26 Fed. Cas. No. 15,589. **Ark.**—Garland County v. Hot Springs County, 68 Ark. 83, 56 S. W. 636. **Conn.**—Buckingham's Appeal, 60 Conn. 143, 22 Atl.



b. *Jurisdictional Inquiries.*—To be entitled to any force and effect in a state court, the judgment of the federal court must have been pronounced by a tribunal possessing jurisdiction. The fact that the federal court possessed jurisdiction, neither over the parties nor the subject-matter may always be shown, even though proper jurisdiction appears by the record.<sup>28</sup>

c. *Errors and Irregularities.*—A judgment of a federal court possessing jurisdiction, is not impeachable in a state court for errors and irregularities that do not deprive the court of power to render the judgment.<sup>29</sup>

3. **Direct Enforcement.**—A federal judgment is in its effect upon property within the state, a foreign judgment. It does not become a lien on such property, as does a domestic judgment, consequently

509; *Dennison v. Hyde*, 6 Conn. 508. **Ga.**—*Wilson v. Parr*, 115 Ga. 629, 42 S. E. 5; *Smith v. Walker*, 77 Ga. 289, 3 S. E. 256. **Ill.**—*Knowlton v. Hanbury*, 117 Ill. 471, 5 N. E. 581; *Ruegger v. Indianapolis, etc. R. Co.*, 103 Ill. 449; *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625. **Ia.**—*Rew v. Independent School Dist.*, 125 Iowa 28, 98 N. W. 802, 106 Am. St. Rep. 282; *Reynolds v. Lyon County*, 121 Iowa 733, 96 N. W. 1096. **Kan.**—*Hyatt v. Challiss*, 59 Kan. 422, 53 Pac. 464. **Ky.**—*Dudley v. Lindsey*, 9 B. Mon. 486, 50 Am. Dec. 522; *Thoms v. Southard*, 2 Dana 475, 26 Am. Dec. 467. **La.**—*Bouchard v. Parker*, 32 La. Ann. 535; *Niblett v. Scott*, 4 La. Ann. 246; *Keene v. McDonough*, 8 La. 185. **Mich.**—*De-  
troit v. Ellis*, 103 Mich. 612, 61 N. W. 886; *Rothschild v. Burton*, 57 Mich. 540, 25 N. W. 49. **Miss.**—*Shields v. Taylor*, 13 Smed. & M. 127. **Mo.**—*In re Copenhagen*, 118 Mo. 377, 24 S. W. 221; *Bracken v. Milner*, 99 Mo. App. 187, 73 S. W. 225. **Neb.**—*Gregory v. Kenyon*, 34 Neb. 640, 52 N. W. 685. **N. Y.**—*Woodhouse v. Duncan*, 106 N. Y. 527, 13 N. E. 334; *Lee v. Jefferson County*, 62 How. Pr. 201. **Pa.**—*In re Williamson*, 26 Pa. 9, 2 Am. L. Reg. (O. S.) 741, 12 Leg. Int. 246, 67 Am. Dec. 374; *Buchanan v. Biggs*, 2 Yeates 232. **S. C.**—*Holstein v. Edgefield County*, 64 S. C. 374, 42 S. E. 180. **Tenn.**—*Keith v. Alger*, 114 Tenn. 1, 85 S. W. 71. **Tex.**—*New York & T. Land Co. v. Votaw* (Tex. Civ. App.), 52 S. W. 125. **W. Va.**—*Wandling v. Straw*, 25 W. Va. 692. **Wis.**—*Van Pelt v. Kimball*, 18 Wis. 362.

28. **Conn.**—*Slocum v. Wheeler*, 1 Conn. 429. **Ga.**—*McCauley v. Har-*

*groves*, 48 Ga. 50, 15 Am. Rep. 660. **La.**—*Pasteur v. Lewis*, 39 La. Ann. 5, 1 So. 307. **Mass.**—*Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81, 10 N. E. 729. **Mo.**—*Corby v. Wright*, 4 Mo. App. 443. **Neb.**—*Tzschuck v. Mead*, 47 Neb. 260, 66 N. W. 428. **N. Y.**—*Che-  
mung Canal Bank v. Judson*, 8 N. Y. 254; *Hovey v. Elliott*, 29 Jones & S. 409, 21 N. Y. Supp. 108. **Ohio.**—*Haf-  
ner v. Enterprise Bank*, 24 Ohio Cir. Ct. 652. **Tex.**—*Southern Ins. Co. v. Wolvorton Hardw. Co.*, 19 S. W. 615. **Va.**—*Richardson v. SeEVERS' Admr.*, 84 Va. 259, 4 S. E. 712.

[a] The fact that defendant was a resident of the state does not prevent inquiry in a collateral proceeding, into the jurisdiction of the federal court. *League v. Scott*, 25 Tex. Civ. App. 318, 61 S. W. 521.

[b] **Distinction Between Federal Courts Sitting Within and Without the State.**—In *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938, a distinction is made between federal courts sitting within the state and those sitting elsewhere. In the former case the federal judgment is placed on the same basis as a domestic judgment, in that want of jurisdiction must appear upon the face of the record and cannot be shown in contradiction of the record itself.

29. **Ill.**—*Windett v. Connecticut Mut. Life Ins. Co.*, 130 Ill. 621, 22 N. E. 474. **Ind.**—*Harrison v. Phoenix Mut. Life Ins. Co.*, 83 Ind. 575. **Minn.**—*Ames v. Slater*, 27 Minn. 70, 6 N. W. 418. **Neb.**—*Mead v. Weaver*, 42 Neb. 149, 60 N. W. 385.

Compare *supra*, XVII, A, 7, e; XVIII, B, 4, d.

process cannot issue directly thereon, but an action must be brought to enforce it.<sup>30</sup>

**Creditor's Bills.** — In some states a creditor's bill will lie on a federal judgment,<sup>31</sup> but the rule is not universal.<sup>32</sup>

**E. COURTS OF INDIAN TRIBES.** — The judgments of courts of the Indian tribes in cases within their jurisdiction are on the same footing as territorial courts and entitled to the same extraterritorial recognition.<sup>33</sup>

**F. JUDGMENTS OF FOREIGN COUNTRIES.** — 1. **Basis of Recognition.**<sup>34</sup> — Except where the matter is regulated by statute,<sup>35</sup> judgments and decrees rendered in one country do not necessarily have any effect in another. When operative beyond the territorial jurisdiction of the court in which they are recovered, it is solely by virtue of comity,<sup>36</sup> the degree of recognition accorded to them being largely

30. *Hunt v. Palao*, 4 How. (U. S.) 589, 11 L. ed. 1115; *Goodyear Dental Vulcanite Co. v. Frisselle*, 22 Hun (N. Y.) 174; *Morton v. Palmer*, 60 Hun 583, 21 Civ. Proc. 94, 14 N. Y. Supp. 912.

As to actions on judgments, see the title "Judgments and Decrees, Enforcement of."

31. *Ala.*—*Brown v. Bates*, 10 Ala. 422. *Ill.*—*Dilworth v. Curtis*, 139 Ill. 508, 29 N. E. 861. *Kan.*—*Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727. *Miss.*—*Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412. *Mo.*—*Bush v. Arnold*, 50 Mo. App. 8. *Neb.*—*First Nat. Bank v. Sloman*, 42 Neb. 350, 60 N. W. 589.

32. *Tarbell v. Griggs*, 3 Paige (N. Y.) 207, 23 Am. Dec. 790; *Davis v. Bruns*, 23 Hun (N. Y.) 648. And see *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588; *Steere v. Hoagland*, 39 Ill. 264.

33. *Mackey v. Cox*, 18 How. (U. S.) 100, 15 L. ed. 299; *Holden v. Joy*, 17 Wall. (U. S.) 211, 21 L. ed. 523; *Standley v. Roberts*, 59 Fed. 836, 8 C. C. A. 305; *Mehlin v. Ice*, 56 Fed. 12, 5 C. C. A. 403.

As to the effect of judgments of territorial courts, see *supra*, XVIII, D, 1.

As to the jurisdiction of Indian courts, see the title "Indians."

[a] A white man by appearing generally waives the question of jurisdiction of the Cherokee Indian courts over his person. *Mehlin v. Ice*, 56 Fed. 12, 5 C. C. A. 403.

34. Basis of recognition of judgment of sister state, see *supra*, XVIII, B, 1.

35. *Title Ins. & Trust Co. v. Cali-*

*fornia Development Co.*, 171 Cal. 173, 152 Pac. 542.

36. **U. S.**—*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133; *Cruz v. O'Boyle*, 197 Fed. 824; *Gioe v. Westervelt*, 116 Fed. 1017; *Ousely v. Lehigh Valley Trust & Safe-Deposit Co.*, 84 Fed. 602; *New York L. E. & W. Ry. Co. v. McHenry*, 21 Blatchf. 400, 17 Fed. 414; *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715. *Ala.*—*Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 So. 786. *Mich.*—*Sheehan v. Farwell*, 135 Mich. 196, 97 N. W. 728; *Coveney v. Phisecator*, 132 Mich. 258, 93 N. W. 619. **N. H.**—*MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982. **N. Y.**—*Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113; *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729; *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573. **Tex.**—*Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711; *Rodriguez v. Priest* (Tex. Civ. App.), 126 S. W. 1187.

[a] **Comity of Nations Defined.** Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will on the other, but it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens, who are under the protection of its laws. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95. And see *Bank of Augusta v. Earle*, 13 Pet. (U. S.)

measured by the principle of reciprocity, whereby they are extended the same respect as the courts from which they come give to adjudications of the *lex fori*.<sup>37</sup>

**2. Requisites of Judgment.**—To receive any faith and credit in another country the foreign judgment must fulfill the same requirements as in the case of domestic judgments<sup>38</sup> or the judgments of sister states.<sup>39</sup> It must be a final disposition of the case,<sup>40</sup> must not be penal in its character, or in the nature of a domestic police regulation,<sup>41</sup>

519, 10 L. ed. 274; *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270; *People v. Martin*, 175 N. Y. 315, 67 N. E. 589.

[b] **Rules of Evidence at Variance With Those of Forum.**—Within the established rule of comity, an English judgment will be given full force and effect in this country, though the court pronounced it through a resort to presumptive evidence at variance with the rule of the forum, it appearing that the courts of England recognize and give effect to our judgments in personam. *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573.

**Foreign judicial records as evidence**, see 10 ENCY. OF EV. 1040.

37. **U. S.**—*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; *Cruz v. O'Boyle*, 197 Fed. 824. **Conn.**—*Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270. **Ia.** *Buchanan v. Marsh*, 17 Iowa 494.

[a] In *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95, it was said: "It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller states—Norway, Portugal, Greece, Monaco, and Hayti—the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to

the judgments of the country in which the judgment in question is sought to be executed."

38. See *supra*, XVII, B.

39. See *supra*, XVIII, B.

40. **U. S.**—*L. E. Waterman Co. v. Modern Pen Co.*, 193 Fed. 242. **N. Y.** *Munn v. Cook*, 55 Hun 608, 8 N. Y. Supp. 698, 24 Abb. N. C. 314. **Eng.** *Vanquelin v. Bouard*, 15 Com. B. (N. S.) 341, 143 Eng. Reprint 817; *Plummer v. Woodburne*, 4 Barn. & C. 625, 107 Eng. Reprint 1193; *Paul v. Roy*, 15 Beav. 433, 51 Eng. Reprint 605; *Nouvion v. Freeman*, 15 App. Cas. 1; *Smith v. Nichols*, 5 Bing. N. C. 208, 132 Eng. Reprint 1084.

Compare *supra*, XVII, B, 3, e.

[a] **A default judgment rendered by a court having jurisdiction will be enforced in another country.** *Ouseley v. Lehigh Valley Trust & Safe-Deposit Co.*, 84 Fed. 602; *Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

[b] **As to the effect of appeal**, see *Trevino v. Fernandez*, 13 Tex. 630; *Scott v. Pilkington*, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 121 Eng. Reprint 978; *Howland v. Codd*, 9 Manitoba 435. And see *supra*, XVII, B, 3, e, (V).

41. **U. S.**—*Hohner v. Gratz*, 50 Fed. 369; *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715. **N. Y.**—*In re Neidnig's Est.*, 123 App. Div. 894, 108 N. Y. Supp. 478. **Eng.** *Ogden v. Folliott*, 3 T. R. 726, 100 Eng. Reprint 825. **Can.**—*Addams v. Worden*, 6 L. Can. 237.

See *supra*, XVIII, B, 2, b, (II).

[a] **Bastardy Proceeding.**—In *In re Neidnig's Est.*, 123 App. Div. 894, 108 N. Y. Supp. 478, the New York courts refused to extend faith and credit to a judgment rendered in a bastardy proceeding in the Royal Court at Hassfurt, Germany.

[b] **Annuity To Support Relatives.** A citizen of the United States whose



nor, it is said, contrary to principles of natural justice,<sup>42</sup> or in direct violation of the policy of the laws of the forum.<sup>43</sup>

3. **Direct Enforcement.**—A foreign judgment has no executory force; its validity must first be passed upon by the courts of the country in which it is sought to be enforced. Until that time it does not form a lien upon defendant's real estate located in the forum.<sup>44</sup> The plaintiff cannot have execution on such judgment,<sup>45</sup> nor can a successful defendant have execution thereon for costs.<sup>46</sup>

4. **Judgments in Personam.**—The present tendency of American decisions is to apply the same principles of conclusiveness to personal judgments of foreign countries as to those of domestic tribunals and to regard such judgments as conclusive upon the merits when jurisdiction of the parties and the subject-matter exists and no invalidating fraud appears.<sup>47</sup> The courts of England are unquestionably com-

daughter married in France cannot be prosecuted here upon a decree of the French court, requiring him and his wife to pay an annuity for the support of their son-in-law. The laws of France requiring such payment are local in their nature and operation. They are designed to regulate the domestic relations of those who reside there and to protect the public against pauperism, consequently they have no extraterritorial significance but must be executed upon persons and property within their jurisdiction. Such orders of the French tribunals are in this respect like orders of filiation and orders made under local statutes to guard against pauperism and in the nature of local police regulations and are not founded upon principles which, irrespective of local statutes, are of universal acceptance like judgments for a sum certain founded upon contracts or other recognized private rights. *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715.

42. *Ill.*—Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81. *Tex.*—Banco Minero *v.* Ross, 106 Tex. 522, 172 S. W. 711. *Eng.*—Vallee *v.* Dumergue, 4 Ex. 290, 18 L. J. Ex. 398. See *Buchanan v. Rucker*, 1 Camp. 63, 9 East 192, 103 Eng. Reprint 546.

43. *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715. See *McDonald v. Grand Trunk R. Co.*, 71 N. H. 448, 52 Atl. 982.

44. *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192, 6 L. ed. 300; *Buchanan v. Marsh*, 17 Iowa 494. See *supra*, XVIII, B, 3, g.

45. *Buchanan v. Marsh*, 17 Iowa 494;

*MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982. See *supra*, XVIII, B, 3, g.

46. *MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982.

47. *U. S.*—*Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133; *Cruz v. O'Boyle*, 197 Fed. 824; *Strauss v. Conried*, 121 Fed. 199; *Gioe v. Westervelt*, 116 Fed. 1017; *Lea v. Deakin*, 11 Biss. 23, 15 Fed. Cas. No. 8,154. See *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95. *Ala.*—*Christian v. Coleman*, 125 Ala. 158, 27 So. 786. *Ark.*—*Glass v. Blackwell*, 48 Ark. 50, 2 S. W. 257. *Ill.*—*Baker v. Palmer*, 83 Ill. 568. *La.*—*State v. Orleans R. Co.*, 38 La. Ann. 312. *Mass.*—*Barrow v. West*, 23 Pick. 270. *Mich.*—*McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332. *N. H.*—*McDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982. *N. Y.*—*Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729; *Konitzky v. Meyer*, 49 N. Y. 571; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573. *Ohio.*—*Anderson v. Anderson*, 8 Ohio 108; *Silver Lake Bank v. Harding*, 5 Ohio 545. *Pa.*—*Messier v. Amery*, 1 Yeates 533, 583, 2 Dall. 231, 1 L. ed. 361, 1 Am. Dec. 316.

[a] Where the statute gives to the judgment of a foreign country the same effect as is given to a domestic judgment, it would be conclusive on the merits. *California Code Civ. Proc.*, §1915. And see *Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 173, 152 Pac. 542.

[b] Parties and privies concluded.

mitted to that rule,<sup>48</sup> as are, perhaps, also those of her colonies.<sup>49</sup> The earlier view of the English courts<sup>50</sup> followed largely by the former decisions of our own country<sup>51</sup> and still adhered to by some,<sup>52</sup> was that personal judgments of other countries were, except when incidentally in question, in which case they were conclusive,<sup>53</sup> merely

*Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573.

48. *Vanquelin v. Bouard*, 15 Com. B. (N. S.) 341, 143 Eng. Reprint 817; *Bank of Australia v. Harding*, 9 Com. B. 661, 137 Eng. Reprint 1052; *Bank of Australia v. Nias*, 16 Q. B. 717, 20 L. J. Q. B. 284, 117 Eng. Reprint 1055; *Henderson v. Henderson*, 6 Q. B. 288, 115 Eng. Reprint 111; *Ferguson v. Mahon*, 11 Ad. & El. 179, 113 Eng. Reprint 382; *Paul v. Roy*, 15 Beav. 433, 51 Eng. Reprint 605; *Pemberton v. Hughes*, 80 L. T. 369; *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301; *Messino v. Petrocchino*, L. R. 4 P. C. 144; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Doglionio v. Crispin*, L. R. 1 H. L. 301; *Godard v. Gray*, L. R. 6 Q. B. 139; *Vaughan v. Campbell*, 5 L. Can. 431.

49. **The Doctrine Is Recognized in Canada.**—*Law v. Hansen*, 25 Can. Sup. 69; *Fowler v. Vail*, 27 U. C. C. P. 417; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407; *Ritter v. Fairfield*, 32 Ont. 350; *Solmes v. Stafford*, 16 Ont. Pr. 78.

50. *Arnott v. Redfern*, 3 Bing. 353, 130 Eng. Reprint 549; *Phillips v. Hunter*, 2 H. Bl. 402, 410, 126 Eng. Reprint 618; *Bayley v. Edwards*, 3 Swanst. 703, 36 Eng. Reprint 1029; *Don v. Lippmann*, 5 Cl. & Fin. 1, 7 Eng. Reprint 303.

[a] **As Basis of Action by Plaintiff.** "At the time of the Revolution, it appears to have been understood, as the law of England, that a judgment offered as evidence of a debt, in an action by the plaintiff to obtain its fruit, was merely prima facie evidence, and examinable upon the merits. *Hilton v. Guyot*, 159 U. S. 113, 187, 16 Sup. Ct. 139, 40 L. ed. 95. This view was followed by the early American cases, among which is the case of *Robinson v. Prescott*, 4 N. H. 450; and to this view is to be ascribed the expressions found in *Bryant v. Ela*, Smith 396, 404; *Thurber v. Blackbourne*, 1 N. H. 242, 243; *Taylor v. Barron*, 30 N. H. 78, 95, 64 Am. Dec. 281. The American

cases, however, adopted in full the distinction made in *Phillips v. Hunter*, which, it is said by Story, 'has been very frequently recognized as having a just foundation in international justice,' upon the ground that where a defendant sets up a foreign judgment as a bar to the proceedings, 'if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatee* under such circumstances is entitled to universal conclusiveness and respect.'" *MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982.

51. **U. S.**—*Burnham v. Webster*, 1 Wood. & M. 172, 4 Fed. Cas. No. 2,179. Conn.—*Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151. Del.—*Pritchett v. Clark*, 3 Harr. 517. Ill.—*Bimeler v. Dawson*, 5 Ill. 536. Ky.—*Garland v. Tucker*, 1 Bibb 361. Me.—*Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158; *Jordan v. Robinson*, 15 Me. 167. Mass.—*Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105; *Bartlet v. Knight*, 1 Mass. 401, 2 Am. Dec. 36. N. H.—*Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Robinson v. Prescott*, 4 N. H. 450; *Thurber v. Blackbourne*, 1 N. H. 242; *Bryant v. Ela*, Smith 396. N. Y.—*Cummings v. Banks*, 2 Barb. 602; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Pawling v. Willson*, 13 Johns. 192; *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469. Ohio.—*Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197. Pa.—*Benton v. Burgot*, 10 Serg. & R. 240. Vt.—*Boston India Rubber Co. v. Hoit*, 14 Vt. 92.

52. *Tremblay v. Aetna Life Ins. Co.*, 97 Me. 547, 55 Atl. 509; *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158.

53. *Taylor v. Phelps*, 1 Harr. & G.

prima facie evidence of the matter which they decided and therefore an inquiry was permissible into the merits of the case. The principle of reciprocity would, of course, permit an examination into the merits of judgments rendered in countries such as France, whose courts treat our judgments in a like manner.<sup>54</sup> A judgment in personam in a court of a foreign country, while it constitutes a good cause of action in a domestic court, does not merge the original cause of action, or extinguish the original debt, and it is no bar to an action thereon in a domestic court unless it has been paid or satisfied.<sup>55</sup>

(Md.) 492; *Barney v. Patterson*, 6 Harr. & J. (Md.) 182; *Cummings v. Banks*, 2 Barb. (N. Y.) 602.

[a] "It has been said that 'all the American cases agree that, where a foreign judgment comes incidentally in question, it is conclusive' (*Cummings v. Banks*, 2 Barb. 602, 605); and that 'it is, an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent as those of our own courts' (*Griswold v. Pitcairn*, 2 Conn. 85, 92). 'Foreign judgments are never re-examined unless the aid of our courts is asked to carry them into effect by a direct suit upon the judgment. The foreign judgment is then held to be only prima facie evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the *exceptio rei judicatae*, it is then received as conclusive.' . . . *Smith v. Lewis*, 3 Johns. 157, 169, 3 Am. Dec. 469; *Monroe v. Douglas*, 4 Sand. Ch. 126, 181; *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. The only American case apparently questioning the conclusiveness of a foreign judgment when offered as a defense which has been discovered is *Burnham v. Webster*, 1 Woodb. & M. 172, Fed. Cas. No. 2,179. The general expressions used by the distinguished author of the opinion in this case, if carried out, would render a foreign judgment of little value, and would, it has been said, 'destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its rank, or how binding its decisions within its own jurisdiction, of little greater effect than the original contract or promise sued upon.'" *MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982.

54. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; *Kessler*

*v. Armstrong Cork Co.*, 158 Fed. 744, 85 C. C. A. 642.

55. U. S.—*Swift v. David*, 181 Fed. 828, 104 C. C. A. 338; *New York L. E. & W. R. v. McHenry*, 21 Blatchf. 400, 17 Fed. 414; *Lyman v. Brown*, 2 Curt. 559, 15 Fed. Cas. No. 8,627; *The Propeller East*, 9 Ben. 76, 8 Fed. Cas. No. 4,251. Mass.—*Wood v. Gamble*, 11 Cush. 8, 59 Am. Dec. 135. Mich.—*Canadian Typograph Co. v. Macgurn*, 119 Mich. 533, 78 N. W. 542; *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90. N. H.—*MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 52 Atl. 982. N. Y.—*Athurton v. Dalley*, 20 How. Pr. 311. Tex.—*Frazier v. Moore's Admr.*, 11 Tex. 755; *Wilson v. Tunstall*, 6 Tex. 221; *Hays v. Cage*, 2 Tex. 501. Vt.—*Eastern T. B. v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665. Eng.—*Bank of Australia v. Harding*, 9 Com. B. 661, 137 Eng. Reprint 1052; *Phillips v. Hunter*, 2 H. Bl. 402, 126 Eng. Reprint 618; *Bank of Australasia v. Nias*, 16 Q. B. 717, 20 L. J. Q. B. 284, 117 Eng. Reprint 1055; *Robertson v. Struth*, 5 Q. B. 941, 114 Eng. Reprint 1503; *Hall v. Odber*, 11 East 118, 103 Eng. Reprint 949; *Smith v. Nichols*, 5 Bing. N. C. 208, 132 Eng. Reprint 1084. Can.—*Trevelyan v. Myers*, 26 Ont. 430.

[a] "There is some uncertainty concerning some of the effects of a foreign judgment. . . . But there is none as to this particular. It does not operate as a merger of the original cause of action. . . . The fact that assumpsit lies on a foreign judgment is decisive, that the demand has not passed into a security of a higher nature, so as to operate as a technical merger." *Lyman v. Brown*, 2 Curt. (C. C.) 559, 15 Fed. Cas. No. 8,627.

[b] "The rule as to foreign judgments rests upon considerations of comity, and though treated by our courts, in respect to their conclusive-



5. **Judgments in Rem.**—a. *In General.*—A judgment or decree in rem rendered by a court possessing jurisdiction is binding upon all persons, and is entitled to faith and credit in the courts of every other country where the law of nations is recognized.<sup>56</sup>

b. *Foreign adjudications in bankruptcy* are extended the same degree of recognition as are foreign judgments in rem generally.<sup>57</sup>

ness, as entitled to the same weight as judgments of our own country (*Lazier v. Westcott*, 26 N. Y. 146), yet no authority has been furnished holding that a foreign judgment, to the same extent as a domestic judgment, extinguishes the original contract debt." *New York, L. E. & W. R. Co. v. McHenry*, 17 Fed. 414.

[c] **Effect of Appeal Bond.**—The giving of a supersedeas bond on appeal does not constitute payment or satisfaction of the judgment so as to bar an action on the original cause of action in a domestic court. *Swift v. David*, 181 Fed. 828, 104 C. C. A. 338.

[d] **By statute a foreign judgment merges the original cause of action.** *Jones v. Jamison*, 15 La. Ann. 35.

56. **U. S.**—*Hapai v. Brown*, 239 U. S. 502, 36 Sup. Ct. 201, 60 L. ed. 407; *John Li Estate v. Brown*, 235 U. S. 342, 35 Sup. Ct. 106, 59 L. ed. 259; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. ed. 896; *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 3 L. ed. 200; *Williams v. Armroyd*, 7 Cranch 423, 3 L. ed. 392; *Rose v. Himley*, 4 Cranch 241, 2 L. ed. 608; *Cloudson v. Leonard*, 4 Cranch 434, 2 L. ed. 670; *Hudson v. Guestier*, 4 Cranch 293, 2 L. ed. 625; *Magoun v. New England M. Ins. Co.*, 1 Story 157, 16 Fed. Cas. No. 8,961; *Juando v. Taylor*, 2 Paine 652, 655, 13 Fed. Cas. No. 7,558; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600, 3 Fed. Cas. No. 1,793; *The Ship Poll Cary*, 45 Ct. Cl. 219. **Conn.**—*Brown v. Union, etc. Co.*, 4 Day 179, 4 Am. Dec. 204; *Stewart v. Warner*, 1 Day 142, 2 Am. Dec. 61. **Ill.**—*Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81. **Ky.**—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. **La.**—*Zavaglia v. Notarbartolo*, 137 La. 722, 69 So. 152; *Cucullu v. Louisiana, etc. Co.*, 5 Mart. (N. S.) 464, 16 Am. Dec. 199. **Me.**—*Tremblay v. Aetna Life Ins. Co.*, 97 Me. 547, 55

Atl. 509. **Mass.**—*Sawyer v. Maine Fire Ins. Co.*, 12 Mass. 291; *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114; *Baxter v. New England Ins. Co.*, 6 Mass. 277, 4 Am. Dec. 125. **N. Y.**—*China Mut. Ins. Co. v. Force*, 142 N. Y. 90, 36 N. E. 874; *Monroe v. Douglas*, 5 N. Y. 447; *Ocean Ins. Co. v. Frances*, 2 Wend. 64, 19 Am. Dec. 549; *Wheelwright v. Depeyster*, 1 Johns. 471, 3 Am. Dec. 345; *United States Life Ins. Co. v. Hellinger*, 130 App. Div. 415, 114 N. Y. Supp. 885. **Ohio.**—*Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197. **Pa.**—*Cheriot v. Foussat*, 3 Bin. 220. **S. C.**—*Street v. Augusta Ins. & Bkg. Co.*, 12 Rich. L. 13, 75 Am. Dec. 714; *Bailey v. South Carolina Ins. Co.*, 3 Brev. 354. **Tex.** *Wellborn v. Carr*, 1 Tex. 463. **Vt.** *Woodruff v. Taylor*, 20 Vt. 65. **Eng.** *Shand v. De Buisson*, L. R. 18 Eq. 283; *Messina v. Petrococchino*, L. R. 4 P. C. 144; *Castrique v. Irmie*, L. R. 4 H. L. 414; *Minna Craig S. S. Co. v. Chartered M. Bk.*, 66 L. J. Q. B. 339, 460.

[a] "It appears to be settled in this country, that the sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry." *Marshall in Williams v. Armroyd*, 7 Cranch 423, 3 L. ed. 392.

[b] **A decree of restitution rendered by the highest French court, in a spoliation case, comes within the principle that a judgment in rem is an act of the sovereign power and that as such its effects cannot be disputed.** *The Ship Poll Cary*, 45 Ct. Cl. (U. S.) 219.

57. **Conn.**—*Smith v. Mead*, 3 Conn.

c. *Divorce Decrees*.—A decree of divorce granted by a competent court, having jurisdiction to make the same will be given binding effect in whatever country it is drawn in question,<sup>58</sup> but it will be given no greater effect than is accorded it in the country where rendered.<sup>59</sup>

d. *Probate decrees* are, when valid where procured, generally received in other countries as conclusive upon the merits.<sup>60</sup>

e. *Admiralty Judgments and Decrees*.—This principle of the conclusiveness of foreign judgments in rem is well illustrated by the recognition accorded sentences and decrees of admiralty courts of other countries. These are everywhere regarded as conclusive determinations of the matters decided.<sup>61</sup> Thus sentences of condemnation by such

253, 8 Am. Dec. 183. **La.**—Ory v. Winter, 4 Mart. (N. S.) 277. **Mass.**—Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Marsh v. Putnam, 3 Gray 551; May v. Breed, 7 Cush. 15, 54 Am. Dec. 700. **N. Y.**—Sherrill v. Hopkins, 1 Cow. 103, 133; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410. **Vt.**—Peck v. Hubbard, 26 Vt. 698, 62 Am. Dec. 605. **Eng.**—Potter v. Brown, 5 East 124, 102 Eng. Reprint 1016.

58. **Ill.**—Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81. **La.**—Zavaglia v. Notarbartolo, 137 La. 722, 69 So. 152. **Eng.**—Roach v. Garvan, 1 Ves. Sen. 157, 27 Eng. Reprint 954; Harvey v. Farnie, 8 App. Cas. 43; Shaw v. Gould, L. R. 3 H. L. 55; Ingham v. Sachs, 56 L. T. N. S. 920; Pemberton v. Hughes, 80 L. T. 369; Le Mesurier v. Le Mesurier, 64 L. J. P. C. 97, 72 L. T. 873; Turner v. Thompson, 13 Prob. Div. 37; Scott v. Attorney-General, 11 Prob. Div. 128; Argent v. Argent, 11 Jur. N. S. 864.

See *supra*, XVIII, B, 5.

[a] **Presumption as to Wife's Domicil**.—As a means of determining whether both parties were within the jurisdiction of the court which rendered the decree, the English courts will in all cases, perhaps, presume that the domicile of the husband was that of the wife. Tovey v. Lindsay, 1 Dow. 131, 3 Eng. Reprint 648; Pitt v. Pitt, 4 Macq. H. L. 627; Niboyet v. Niboyet, 4 Prob. Div. 1; Briggs v. Briggs, 5 Prob. Div. 163.

59. **Zavaglia v. Notarbartolo**, 137 La. 722, 69 So. 152.

[a] A divorce a mensa et thoro rendered by a court of one country cannot be made the basis of a final divorce in another country. **Zavaglia v. Notarbartolo**, 137 La. 722, 69 So. 152.

60. **U. S.**—McCormick v. Sullivan,

10 Wheat. 192, 6 L. ed. 300. **N. Y.**—Monroe v. Douglas, 4 Sandf. Ch. 126. **Tenn.**—Williams v. Saunders, 5 Coldw. 60.

See the title "Probate Courts."

61. **U. S.**—Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; Williams v. Armroyd, 7 Cranch 423, 3 L. ed. 392; Croudson v. Leonard, 4 Cranch 434, 2 L. ed. 670; Hudson v. Guestier, 4 Cranch 293, 2 L. ed. 625. **La.**—Cucullu v. Louisiana Ins. Co., 5 Mart. (N. S.) 464, 16 Am. Dec. 199. **Mass.**—Baxter v. New England M. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125. **N. Y.**—Ludlow v. Dale, 1 Johns. Cas. 16, 2 Caines Cas. 348. **S. C.**—Walton v. Bethune, 2 Brev. 453, 4 Am. Dec. 597. **Eng.**—Lothian v. Henderson, 3 Bos. & Pul. 499, 127 Eng. Reprint 271; Baring v. Clagett, 3 Bos. & Pul. 201, 127 Eng. Reprint 111; Price v. Bell, 1 East 663, 102 Eng. Reprint 257; Christie v. Secretan, 8 T. R. 192, 196, 101 Eng. Reprint 1340; Geyer v. Aguilar, 7 T. R. 681, 101 Eng. Reprint 1196; Garrels v. Kensington, 8 T. R. 230, 101 Eng. Reprint 1361; Pollard v. Bell, 8 T. R. 434, 101 Eng. Reprint 1474; Lord Camden v. Home, 4 T. R. 382, 100 Eng. Reprint 1076; Ladbroke v. Cricckett, 2 T. R. 649, 100 Eng. Reprint 349; Ewer v. Jones, 2 Ld. Raym. 935, 92 Eng. Reprint 124; Green v. Waller, 2 Ld. Raym. 891, 893, 92 Eng. Reprint 96; Hughes v. Cornelius, 2 Show. K. B. 232, 89 Eng. Reprint 907; Lindo v. Rodney, 2 Dougl. 613n.

See 1 STANDARD PROC. 550.

[a] "In these cases, the proceedings are in rem; and every person interested is supposed to be a party to them. Whenever, then, a court of admiralty in one country acting as a prize court, decides on the question of prize, and condemns captured property, such

courts are conclusive as to the title of the thing claimed under them.<sup>62</sup> And in actions upon insurance policies the decree of a foreign court of admiralty is almost universally accepted as conclusive evidence of everything clearly expressed in it.<sup>63</sup>

**6. Impeachment.**—a. *Generally.*—A foreign judgment may of course be impeached upon any of the grounds upon which a domestic or sister state judgment may be attacked.<sup>64</sup> And it seems that there may be other grounds for refusing recognition of a foreign judgment.<sup>65</sup> The judgment of another country may be impeached by

sentence or decree must be conclusive evidence, when the same question shall arise in any other country recognizing the law of nations, on the same principle that the judgment of a municipal court is conclusive between the same parties, and their representatives, whenever the same question shall arise in another court in the same country where the judgment was rendered." Cal. Code Civ. Proc., §1914; *Brown v. Union Ins. Co.*, 4 Day (Conn.) 179.

**62. U. S.**—*Rose v. Himely*, 4 Cranch 241, 2 L. ed. 608; *Williams v. Armroyd*, 7 Cranch 423, 3 L. ed. 392; *The Ship Poll Cary*, 45 Ct. Cl. 219. **Conn.** *Brown v. Union Ins. Co.*, 4 Day 179, 4 Am. Dec. 204. **N. Y.**—*Ocean Ins. Co. v. Francis*, 2 Wend. 64, 19 Am. Dec. 549. **Pa.**—*Cheriot v. Foussat*, 3 Binn. 220. **S. C.**—*Walton v. Bethune*, 2 Brev. 453, 4 Am. Dec. 597.

[a] A condemnation under the Milan decree by a French court, was held in *Williams v. Armroyd*, 7 Cranch 423, 3 L. ed. 392, to defeat the American owner's right to reclaim his property in the courts of this country.

**63. U. S.**—*Croudson v. Leonard*, 4 Cranch 434, 2 L. ed. 670; *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 2 L. ed. 591; *Vasse v. Ball*, 2 Dall. 270, 2 Yeats 178, 1 L. ed. 377; *Magoun v. New England M. Ins. Co.*, 1 Story 157, 16 Fed. Cas. No. 8,961. **Conn.** *Brown v. Union Ins. Co.*, 4 Day 179, 4 Am. Dec. 204. **La.**—*Cucullu v. Louisiana Ins. Co.*, 5 Mart. (N. S.) 464, 16 Am. Dec. 199; *Blancue v. Peytavin*, 4 Mart. (O. S.) 458, 6 Am. Dec. 705. **Mass.**—*Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114; *Baxter v. New England Mar. Ins. Co.*, 6 Mass. 277, 4 Am. Dec. 125. **S. C.**—*Bailey v. South Carolina Ins. Co.*, 3 Brev. 354; *Walton v. Bethune*, 2 Brev. 453, 4 Am. Dec. 597; *Blacklock v. Stewart*, 2 Bay 363; *Campbell v. Williamson*, 2 Bay

237. **Eng.**—*Dalgleish v. Hodgson*, 7 Bing. 495, 131 Eng. Reprint 192; *Lothian v. Henderson*, 3 Bos. & Pul. 499, 127 Eng. Reprint 271; *Bolton v. Gladstone*, 5 East 155, 102 Eng. Reprint 1028.

[a] The New York courts regard such sentences of condemnation as only prima facie evidence of the facts upon which the condemnation rested, although conclusive in respect to the thing itself. *Ocean Ins. Co. v. Francis*, 2 Wend. 64, 19 Am. Dec. 549; *Van Denheuvel v. United Ins. Co.*, 2 Johns. Cas. 127, 451, 2 Caines Cas. 217; *New York F. Ins. Co. v. De Wolf*, 2 Cow. 56; *Radeliffe v. United Ins. Co.*, 9 Johns. 277.

[b] *Incidental matters not concluded by the decree.* **U. S.**—*Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 2 L. ed. 591; *Maley v. Shattuck*, 3 Cranch 458, 2 L. ed. 498; *Russel v. Union Ins. Co.*, 4 Dall. 421, 1 L. ed. 892, 1 Wash. C. C. 409, 4 Fed. Cas. No. 2,146; *Lambert v. Smith*, 1 Cranch C. C. 361, 14 Fed. Cas. No. 8,028. **Md.**—*Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159. **Eng.**—*Christie v. Secretan*, 8 T. R. 192, 101 Eng. Reprint 1340; *Calvert v. Bovill*, 7 T. R. 523, 101 Eng. Reprint 1111.

**64.** See *supra*, XVII, A; XVIII, B, 4.

**65.** *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

See *supra*, XVIII, F, 1; and *infra*, XVIII, F, 5.

[a] *Matters Affecting Recognition.* "In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings,



showing that the court was not legally organized,<sup>66</sup> or that the judges thereof were for some reason disqualified.<sup>67</sup>

b. *Jurisdictional Inquiries*.—(I.) Generally.—No rule of comity requires that effect be given to a judgment of a foreign court, whether in rem<sup>68</sup> or in personam,<sup>69</sup> when jurisdiction to render the same was wanting. It is always permissible for the party assailing the judgment to show by any competent evidence, even in contradiction of the record, that jurisdiction of the subject-matter was wanting, or that no jurisdiction of the person was acquired by domicile, service of process, or voluntary appearance.<sup>70</sup>

after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on." *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

66. *Lang v. Holbrook*, *Crabbe* 179, 14 Fed. Cas. No. 8,957; *The Flad Oyen*, 1 Rob. C. (Eng.) 135.

67. *Price v. Dewhurst*, 8 Sim. 279, 59 Eng. Reprint 111, judges interested in the property in litigation.

68. U. S.—*Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600, 3 Fed. Cas. No. 1,793. Mass.—*Sawyer v. Maine F. & M. Ins. Co.*, 12 Mass. 291. N. Y.—*Wheelwright v. Depeyster*, 2 Johns. 471, 3 Am. Dec. 345. Pa.—*Kuehling v. Leberman*, 2 W. N. C. 616. Eng.—*The Kierlighett*, 3 Rob. C. 96; *The Christopher*, 2 Rob. C. 209; *The Flad Oyen*, 1 Rob. C. 135.

[a] Admiralty Decrees.—A decree of a foreign court of admiralty may be impeached for want of jurisdiction. U. S.—*The Mary*, 9 Cranch 126, 3 L. ed. 678; *Rose v. Himely*, 4 Cranch 241, 2 L. ed. 608; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600, 3 Fed. Cas. No.

1,793. N. Y.—*Wheelwright v. Depeyster*, 2 Johns. 471, 3 Am. Dec. 345. Eng.—*The Kierlighett*, 3 Rob. C. 96; *The Christopher*, 2 Rob. C. 209; *The Flad Oyen*, 1 Rob. C. 135.

[b] In *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600, 3 Fed. Cas. No. 1,793, Story said: "If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation."

69. U. S.—*Kessler v. Armstrong Cork Co.*, 158 Fed. 744, 85 C. C. A. 642; *French Mut. Gen. Soc. v. United States F. & G. Co.*, 203 Fed. 558. Ky.—*Kerr v. Condry*, 9 Bush 372. La.—*Cuculu v. Louisiana Ins. Co.*, 5 Mart. (N. S.) 464, 16 Am. Dec. 199. Mich.—*McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332. N. Y.—*Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113; *Shepherd v. Wright*, 113 N. Y. 582, 21 N. E. 724; *Monroe v. Douglas*, 4 Sandf. Ch. 126; *Eytinge & Co. v. Atlantic Transport Co.*, 160 App. Div. 635, 145 N. Y. Supp. 1054; *Hyde v. Scott*, 75 Misc. 487, 133 N. Y. Supp. 904. Tex.—*Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711. Eng.—*Godard v. Gray*, L. R. 6 Q. B. 139; *Schibsbey v. Westenholtz*, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. N. S. 93, 19 Wkly. Rep. 587; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Vallee v. Dumergue*, 4 Exch. 290, 18 L. J. Exch. 398.

70. U. S.—*Bischoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829; *French Mut. Gen. Soc. v. United States F. & G.*

(II.) **Presumptions as to Jurisdiction.**—Judgments of foreign countries are upheld by the same presumptions that attach to those of domestic tribunals. Where the judgment, therefore, was rendered by a court of general jurisdiction, it will be presumed that the court had jurisdiction of the parties and the subject-matter and the burden rests upon the party seeking to defeat the judgment of showing the contrary.<sup>71</sup>

(III.) **Judgments Affecting Non-Residents.**—A person who as plaintiff selects the tribunal of a foreign country wherein to prosecute his claim could not afterwards dispute the jurisdiction of such court over him.<sup>72</sup> But no extraterritorial recognition will be given to a judgment against a non-resident foreigner who has not submitted to the jurisdiction of the court,<sup>73</sup> even though personal service be made upon defendant in

Co., 203 Fed. 558; *Burnham v. Webster*, 1 Woodb. & M. 172, 4 Fed. Cas. No. 2,179. **Ala.**—*Foster v. Glazener*, 27 Ala. 391. **Kan.**—*Thorn v. Salmonson*, 37 Kan. 411, 15 Pac. 588. **Ky.**—*Wood v. Wood*, 78 Ky. 624, 1 Ky. L. Rep. 358. **Me.**—*Rankin v. Goddard*, 55 Me. 389; *Middlesex Bank v. Butman*, 29 Me. 19, 28. **Mass.**—*Folger v. Columbian, etc. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Bissell v. Briggs*, 9 Mass. 426, 6 Am. Dec. 88. **Mich.**—*McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332. **Mo.**—*Corby v. Wright*, 4 Mo. App. 443. **N. Y.**—*Shepherd v. Wright*, 113 N. Y. 582, 21 N. E. 724; *Kerr v. Kerr*, 41 N. Y. 272; *China Bank, etc. v. Morse*, 44 App. Div. 435, 61 N. Y. Supp. 268; *Hyde v. Scott*, 133 N. Y. Supp. 904. **N. C.**—*Battle v. Jones*, 41 N. C. 567. **Pa.**—*Moore v. Phillips*, 10 Pa. Co. Ct. 552. **Vt.**—*Eastern Township Bank v. Beebe & Co.*, 53 Vt. 177, 38 Am. Rep. 665. **Wis.**—*St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308; *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477. **Eng.**—*Bank of Australasia v. Nias*, 16 Q. B. 717, 20 L. J. Q. B. 284, 117 Eng. Reprint 1055; *Henderson v. Henderson*, 6 Q. B. 288, 115 Eng. Reprint 1111; *Ferguson v. Mahon*, 11 Ad. & El. 179, 113 Eng. Reprint 382; *Ricardo v. Gareias*, 12 Cl. & Fin. 368, 8 Eng. Reprint 1450; *Don v. Lippmann*, 5 Cl. & Fin. 1, 7 Eng. Reprint 303; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. N. S. 93, 19 Wkly. Rep. 587. **Can.**—*Burn v. Bletcher*, 23 U. C. Q. B. 28; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407; *McLean v. Shields*, 9 Ont. 699; *Bugbee v. Clergue*, 27 Ont. App. 96.

See *supra*, XVII, A; XVIII, B, 4, b.

#### [a] Adjudication of Jurisdiction.

(1) The decision of a French admiralty court in favor of its own jurisdiction was not considered conclusive in England in *The Christopher*, 2 Rob. C. (Eng.) 209. (2) And see *Hyde v. Scott*, 133 N. Y. Supp. 904, where a Canadian court's adjudication of its jurisdiction was held not to be conclusive in New York. Compare *supra*, XVIII, B, 4, b, (III), (C).

71. **U. S.**—*Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133. **Cal.**—*Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30. **Colo.**—*Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152. **Ill.**—*Horton v. Critchfield*, 18 Ill. 133, 65 Am. Dec. 701. **Kan.**—*Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588. **Mass.**—*Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105. **Minn.**—*Gunn v. Peakes*, 36 Minn. 177, 30 N. W. 466. **Eng.**—*Reynolds v. Fenton*, 3 Com. B. 187, 136 Eng. Reprint 75; *Cowan v. Braidwood*, 1 Man. & G. 882, 2 Scott N. R. 138, 9 Dowl. P. C. 26, 133 Eng. Reprint 589; *Robertson v. Struth*, 5 Q. B. 941, 114 Eng. Reprint 1503. **Can.**—*Montreal Min. Co. v. Cuthbertson*, 9 U. C. Q. B. 78; *Addams v. Worden*, 6 L. Can. 237; *McLean v. Shields*, 9 Ont. 699.

72. *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. N. S. 93, 19 Wkly. Rep. 587.

73. **U. S.**—*Bischoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829; *Burnham v. Webster*, 1 Woodb. & M. 172, 4 Fed. Cas. No. 2,179. **Ala.**—*Foster v. Glazener*, 27 Ala. 391. **Kan.**—*Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588. **Me.**—*Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *Long v. Hammond*, 40 Me. 204;

the state of his domicile.<sup>74</sup> It is otherwise where such defendant voluntarily appears and takes the chance of a judgment in his favor.<sup>75</sup>

c. *Fraud*.—Judgments of foreign countries, both in rem and in personam, may be impeached for fraud.<sup>76</sup> In England it may be

Middlesex v. Butman, 29 Me. 19. Mass. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88. Mo.—Corby v. Wright, 4 Mo. App. 443. N. Y.—Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113; Shephard v. Wright, 113 N. Y. 582, 21 N. E. 724; United States Life Ins. Co. v. La Grave, 130 App. Div. 415, 114 N. Y. Supp. 885; China Bank v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268. Tex.—Banco Minero v. Ross, 106 Tex. 522, 172 S. W. 711. Eng.—General Steam Navigation Co. v. Guillon, 11 Mees. & W. 877.

[a] Where (1) the non-resident possessed property in the country where the judgment was given and owed allegiance to such country, the judgment against him has been enforced. "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Douglas v. Forrest, 4 Bing. 686, 703, 130 Eng. Reprint 933. (2) In Schibbsby v. Westenholz, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. N. S. 93, 19 Wkly. Rep. 587, the court expressed a doubt whether the possession of property locally situated in the foreign country and protected by its laws furnished a sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfill a personal judgment against him.

[b] Against Absentees.—The courts will enforce a foreign judgment against a non-resident who was domiciled in the country where the judgment was rendered and owed allegiance to it, but was at the time proceedings were taken against him temporarily absent therefrom. Cowan v. Braidwood, 1 Man. & G. 882, 2 Scott N. R. 138, 9 Dowl. Pr. C. 26, 133 Eng. Reprint 589; Douglas v. Forrest, 4 Bing. 686, 130 Eng. Reprint 933; Gauthier v. Blight, 5 U. C. C. P. 122.

[c] A personal judgment (1) on

constructive service obtained in Germany against a citizen of Germany domiciled in New York at the time of the judgment has been refused recognition in New York. Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113. (2) "The only case, however, I can find in which a judgment of a foreign country recovered against a citizen of that country, upon whom, absent therefrom, constructive service only was had, was upheld is that of Douglas v. Forrest, 4 Bing. 686. (3) In that case the judgment was recovered in Scotland and enforced in England. The grounds on which the decision was made are not very clearly stated in the opinion." Quoted from Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113.

74. Smith v. Grady, 68 Wis. 215, 31 N. W. 477, to the effect that a judgment recovered in Canada against a Canadian residing in Wisconsin, upon personal service upon defendant in Wisconsin, will not be enforced in that state.

75. Ala.—Christian, etc. Co. v. Coleman, 125 Ala. 158, 27 So. 786. Mich. Capling v. Herman, 17 Mich. 524. Eng. De Cosse Brissac v. Rathbone, 6 Hurl. & N. 301; Voinet v. Barrett, 55 L. J. Q. B. 39, 34 Wkly. Rep. 161.

76. U. S.—Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; De Brimont v. Penniman, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715; Lang v. Holbrook, Crabbe 179, 14 Fed. Cas. No. 8,057. Cal.—Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542. Conn.—Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270. Ill. Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81. Me.—Rankin v. Goddard, 55 Me. 389. Mich.—Coveney v. Phiscator, 132 Mich. 258, 93 N. W. 619. Mo.—Ward v. Quinlvin, 57 Mo. 425. N. Y.—Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Monroe v. Douglas, 4 Sandf. Ch. 126; Van Denheuvel v. United Ins. Co., 2 Johns. Cas. 127, 451, 2 Caines Cas. 217. Eng.—Bank of Australasia v. Nias, 16 Q. B. 717, 20 L. J. Q. B.



shown that the judgment was procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.<sup>77</sup> Such an inquiry into the merits between the parties would doubtless not be permitted in America; the fraud for which such foreign judgments are impeachable in our courts must be a fraud upon the court, practiced in the very procurement of the judgment.<sup>78</sup>

d. *Errors and Irregularities.*—Where there is a competent court having jurisdiction of the parties and the cause, and an opportunity is given for a full and fair trial according to the course of a civilized jurisprudence, the judgment is not open to impeachment in another country because of mere errors and irregularities in the proceedings.<sup>79</sup>

**XIX. ASSIGNMENTS OF JUDGMENTS.**<sup>80</sup>—A. IN GENERAL. The assignment of a judgment necessarily carries with it the cause

284, 117 Eng. Reprint 1055; Henderson v. Henderson, 6 Q. B. 288, 115 Eng. Reprint 111; Price v. Dewhurst, 8 Sim. 279, 59 Eng. Reprint 111; Reimers v. Druce, 23 Beav. 145, 53 Eng. Reprint 57; White v. Hall, 12 Ves. Jr. 321, 33 Eng. Reprint 122; Don v. Lippmann, 5 Cl. & Fin. 1, 7 Eng. Reprint 303; Godard v. Gray, L. R. 6 Q. B. 139; Cammell v. Sewell, 3 Hurl. & N. 617; Abouloff v. Oppenheimer, 10 Q. B. D. 295, 52 L. J. Q. B. 1, 47 L. T. N. S. 325; Ochsenbein v. Papelier, L. R. 8 Ch. 695, 21 Wkly. Rep. 516; Bowles v. Orr, 1 Yo. & Col. Exch. 464; Messina v. Petrococchino, L. R. 4 P. C. 144.

Compare *supra*, XVIII, B, 4, c.

77. Abouloff v. Oppenheimer, 10 Q. B. D. 295, 52 L. J. Q. B. 1, 47 L. T. N. S. 325; Vadala v. Lawes, 25 Q. B. D. 310, 63 L. T. 128, 38 Wkly. Rep. 594; Crozat v. Brogden, 2 Q. B. 30.

[a] "I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party, which has been obtained by the fraud of the other party to the suit in the foreign court." Abouloff v. Oppenheimer, 10 Q. B. D. 295, 52 L. J. Q. B. 1, 47 L. T. N. S. 325.

78. Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173,

152 Pac. 542; Coveney v. Phiscator, 132 Mich. 258, 93 N. W. 619.

[a] In Hilton v. Guyot, 42 Fed. 253, the English doctrine was refuted. But when the case was removed to the supreme court the question was not decided. See Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

[b] The supreme court of Michigan in Coveney v. Phiscator, 132 Mich. 258, 93 N. W. 619, said: "It may be safely stated that, wherever it is held that a judgment of a foreign country may be impeached for fraud, it is maintained that the fraud meant is a fraud practiced in the very obtaining of the judgment."

79. U. S.—John Li Estate v. Brown, 235 U. S. 342, 35 Sup. Ct. 106, 59 L. ed. 259; Cruz v. O'Boyle, 197 Fed. 824; Gioe v. Westervelt, 116 Fed. 1017; Onseley v. Lehigh Val. Trust & Safe-Dep. Co., 84 Fed. 602. Ala.—Christian & Craft Co. v. Coleman, 125 Ala. 158, 27 So. 786. Tex.—Banco Minero v. Ross, 106 Tex. 522, 172 S. W. 711; Rodriguez v. Priest, 126 S. W. 1187. Eng.—Vanquelin v. Bouard, 15 Com. B. (N. S.) 341, 143 Eng. Reprint 817; Scott v. Pilkington, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 121 Eng. Reprint 978; De Cosse Brissac v. Rathbone, 6 Hurl. & N. 301; Castrique v. Imrie, L. R. 4 H. S. 414; Godard v. Gray, L. R. 6 Q. B. 139; Ochsenbein v. Papelier, L. R. 8 Ch. 695, 21 Wkly. Rep. 516.

Compare, XVIII, B, 4, d.

80. As to assignments generally, see the title "Assignments."

of action on which it is based,<sup>81</sup> together with all the beneficial interest of the assignor in the judgment,<sup>82</sup> and all its incidents.<sup>83</sup> It entitles the assignee to all the remedies for the collection of the judgment, which might have been employed by the assignor.<sup>84</sup> The assignment of a judgment operates as an assignment of the appeal

81. Cal.—Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Brown *v.* Scott, 25 Cal. 189. Fla.—Feinberg *v.* Stearns, 56 Fla. 279, 47 So. 797, citing Freeman on Judgments, §431. Ga.—Thompson *v.* First State Bank, 102 Ga. 696, 29 S. E. 610, quoting Black on Judgments, §948. Ind.—Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739. Ia.—Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, quoting Freeman on Judgments, §431. Kan.—Gilmore *v.* State Nat. Bank, 90 Kan. 405, 133 Pac. 726. N. Y.—Bolen *v.* Crosby, 49 N. Y. 183; Pattison *v.* Hull, 9 Cow. 747. Ore.—King *v.* Miller, 53 Ore. 53, 59, 97 Pac. 542. Va.—Com. *v.* Wampler, 104 Va. 337, 51 S. E. 737, quoting Freeman on Judgments, §431.

[a] "The assignment of the judgment necessarily carries the debt; they are inseparable." Bolen *v.* Crosby, 49 N. Y. 183.

[b] The assignment of a judgment against the maker of a note does not carry with it a cause of action against a remote indorser of the note, existing before the note was merged in the judgment. Ward *v.* Haggard, 75 Ind. 381, followed in Cole *v.* Matchett, 78 Ind. 601; Kelsey *v.* McLaughlin, 76 Ind. 379.

82. Fla.—Feinberg *v.* Stearns, 56 Fla. 279, 47 So. 797. Ill.—Brooks *v.* Sanders, 110 Ill. 453; McJilton *v.* Love, 13 Ill. 486, 496, 54 Am. Dec. 449. Ia.—Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443. Kan.—Ives *v.* Addison, 39 Kan. 172, 17 Pac. 797. Va.—Com. *v.* Wampler, 104 Va. 337, 51 S. E. 737.

[a] The assignment is not of all the rights of the assignor, but of the rights vested in him by virtue of the judgment. Timberlake *v.* Powell, 99 N. C. 233, 5 S. E. 410.

83. Cal.—Strout *v.* Natoma Water & Min. Co., 9 Cal. 78. Fla.—Feinberg *v.* Stearns, 56 Fla. 279, 47 So. 797. Ga.—Thompson *v.* First State Bank, 102 Ga. 696, 29 S. E. 610. Ia.—Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443. Minn.—Schlieman *v.* Bowlitt,

36 Minn. 198, 30 N. W. 879. N. Y.—Burt *v.* Lustig, 28 Jones & S. 181, 17 N. Y. Supp. 362, affirmed, 137 N. Y. 538, 33 N. E. 336. Va.—Com. *v.* Wampler, 104 Va. 337, 51 S. E. 737.

84. Del.—Wilson *v.* Wilson, 3 Del. Ch. 183, among them the election to enforce it against any part of the debtor's real estate then held or to be acquired. Fla.—Feinberg *v.* Stearns, 56 Fla. 279, 47 So. 797. Ga.—Thompson *v.* First State Bank, 102 Ga. 696, 29 S. E. 610. Ill.—McJilton *v.* Love, 13 Ill. 486; Lasher *v.* Carey, 182 Ill. App. 147, 155. Ind.—Applegate *v.* Mason, 13 Ind. 75. Ia.—Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, reviewing authorities. Kan.—Gilmore *v.* State Nat. Bank, 90 Kan. 405, 133 Pac. 726. Ky.—Kimble *v.* Cummins, 3 Mete. 327. Miss.—Shotwell *v.* Webb, 23 Miss. 375. Mo.—Burns *v.* Baugert, 16 Mo. App. 22, assignee of a judgment takes assignor's right to enforce the judgment by supplemental proceedings. N. Y.—Bowdoin *v.* Coleman, 3 Abb. Pr. 431, 439, 6 Duer 182; Burt *v.* Lustig, 28 Jones & S. 181, 17 N. Y. Supp. 362, affirmed, 137 N. Y. 538, 33 N. E. 336. N. C.—Timberlake *v.* Powell, 99 N. C. 233, 5 S. E. 410, any remedies which assignor might have pursued, and no more. Pa.—Richmond Bldg. Assn. *v.* Richmond Bldg. Assn., to use, etc., 100 Pa. 191, 197.

[a] "Such an assignment entitles the assignee to use every remedy, lien, or security available to the assignor as a means of enforcing the judgment." Feinberg *v.* Stearns, 56 Fla. 279, 47 So. 797.

[b] The assignment of a judgment ordinarily carries with it the right to proceed with any outstanding process issued thereon. Richmond Bldg. Assn. *v.* Richmond Bldg. Assn., to use, etc., 100 Pa. 191.

Issuance of execution at instance of assignee of judgment, see generally the title "Judgments and Decrees, Enforcement of."

Actions on judgments by assignee

bond,<sup>85</sup> or an undertaking to stay the enforcement of the judgment,<sup>86</sup> so that the assignee may sue the sureties thereon, though upon this proposition, there is authority to the contrary.<sup>87</sup> The assignment of a judgment against a guardian operates as an assignment of a right of action on the guardian's bond.<sup>88</sup> So also an assignment of a judgment in a claim and delivery or replevin suit, transfers to the assignee any undertaking executed in the action for the delivery of the property to the plaintiff, so that he may sue thereon.<sup>89</sup> But an assignment of a judgment in an attachment suit does not transfer the benefit of an attachment bond, unless the assignment expressly purports to do so.<sup>90</sup>

Such an assignment carries with it the right of action against a sheriff for negligence in the care of property seized under an attachment,<sup>91</sup> for neglect in not collecting an execution, taken out and delivered to him by the assignee,<sup>92</sup> or for a false return.<sup>93</sup> It does not carry with it the right to sue the sheriff and the sureties on his official bond for a breach of the condition thereof occurring prior to the assignment by reason of his failure to return, in the time and manner provided by law, a forthcoming bond taken upon such judgment.<sup>94</sup>

thereof, see generally the title "Judgments and Decrees, Enforcement of."

85. *Ullmann v. Kline*, 87 Ill. 268.

86. *Burt v. Lustig*, 28 Jones & S. 181, 17 N. Y. Supp. 362, *affirmed*, 137 N. Y. 538, 33 N. E. 336.

87. *Chilstrom v. Eppinger*, 127 Cal. 326, 59 Pac. 696, 78 Am. St. Rep. 46 (where assignment made pending appeal); *Moses v. Thorne*, 6 Cal. 87, where assignment made after judgment had become a finality.

[a] Reason.—Where no assignment is made of the undertakings given on appeal and to stay proceedings, the assignee of the judgment cannot sue on such undertakings; such contracts are separate and distinct and do not pass by the assignment of the judgment as necessary incidents thereto. *Chilstrom v. Eppinger*, 127 Cal. 326, 59 Pac. 696, 78 Am. St. Rep. 46.

88. *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180.

89. *Schlieman v. Bowlin*, 36 Minn. 198, 30 N. W. 879; *Bowdoin v. Coleman*, 3 Abb. Pr. (N. Y.) 431, 6 Duer 182.

90. *Forrest v. O'Donnell*, 42 Mich. 556, 4 N. W. 259.

91. *Citizens' Nat. Bank v. Loomis*, 100 Iowa 266, 69 N. W. 443.

92. *McGregor v. Walden*, 14 Vt. 450.

[a] But it does not carry the right to recover against the sheriff for a

neglect to collect on an execution issued before the assignment. *Com. v. Fuqua*, 3 Litt. (Ky.) 41.

93. *Goodrich v. Bowē*, 1 N. Y. City Ct. 338.

94. *Com. v. Wampler*, 104 Va. 337, 51 S. E. 737.

[a] *Com. v. Wampler*, 104 Va. 337, 51 S. E. 737, criticizes *Citizens Nat. Bank v. Loomis*, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571, in the following language: "The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee—whereas, we apprehend, it appears by the weight of authority, that the right of action for the previous breach of duty by the officer, is a mere personal right which appertains to the judgment creditor. The right to recover damages for the tort, it is true, is an incident to the judgment in the qualified sense that it belongs to the owner of the judgment at the time the injury is committed; but it is separate and distinct from the right to the judgment, both in its character and in respect to the persons liable to respond in damages for the wrong. It is a collateral right, over which the judgment cred-



Nor does it carry with it the right of action which the assignor has against the clerk of the court for failure to properly index the judgment.<sup>95</sup>

The assignee of a judgment stands in no better position than his assignor, and the judgment may be vacated, reversed, or set aside in his hands, for the same reasons that would justify such in the hands of the assignor.<sup>96</sup>

**B. SETTING ASIDE OR RESCINDING.**—An assignment of a judgment may be vacated or set aside for good cause upon motion and notice to the adverse party, in the absence of an express statute requiring the bringing of an action therefor.<sup>97</sup> But a suit or action to vacate or set aside the assignment of a judgment is proper where sufficient ground for such relief exists.<sup>98</sup> Such an action has been considered to be a local one,<sup>99</sup> which must be brought in the county in which the land to be affected thereby is situated.<sup>1</sup> No order setting aside an assignment of a judgment can be made except upon notice to the assignee.<sup>2</sup>

itor possesses exclusive dominion, which he may enforce or forbear to enforce, and may assign or withhold at pleasure. The assumption, therefore, that the right to sue the officer exists in the assignee of the judgment, proceeds upon the hypothesis that it is such an incident as must necessarily pass by the assignment of the judgment, a conclusion which the authorities do not sustain.”

95. *Redmond v. Staton*, 116 N. C. 140, 21 S. E. 186.

96. *Cal.*—*Northam v. Gordon*, 23 Cal. 255 (assignee of judgment by default takes it subject to right of defendant to have default and judgment set aside upon proper showing); *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. *Ill.*—*McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449. *Minn.* *Magin v. Lamb*, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216, 466. *Ore.* *King v. Miller*, 53 Ore. 53, 97 Pac. 542. *S. D.*—*Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201. *Tenn.*—See *Gore v. Poteet*, 101 Tenn. 608, 50 S. W. 754. *Wis.*—*Parmalee v. Wheeler*, 32 Wis. 429.

As to right to set off judgment against assignee, see *supra*, XV, F, 2, b.

97. *Leonard v. Ross* (Okla.), 155 Pac. 885.

98. See the following: *U. S.*—*Lee*

*Line Steamers v. Robinson* (C. C. A.), 232 Fed. 417, fraud in procuring. *Conn.* *Vila v. Weston*, 33 Conn. 42, 50, where judgment reversed. *La.*—*Savoie v. Meyers*, 40 La. Ann. 677, 4 So. 882. *Mo.*—*Gottschalk v. Kircher*, 109 Mo. 170, 17 S. W. 905. *Ore.*—*King v. Miller*, 53 Ore. 53, 97 Pac. 542, where judgment assigned without reservation is reversed, vacated or set aside. *S. C.* *Mayer v. Blease*, 4 S. C. 10. *Tenn.* *Pearcy v. Huddleston*, 3 Yerg. 36. *Tex.* *Texas Elevator, etc. Co. v. Mitchell*, 7 Tex. Civ. App. 222, 28 S. W. 45, fraud in procuring assignment. *Va.*—*Lowe v. Trundle*, 78 Va. 65.

[a] That no tender was made of the money received in consideration of the assignment does not affect the right to maintain such a suit, where provision is made in the decree to return the money. *Lee Line Steamers v. Robinson* (C. C. A.), 232 Fed. 417.

99. See *Mahoney v. Mahoney*, 70 Hun 78, 23 N. Y. Supp. 1097, wherein the plaintiff sought a judgment vacating and setting aside the assignment and adjudging that the lien of the judgment be restored and again made a lien upon the land.

1. *Mahoney v. Mahoney*, 70 Hun 78, 23 N. Y. Supp. 1097.

2. *Avery v. Ackart*, 20 Misc. 631, 46 N. Y. Supp. 1085.

# JUDGMENTS AND DECREES, ENFORCEMENT OF

By the Editorial Staff.

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- 9. *Alias and Pluries*. [See 16 STANDARD PROC.]
- C. *Against Person*. [See 16 STANDARD PROC.]
- D. *Proceedings for Wrongful Execution*. [See 16 STANDARD PROC.]

### III. BY ACTION OR OTHER PROCEEDING. [See 16 STANDARD PROC.]

### IV. RELIEF FROM ENFORCEMENT. [See 16 STANDARD PROC.]

### V. STAY. [See 16 STANDARD PROC.]

#### CROSS-REFERENCES:

Arrest in Civil Cases;	Homesteads and Exemptions;
Assistance, Writs of;	Judicial Sales;
Attachment;	Mandamus;
Audita Querela;	Process;
Contempt;	Sentence and Judgment;
Creditors' Suits;	Sequestration;
Debt;	Sheriffs, Constables and
Decrees;	Marshals;
Garnishment;	Writ of Entry.

As to suits in equity to enforce decrees, see the title "Bills To Enforce Decrees;" to set aside fraudulent conveyances, see the title "Fraudulent Conveyances."

As to supplementary proceedings in aid of enforcement of judgment, see the title "Supplementary Proceedings."

Collection and enforcement of costs, see 5 STANDARD PROC. 973, et seq.; of fines, see the title "Penalties, Forfeitures and Fines."

Enforcement of decree or order for payment of alimony, costs or attorney's fees in divorce action, see 7 STANDARD PROC. 828, et seq.

Enforcement of judgments by or against corporations, see 5 STANDARD PROC. 670, et seq.; executors or administrators, see generally 8 STANDARD PROC. 770, et seq.; guardian or ward, see 10 STANDARD PROC. 874, et seq.; husband and wife or either of them, see 11 STANDARD PROC. 805, et seq.; infants, see 12 STANDARD PROC. 791, et seq.; insane persons, see 13 STANDARD PROC. 615, et seq.; municipal corporations, see generally the title "Municipal Corporations;" partnership, see generally the title "Partnership;" state, see generally the title "States and Territories;" United States, see generally the title "United States."

Enforcement of judgment in detinue, see 7 STANDARD PROC. 489; ejectment suit, see 7 STANDARD PROC. 1050, et seq.; federal courts, see the title "United States Courts;" foreclosure proceedings, see the title "Mortgages;" justice's court, see the title "Justices of the Peace;" replevin suit, see the title "Replevin;" trespass to try title suit, see the title "Trespass To Try Title."

Execution as prerequisite to creditors' suit, see 6 STANDARD PROC. 177, et seq.

For forms see 9 STANDARD PROC. 724, et seq., and particular titles dealing with enforcement in particular way or under particular circumstances.

For further references and cross-references, see the index to this work and the cross-references throughout the title.



**I. METHODS OF ENFORCEMENT. — IN GENERAL.** — When a judgment is recovered it constitutes a new cause of action upon which there are at least three remedies;<sup>1</sup> one, an execution<sup>2</sup> against the property,<sup>3</sup> or person<sup>4</sup> of the defendant; another, a writ of scire facias, if execution is delayed;<sup>5</sup> and the third, an action at law or suit in equity.<sup>6</sup> Of course, in some jurisdictions, there can be no proceeding upon a foreign judgment other than an action.<sup>7</sup>

Proceedings for contempt were the original mode of enforcing decrees.<sup>8</sup> But the more direct remedy of execution has long been the usual method of carrying decrees into effect.<sup>9</sup> A writ of assistance,<sup>10</sup> a writ of possession,<sup>11</sup> a writ of sequestration,<sup>12</sup> are also remedies for the enforcement of judgments or decrees.

**Agreement as to Mode of Enforcement.** — If a judgment is rendered in pursuance of an agreement of the parties which directs a particular mode of satisfying it, equity will not permit it to be enforced in any way inconsistent with the agreement.<sup>13</sup>

A proceeding to enforce a judgment is collateral to the judgment.<sup>14</sup>

**What Law Governs.** — The law regulating the enforcement of judgments, which is in force at the time judgment in a particular case is rendered, must govern in that case.<sup>15</sup> And the law of the place where the judgment is rendered governs the mode of its enforcement.<sup>16</sup>

1. *Waddill v. Cabell*, 10 Mackey 597.

2. **D. C.**—*Waddill v. Cabell*, 10 Mackey 597. Minn.—*Maki v. Maki*, 106 Minn. 357, 364, 119 N. W. 51. Neb.—*Halmes v. Dovey*, 64 Neb. 122, 89 N. W. 631.

3. Enforcement by execution against property, see *infra*, II, B.

4. Enforcement by execution against person, see *infra*, II, C.

5. *Waddill v. Cabell*, 10 Mackey 597. See generally the title "**Scire Facias**."

6. Enforcement by action or other proceeding, see *infra*, III, and generally the title "**Bills To Enforce Decrees**."

7. See *infra*, II, B, 1, b, (IV).

As to action at law on foreign judgments, see *infra*, III.

8. *Stuart v. Burcham*, 62 Neb. 84, 86 N. W. 898, 89 Am. St. Rep. 739; *De Vall v. De Vall*, 57 Ore. 128, 144, 109 Pac. 755, 110 Pac. 705. See generally 6 STANDARD PROC. 786.

[a] "A court of equity originally coerced a compliance with the terms of its decree by punishing the party commanded to obey its mandate, but it was powerless to issue an execution for that purpose." *De Vall v. De Vall*, 57 Ore. 128, 144, 109 Pac. 755, 110 Pac. 705.

As to proceedings for contempt, see generally the title "**Contempt**."

9. See generally 6 STANDARD PROC. 787.

10. See generally 3 STANDARD PROC. 140, et seq.; 6 STANDARD PROC. 788.

11. See generally 6 STANDARD PROC. 788; 7 STANDARD PROC. 890; 7 STANDARD PROC. 1050, et seq., and the titles "**Mortgages**;" "**Trespass To Try Title**."

12. See generally 6 STANDARD PROC. 788, and the title "**Sequestration**."

13. *Nason v. Smalley*, 8 Vt. 118.

14. See generally XVII, A, 4, a.

15. *Carnes v. Red River Parish*, 29 La. Ann. 608.

[a] "As the issuance of an execution relates to the remedy and not to the right of a party recovering a judgment, it is governed by the law in existence at the time of its issuance." *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

16. **U. S.**—*Mathuson v. Crawford*, 4 McLean 540, 16 Fed. Cas. No. 9,279. Ga.—*Massachusetts Ben. L. Assn. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. Wash.—*La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. Rep. 855, 32 L. R. A. 75. Can.—*Barker v. Central Vt. Ry. Co.*, 13 Quebec Super. Ct. 2.

[a] The United States Revised Stat-

## II. BY EXECUTION. — A. DEFINITIONS AND GENERAL STATEMENT.

1. In General. — An execution may be said to be the writ which authorizes the sheriff or other officer either to enforce a judgment or decree, or to endeavor to produce a satisfaction thereof.<sup>17</sup> The term

utes, §916 (U. S. Comp. St., 1913, §1540) providing that one recovering a judgment at common law shall be entitled to like remedies, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like cases by the laws of the state in which the court is held, applies to Porto Rico. *Bravo & Co. v. Gomez*, 1 P. R. Fed. 303.

17. **U. S.**—*In re Teuscher*, 23 Fed. Cas. No. 13,846. **Kan.**—*Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Mo.**—*Orehard v. Wright*, etc. *Store Co.*, 225 Mo. 414, 125 S. W. 486. **N. Y.**—*Strobridge v. Strobridge*, 21 Hun 288. **Ore.**—*Habersham v. Sears*, 11 Ore. 431, 5 Pac. 208, 50 Am. Rep. 481. **Tex.**—*Pierson v. Hammond*, 22 Tex. 585; *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385. **Can.**—*Harris v. Rankin*, 4 Manitoba L. R. 115.

See Freeman on Executions, §1.

[a] Other Definitions.—A written command, under the seal of the court, authorizing and directing the officer to whom it is directed to execute the court's judgment. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113. And see *Ark.*—*Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567. **Kan.**—*Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Ohio.**—*Kelley v. Vincent*, 8 Ohio St. 415.

[b] "An execution is an order to the sheriff to attach and sell the property of the judgment debtor." *Osorio v. Cortez*, 24 Phil. Isl. 653, 661.

[c] An execution is the putting of the sentence of the law in force. 3 Bl. Com. 412. And see, *Ark.*—*Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567. **Conn.**—*Mallory v. Hartman*, 86 Conn. 615, 86 Atl. 567. **Ind.**—*Ex parte Voltz*, 37 Ind. 237. **Kan.**—*Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Tex.**—*Borden v. Tillman*, 39 Tex. 262; *Pierson v. Hammond*, 22 Tex. 585.

[d] An execution is the end of the law. **U. S.**—*Central Nat. Bank v. Stevens*, 169 U. S. 432, 465, 18 Sup. Ct. 403, 42 L. ed. 807; *United States v. Nourse*, 9 Pet. 8, 9 L. ed. 31; *Bank of United States v. Halstead*, 10 Wheat.

51, 6 L. ed. 264. **Ark.**—*Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567. **Ill.**—*Dobbins v. First Nat. Bank*, 112 Ill. 553. **Ind.**—*McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 106 Am. St. Rep. 268, 68 L. R. A. 273. **Kan.**—*Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Neb.**—*Miller v. Finn*, 1 Neb. 254. **N. H.**—*Hurlbutt v. Currier*, 68 N. H. 94, 38 Atl. 502. **Pa.**—*Federal Ins. Co. v. Robinson*, 82 Pa. 357; *Speer v. Sample*, 4 Watts 367. **Can.**—*Harris v. Rankin*, 4 Manitoba L. R. 115, the last stage of a suit whereby possession is obtained of anything recovered.

[e] An execution at law is a writ issuing out of a court, directed to an officer thereof, and running against the body or goods of a party. **U. S.**—*Brown v. United States*, 6 Ct. Cl. 171. **Kan.**—*Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459; *Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Ohio.**—*Kelley v. Vincent*, 8 Ohio St. 415.

[f] An execution in civil actions, is the process by which the debt, or damages, or other thing recorded, and the costs adjudged, is obtained. *Steele v. Thompson*, 62 Ala. 323.

[g] The process of authorizing seizure or appropriation of the property of the defendant for the satisfaction of a judgment against him. *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627. And see **Ia.**—*Lambert v. Powers*, 36 Iowa 18. **Kan.**—*Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. **Mo.**—*Smith ex rel. McElhany v. Rogers*, 191 Mo. 334, 90 S. W. 1150. **Neb.**—*Miller v. Finn*, 1 Neb. 254. **N. Y.**—*Strobridge v. Strobridge*, 21 Hun 288; *Devlin v. Hinman*, 40 App. Div. 101, 57 N. Y. Supp. 663. **Pa.**—*Girard Life Ins. A. & Tr. Co. v. Farmers' & Mechanics' Nat. Bank*, 57 Pa. 388.

[h] Still other definitions will be found in the following cases and statutes: **U. S.**—*In re Teuscher*, 23 Fed. Cas. No. 13,846. **Ark.**—*Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567; *Isbell v. Epps*, 28 Ark. 35. **Fla.**—*Davidson v. Seegar*, 15 Fla. 671; *Mitchell v.*

"execution," as used in the statutes, is not to be construed in the restricted sense of process simply to collect the amount due on the judgment by levy and sale,<sup>18</sup> but as applying to all processes issued and means employed to carry into effect the final judgment of a court.<sup>19</sup> It includes within its meaning the phrase "order of sale."<sup>20</sup>

**Different Writs of Execution.**—The writ of fieri facias,<sup>21</sup> which is the one old writ now most usual in the enforcing of judgments which

Duncan, 7 Fla. 13. **Kan.**—Webber v. Harshbarger, 5 Kan. App. 185, 47 Pac. 166. **N. Y.**—Seaman v. Clarke, 60 App. Div. 416, 69 N. Y. Supp. 1002. **Ohio.** Gen. Code, 1910, §11,653; Kelley v. Vincent, 8 Ohio St. 415; Darby's Lessee v. Carson, 9 Ohio 149. **Pa.**—Girard Life Ins. Co. v. Farmers' & Mech. Nat. Bank, 57 Pa. 388; Reid v. Northwestern R. Co., 32 Pa. 257; Pentland v. Kelly, 6 Watts & S. 483. **S. C.**—Dibble v. Taylor, 2 Speers 308, 42 Am. Dec. 368. **Tex.**—Morris v. Morgan, 92 Tex. 92, 45 S. W. 1002; Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486; Gruner v. Westin, 66 Tex. 209, 216, 18 S. W. 512; Borden v. McRae, 46 Tex. 396; Pierson v. Hammond, 22 Tex. 585; Lockridge v. Baldwin, 20 Tex. 303, 70 Am. Dec. 385; Henry v. Moore, 1 White & W. Civ. Cas., §§880, 882. **Vt.**—Griffith v. Fowler, 18 Vt. 390, 394. **Wash.**—Mayer v. Morgan, 26 Wash. 71, 66 Pac. 128. **Wyo.**—Comp. St., 1910, §4668. **Eng.** *Ex parte* Duignan, L. R. 11 Eq. 604.

18. Green v. Mann, 19 App. Cas. (D. C.) 243; Orchard v. Wright, etc. Store Co., 225 Mo. 414, 125 S. W. 486.

19. **U. S.**—National Foundry & Pipe Wks. v. Oconto Water Co., 52 Fed. 43. **D. C.**—Green v. Mann, 19 App. Cas. 243, includes a scire facias. **Mo.**—Orchard v. Wright, etc. Store Co., 225 Mo. 414, 125 S. W. 486. **N. J.**—Kemble v. Harris, 36 N. J. L. 526, includes writs of fieri facias and capias ad satisfaciendum. **N. D.**—Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 513. **Pa.**—Reid v. Northwestern R. Co., 32 Pa. 257. **Tex.**—Pierson v. Hammond, 22 Tex. 585; Lockridge v. Baldwin, 20 Tex. 303, 70 Am. Dec. 385. **Can.**—And see Fisher v. Grace, 28 U. C. Q. B. 312, writ of assignment of dower.

[a] **Distinguished From "Attachment" and "Sequestration."**—The terms attachment and sequestration comprise all the process, by virtue of which personal property may be seized before judgment; and execution "all

process by which it may be seized after final judgment. Pierson v. Hammond, 22 Tex. 585. And see Beard v. Wilson, 52 Ark. 290, 12 S. W. 567, quoting Grubbs v. Ellyson, 23 Ark. 287; Reid v. Northwestern R. Co., 32 Pa. 257.

[b] **The distinction "between the writ of seizure and sale and the fi. fa."** is clear: The one writ addresses itself to specified property; its mandate to the sheriff is to seize and sell the property thus specified, and no other; the other writ addresses itself to the debtor's property in general; and its mandate to the sheriff is to cause the amount of the debt to be made out of the property of the debtor indiscriminately." Lisso v. Williams, 139 La. —, 71 So. 365.

20. Webber v. Harshbarger, 5 Kan. App. 185. See also Aetna Ins. Co. v. Hallock, 6 Wall. (U. S.) 556, 18 L. ed. 948.

[a] The terms are often used interchangeably. Burkett v. Clark, 46 Neb. 466, 64 N. W. 1113.

[b] **Order of Probate Court.**—A sale by the administrator based upon an order or judgment of the probate court directing him to sell, is a sale under execution. Orchard v. Wright, etc. Store Co., 225 Mo. 414, 125 S. W. 486. Compare, the title "Judicial Sales."

[c] **An order of sale in an action of partition** is not an execution, however. Girard Life Ins. A. & Tr. Co. v. Farmers' & Mechanics' Nat. Bank, 57 Pa. 388.

21. **A fieri facias is a writ** directing the officer to cause to be made out of the goods and chattels of the judgment-debtor the sum or debt recovered. 2 Bouvier's Law Dict. (3rd ed.) 1217.

[a] In England the writ of fieri facias was used to sell goods and chattels; but in Pennsylvania lands have always been subject to seizure and sale on fieri facias except when specific lands only are to be sold. McClelland v. Devilbiss, 1 Pa. Co. Ct. 613.



deeree the payment of money,<sup>22</sup> as well as the writ of *levari facias*,<sup>23</sup> which is a common-law writ now generally obsolete,<sup>24</sup> are species of executions, as well as the writ of *venditioni exponas*,<sup>25</sup> the common-law writ which compelled an officer to proceed with the sale of property levied upon under a *fieri facias* or attachment,<sup>26</sup> though conferring no

22. See *Canal Bank v. Copland*, 8 La. 577.

23. *Pentland v. Kelly*, 6 Watts & S. (Pa.) 483, wherein the court said: "It cannot be doubted that the *levari facias*, which is substituted for the *fi. fa.*, inquisition and *venditioni* in the case of the mechanics' lien, is an execution. . . . The *levari facias* is expressly enumerated among the species of execution in Jacob's Law Dictionary, and is defined to be a writ of execution directed to the sheriff for levying a sum of money upon a man's lands, tenements, goods and chattels."

[a] A *levari facias* is the ordinary writ for collecting charges upon land, as in the cases of mortgages, mechanics' liens, and municipal charges. *Hart v. Homiller's Exr.*, 23 Pa. 39; *Stewart's Heirs v. Miller*, 2 Pearson (Pa.) 358. See also *McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613.

24. A *Levari Facias* Is a Common-Law Writ.—"It was in common use before the writ of *fieri facias* was adopted." *Stewart's Heirs v. Miller*, 2 Pearson (Pa.) 358.

25. *Mo.*—*Hicks v. Ellis*, 65 Mo. 176, 186. *Tenn.*—*Webb v. Armstrong*, 5 Humph. 379. See *Scawell's Lessee v. Williams*, 2 Overt. 273. *Tex.*—*Wallace & Co. v. Bogel & Bro.*, 66 Tex. 572, 2 S. W. 96; *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

[a] Compare, *Holmes v. McIndoe*, 20 Wis. 657, 669, wherein the court said "that a *venditioni* is not an execution in the proper sense of that word."

[b] A *venditioni exponas* is a writ of execution, and confers upon the officer authority to sell, pursuant to the levy, advertisement, and command of the writ, without re-advertising the property. *Young v. Smith*, 23 Texas 598, 76 Am. Dec. 81, citing *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

[c] "A writ of *venditioni exponas* is undoubtedly a writ of execution. Bouvier Law Liet. tit. Execution-venditioni exponas. It was so denominated in *Kane v. McCown*, 55 Mo. 196; and in *Wood v. Augustine*, 61 Mo. 46. In

*Webb v. Armstrong*, 5 Humph. 379, it was held that a writ of *venditioni exponas* was an execution within the meaning of the statutes authorizing motions against sheriffs for failure to return executions. It is an execution or writ to satisfy the judgment on behalf of the plaintiff. It is sometimes spoken of as a branch of the writ of *fieri facias*, and it may contain a *fieri facias* clause." *Hicks v. Ellis*, 65 Mo. 176, 186.

[d] In Nature of Alias Execution. "In *Dryer v. Graham*, 58 Ala. 623, the supreme court of Alabama said: 'It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of *venditioni exponas*. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a *venditioni exponas* is the proper writ. The *venditioni exponas* continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal. The writ is, indeed, merely for the continuation and completion of the original execution. And if its mandate is for the sale of land on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of the execution. . . . A *venditioni exponas* is in its nature and operation, as to the property on which the levy may have been made an alias execution. It merely commands and authorizes, as to real estate, the completion of the execution already begun.'" *Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. 532, 40 L. ed. 633, 636.

26. *Hastings v. Bryant*, 115 Ill. 69, 75, 3 N. E. 507. See also, *Ala.*—*Antry v. Walters*, 46 Ala. 476; *Garey v. Hines*, 8 Ala. 837. *Cal.*—*Frink v. Roe*, 70 Cal. 296, 305, 11 Pac. 820; *Welch v. Sullivan*, 8 Cal. 165, 186. *Ill.*—*Bellingall v. Duncan*, 8 Ill. 477; *Phillips v. Dana*, 4 Ill. 551. *Ind.*—*Doe v. Cunningham*, 6 Blackf. 430. *Kan.*—*Ritchie v. Higgin-*

power on the officer which he did not possess under the *feri facias*.<sup>27</sup> So too, the writ of *elegit*,<sup>28</sup> a writ unknown to American jurisprudence, except in a few states, in which it is practically obsolete,<sup>29</sup> as well as

botham, 26 Kan. 645. **Ky.**—Keith v. Wilson, 3 Met. 201, 204; Colyer v. Higgins, 1 Duv. 6, 85 Am. Dec. 601; Irvin v. Pickett, 3 Bibb. 343. **Md.**—Clarke v. Belmear, 1 Gill & J. 443, 448. **Mo.** Howell v. Sherwood, 242 Mo. 513, 533, 147 S. W. 810. **Neb.**—Burkett v. Clark, 46 Neb. 466, 477, 64 N. W. 1113. **Pa.**—Frisch v. Miller, 5 Pa. 310. **Tex.** Borden v. Tillman, 39 Tex. 262, 273; Young v. Smith, 23 Tex. 598, 76 Am. Dec. 81; Lockridge v. Baldwin, 20 Tex. 303, 306, 70 Am. Dec. 385. **Wis.** Holmes v. McIndoe, 20 Wis. 657, 669. **Eng.**—Hughes v. Rees, 7 Dowl. P. C. 56, 4 Mees & W. 468, 1 H. & H. 347.

**Property subject to sale under venditioni exponas**, see *infra*, II, B, 3.

27. **Ill.**—Hastings v. Bryant, 115 Ill. 69, 3 N. E. 507; Bellingall v. Duncan, 8 Ill. 477. **Ky.**—Keith v. Wilson, 3 Met. 201, 204; Colyer v. Higgins, 1 Duv. 6, 85 Am. Dec. 601; Irvin v. Pickett, 3 Bibb 343. **Md.**—Manahan v. Sammon, 3 Md. 463; Clarke v. Belmear, 1 Gill & J. 443, 448.

[a] "Such a writ confers no new authority on the sheriff. Its only office is to compel him to proceed with a sale, which he already has the power to make." Bellingall v. Duncan, 8 Ill. 477.

[b] "It is said by Freeman in his work: 'That the venditioni exponas was so frequently used as to create the impression that it was a writ of authorization as well as compulsion, and was necessary to enable the officer to proceed with the sale. Such is not the fact. It gave the officer no authority not previously possessed by him. If he was willing to proceed, the issue of this writ was a clear superfluity.' Herman, in his work on Executions (sec. 215), says: 'A vendi. confers no power or authority on an officer which he did not possess under the execution. . . . The execution is the effective writ, and the officer may sell under it without a vendi.'" Hastings v. Bryant, 115 Ill. 69, 3 N. E. 507.

[c] It is no authority to levy. Welch v. Sullivan, 8 Cal. 165, 186.

[d] It is a mere continuation of the writ of *feri facias*. Doe *ex dem.* Dissett v. McLeod, 3 U. C. Q. B. 297. See

also Hughes v. Rees, 7 Dowl. P. C. 56, 4 Mees & W. 468, 1 H. & H. 347.

28. An *elegit* was a writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted. 1 Bouvier's L. Dict. (3rd ed.) 1000. See also North Amer. F. Ins. Co. v. Graham, 5 Sandf. (N. Y.) 197.

[a] **Historical.**—"At common law no judgment lien existed in favor of the judgment creditor. The nearest approach to a modern judgment lien was found in St. 13 Edw. I, called the 'Statute of Westminster II,' which created the writ of *elegit*. The only remedy offered the judgment creditor under this was sequestration of the profits of the land by writ of *levari facias*, or the possession of a moiety of the lands by writ of *elegit*, and in certain cases of the whole of it by extent." Thompson v. Avery, 11 Utah 214, 229, 39 Pac. 829. See also Hulbert v. Hulbert, 216 N. Y. 430, 436, 111 N. E. 70.

29. Hulbert v. Hulbert, 216 N. Y. 430, 436, 111 N. E. 70; Thompson v. Avery, 11 Utah 214, 230, 39 Pac. 829, writ of *elegit* not in force in Utah.

[a] In Hulbert v. Hulbert, 216 N. Y. 430, 436, 111 N. E. 70, the court said: "The writ of *elegit*, however, has been said to be 'almost unknown in the United States.' (Freeman on Executions, §370.) There are, however, instances of its use in Virginia, Alabama, North Carolina and Delaware. (Freeman on Executions, §370.) Although authorized in New York, in practice it is doubtful if it was ever adopted. In commenting upon it Chancellor Lansing said: 'Whether the *elegit* was ever introduced in practice, is doubtful, as the small value of the income of real estates, afforded little inducement to resort to it, as a means of satisfying a debt due upon a judgment' (Catlin v. Jackson, *supra*, at p. 547 [8 John. (N. Y.) 520])."

[b] The reason for the existence of the writ of *elegit* never existed in the United States, and the slight countenance given to it in the United States was discontinued shortly after the

a writ of *distringas*,<sup>29</sup> are species of execution. An attachment-execution, a process provided for in some states to enforce a judgment, is in substance, if not in form, an execution.<sup>31</sup>

An execution is not a cause of action;<sup>32</sup> but it is process in an action within the meaning of a statute providing that such must be directed to the sheriff of the county.<sup>33</sup>

The purpose or object of a writ of execution is to authorize the officer to whom it is directed and delivered, to seize and hold the property of the debtor for the satisfaction of the amount ordered to be paid by such writ;<sup>34</sup> in other words, to enforce the judgment or decree.<sup>35</sup>

2. **Classification of Executions.**—Executions may be generally divided into two classes, general and special.<sup>36</sup> Again they are some-

passage of the Act of Geo. II, which abolished it in England. Thompson v. Avery, 11 Utah 214, 231, 39 Pac. 829.

30. Which is the writ for enforcing a judgment which orders that something shall or shall not be done. Avery v. Police Jury of Iberville, 15 La. Ann. 223; Traverso & Al v. Row, 11 La. 494.

[a] "As defined by Bouvier's Law Dict. (vol. 1, p. 590), a writ of *distringas* is a writ directed to the sheriff, commanding him to distrain one of his goods and chattels to enforce a compliance with what is required of him, and it was used to compel an appearance where the party could not be found 'and in equity may be availed of to compel the appearance of a corporation aggregate.'" Fiedler v. Bambrick Bros. Const. Co., 162 Mo. App. 528, 142 S. W. 1111.

31. Dobbin v. Allegheny, 7 Fed. Cas. No. 3,941.

[a] "It differs from a *feri facias* essentially only in this, that it reaches effects, from which the debt could not otherwise be levied. . . . It is an execution so far collateral to the judgment that it may proceed simultaneously with the ordinary executions." Dobbins v. Allegheny, 7 Fed. Cas. No. 3,941.

32. Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 513.

33. Johnson v. Elkins, 90 Ky. 163, 13 S. W. 148, 8 L. R. A. 572.

**To whom writ of execution directed,** see *infra*, II, B, 2, f; II, C, 2.

34. U. S.—Berry v. Smith, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359. N. D.—Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 513. N. Y.—Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627. Ore.—Habersham v. Sears, 11 Ore. 441, 5 Pac. 208, 50 Am. Rep. 481.

[a] Writ Not a Security.—The of-

fice of an execution is not to secure but to enforce payment of a debt, and an attempt to make use of it for purposes of security merely, postpones it to other executions subsequently issued. So, if a plaintiff delivers an execution to the sheriff with directions to hold until further orders, it creates no lien on the defendant's property as against a subsequent execution. Koren v. Roemheld, 6 Ill. App. 275.

35. U. S.—Harshman v. Knox County, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152. Colo.—Brown v. Bell, 46 Colo. 163, 103 Pac. 380, 133 Am. St. Rep. 54, 23 L. R. A. (N. S.) 1096. Ill.—Everingham v. Nat. City Bank of Ottawa, 124 Ill. 527, 17 N. E. 26; Gilmore v. Davis, 84 Ill. 487; Western Union Cold Storage Co. v. Rose, 60 Ill. App. 452; Koren v. Roemheld, 6 Ill. App. 275. Mo.—St. Francis Mill Co. v. Sugg, 83 Mo. 476; Wyatt v. Fromme, 70 Mo. App. 613. Neb.—Stuart v. Burcham, 62 Neb. 84, 86 N. W. 898, 89 Am. St. Rep. 739. N. Y.—See Sherman v. Boyce, 15 Johns. 443; Jackson *ex dem.* Saunders v. Cadwell, 1 Cow. 622. N. C.—Lyon v. Russ, 84 N. C. 588.

See also, *supra*, the cases cited in note 17, page 716.

[a] The only proper use of an execution is to enforce the collection of the judgment upon which it is based, and to enforce this collection with considerable diligence. Lane v. Allen, 60 Ill. App. 457.

36. **Distinction.**—A special *feri facias* differs from the general writ only in this, that it points out and specifies the property to be sold, and pursues and follows the judgment in respect of the disposition of the proceeds arising from the sale. State v.



times divided into other classes, as against property, against the person and for the delivery of the possession of real or personal property.<sup>37</sup>

**B. AGAINST PROPERTY.<sup>38</sup> — 1. Issuance of Execution. — a. In General.** — The award of an execution is a judicial act not a ministerial

Melton, 102 Mo. 683, 15 S. W. 139. See *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

[a] "A further distinction between a special and a general execution is to be found in the fact that ordinarily a special execution issues only in proceedings where the defendant has not been brought into court by personal service of process, but his property has been seized, and hence the execution to satisfy the judgment is limited to the specific property seized, though by statute there are cases where even when the defendant is personally brought into court, the judgment is a special one against certain property belonging to the defendant, and in such cases no general judgment is entered; whereas a general execution, which may be levied upon any property the defendant owns, follows a general judgment based upon personal service." *Smith ex rel. McElhany v. Rogers*, 191 Mo. 334, 90 S. W. 1150.

[b] Upon a general judgment in an attachment suit, it is error to award a special execution against the property attached. *Kritzer v. Smith*, 21 Mo. 296.

[c] In Illinois, except in cases provided by statute, executions are general. Rev. St. ch. 77, §4. The right of the party in whose favor the writ was issued, to elect on what property not exempt from execution he will have the same levied, does not, as is contended, give him a right to a special execution. *Brown v. Duncan*, 132 Ill. 413, 418, 23 N. E. 1126, 22 Am. St. Rep. 545.

[d] As the property attached in an action commenced by attachment where there is no personal service of process, but the defendants are notified by publication, is not released by the defendant's appearance, a special execution may properly be issued, although the award of execution is general only. *Kerr v. Swallow*, 33 Ill. 379. See also *Keeley Brewing Co. v. Carr*, 198 Ill. 492, 64 N. E. 1030.

Special executions will be considered

under appropriate titles, such as "Mortgages;" "Taxation."

37. See generally the statutes and the following: Ind.—Burns' Ann. St., 1914, §718; *Ex parte Voltz*, 37 Ind. 237. Mass.—Kellogg v. Underwood, 163 Mass. 214, 4 N. E. 104. Ohio.—Gen. Code, 1910, §11,564. Wis.—St., 1898, §2,967. Wyo.—Comp. St., 1910, §4,669.

[a] The New York practice recognizes four kinds of executions, namely, against the property, against the person, for the delivery of the possession of real property and for the delivery of the possession of a chattel. N. Y. Code Civ. Proc., §1363.

[b] Kansas, Oklahoma and Washington also have four kinds, first, against the property of the judgment debtor; second, against his person; third, for the delivery of the possession of real or personal property, with damages for withholding the same, and costs; fourth, executions in special cases. Gen. St. (Kan.), 1909, §6034; *Watson v. Keystone Ironworks Co.*, 70 Kan. 43, 74 Pac. 269; *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459; *Webber v. Harshbarger*, 5 Kan. App. 185, 47 Pac. 166. And see Okla. Comp. Laws, 1909, §5966; Rem. & Bal. Wash. Code, §511.

[c] Nebraska, South Carolina and South Dakota have three classes; against property, against the person, and for the delivery of property. S. C. Code Civ. Proc., 1902, §305; S. D. Civ. Proc., 1910, §331. See also Neb. Rev. St., 1913, §8043.

[d] Oregon.—"There are two kinds of executions on judgments for the recovery of money in this state—one against the property and the other against the person. B. & C. Comp., §214." *Banning v. Roy*, 47 Ore. 119, 82 Pac. 708.

Executions against property, see *infra*, II, B.

Executions against person, see *infra*, II, C.

38. Enforcement by execution against person, see *infra*, II, C.

one.<sup>39</sup> The actual issuance of the writ, however, is not an act of the court, but is a mere ministerial act of the executive officer of the court;<sup>40</sup> a subsequent and distinct proceeding.<sup>41</sup>

If the law under which the execution issues is unconstitutional, the execution is void.<sup>42</sup>

b. *On What Founded.*<sup>43</sup> — (I.) *Valid Judgment or Decree.*<sup>44</sup> — (A.) *IN GENERAL.* — As a condition precedent to the issuance of a writ of execution, there must be a valid, subsisting judgment or decree, to support it.<sup>45</sup> If the judgment is void for any reason, an execution

39. **N. C.**—Weaver v. Cryer, 12 N. C. 337. **Phil. Isl.**—Hidalgo v. Crossfield, 17 Phil. Isl. 466. **Tenn.**—Schaller & Garke v. Wickersham, 7 Coldw. 376; Union Bank v. McClung, 9 Humph. 91; Daley v. Perry, 9 Yerg. 442; Battle v. Bering, 7 Yerg. 529, 531, 27 Am. Dec. 524; Johnson v. Ball, 1 Yerg. 291, 24 Am. Dec. 451.

[a] The award of execution is not a part of the judgment, and does not add to or detract from its force and effect. *Knotts v. Crossly*, 1 Neb. (Unof.) 730, 95 N. W. 818.

40. **Ala.**—Hudson v. Modawell, 64 Ala. 481; Kyle v. Evans, 3 Ala. 481, 37 Am. Dec. 705. **Ga.**—Scott v. Bedell, 108 Ga. 205, 33 S. E. 903; Luther v. Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; Reeves v. Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837. **Mass.**—Briggs v. Wardwell, 10 Mass. 356. **N. C.**—Weaver v. Cryer, 12 N. C. 337. **Okla.**—Morrow v. Smith, 8 Okla. 267, 61 Pac. 366; Needles v. Frost, 2 Okla. 19, 35 Pac. 574. **Pa.**—Paine v. Fresco, 1 Pa. Co. Ct. 562, 17 W. N. C. 502. **Phil. Isl.**—Hidalgo v. Crossfield, 17 Phil. Isl. 466. **W. Va.**—Speidel Co. v. Warder, 56 W. Va. 602, 49 S. E. 534.

See also *infra*, II, c.

[a] "The right of a party to have an execution having been duly adjudged, the mere issuing of the writ when the time for its issuance as prescribed by law has arrived; that is to say, the preparation and delivery of the formal writ or order to the sheriff, or other officer charged with the execution of judgments, directing him to proceed with the execution, is a mere compliance with the provisions of the award of judgment, and essentially a purely ministerial act." *Hidalgo v. Crossfield*, 17 Phil. Isl. 466.

By whom execution issued, see *infra*, II, B, 1, c.

41. *Krumeick v. Krumeick*, 14 N. J. L. 39.

[a] The issuing of execution is no part of the judgment. *Donalds v. Plumb*, 8 Conn. 447, 458.

Procuring issuance of writ, see *infra*, II, B, 1, i.

42. *Armell v. Lendrum*, 47 Iowa 535.

As to what law governs enforcement of judgments, see *supra*, I.

43. Foundation of execution against person, see *infra*, II, C.

44. As to judgments and decrees generally, see the titles "Decrees;" "Judgments."

45. **U. S.**—Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196; Clements v. Berry, 11 How. 398, 13 L. ed. 745; Wayman v. Southard, 10 Wheat. 1, 29, 6 L. ed. 253; Griffith v. Frazier, 8 Cranch 9, 3 L. ed. 471; Danielson v. Northwestern Fuel Co., 55 Fed. 49; Tilton v. Barrell, 9 Sawy. 84, 17 Fed. 59. **Ala.**—Bringman & Co. v. Merriweather, 121 Ala. 602, 25 So. 994. **Ark.**—Meeks v. Black, 83 Ark. 419, 104 S. W. 147; Jones v. Goodbar, 60 Ark. 182, 29 S. W. 462; Hightower v. Handlin, 27 Ark. 20. **Cal.**—Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740. **Conn.**—Cutler v. Wadsworth, 7 Conn. 6. **Fla.**—Davidson v. Seegar, 15 Fla. 671. **Ga.**—Lott v. Wood & Bro., 135 Ga. 821, 70 S. E. 661; Roney v. McCall, 128 Ga. 249, 57 S. E. 503; Hamlin v. Coleman, 74 Ga. 831. **Ill.**—Hutson v. Wood, 263 Ill. 376, 387, 105 N. E. 343; Anderson v. Gray, 134 Ill. 550, 25 N. E. 843; Bloom v. Geanes, 160 Ill. App. 34; Shue v. Ingle, 87 Ill. App. 522; Martin v. Knights, 56 Ill. App. 65; Swain v. Humphreys, 42 Ill. App. 370; Humphreys, Newton & Co. v. Swain, 21 Ill. App. 232. **Ind.**—Ferrier v. Deutchman, 111 Ind. 330, 12 N. E. 497; Doe on the Demise of Ingram v. Allen, 2 Ind. 166. **Ia.**—Winter v. Coulthard, 94 Iowa 312, 62 N. W. 732; Balm v. Nunn, 63 Iowa 641, 19 N. W.

based thereon is likewise void, and all proceedings founded upon it

- 810; *Armell v. Lendrum*, 47 Iowa 535; *Campbell v. Williams*, 39 Iowa 646. **Kan.**—*Darrow v. Scullin*, 19 Kan. 57; *Davidson v. Floyd*, 15 Kan. 667. **Ky.** *O'Connor v. Stone*, 19 Ky. L. Rep. 1929, 43 S. W. 483; *Rector v. Gale*, Hard. 78. **La.**—*Strother v. Richardson*, 30 La. Ann. 1269; *Childress v. Allin*, 17 La. 37; *De Gruy's Syndic v. Hennen*, 2 La. 544. **Me.**—*Hamant v. Creamer*, 191 Me. 222, 63 Atl. 736; *Prescott v. Prescott*, 62 Me. 428. **Md.**—*United States Tel. Co. v. Stevens*, 67 Md. 156, 8 Atl. 993; *Owings v. Worthington*, 4 Md. 260. **Mass.**—*Clark v. Fowler*, 5 Allen 45. **Mich.**—*Ninde v. Clark*, 62 Mich. 124, 28 N. W. 765. **Miss.**—*Blalack v. Stevens*, 81 Miss. 711, 33 So. 508; *Dailey v. State*, 56 Miss. 475; *Hines v. Noah, Sheriff*, 52 Miss. 192; *Nabours v. Cocke*, 24 Miss. 44. **Mo.**—*Francis v. Francis*, 192 Mo. App. 710, 179 S. W. 975; *Irondale Bank v. Terrill*, 135 Mo. App. 472, 116 S. W. 481; *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971; *State v. Leidy*, 115 Mo. App. 62, 90 S. W. 759; *Bain v. Chrisman*, 27 Mo. 293. **Neb.**—*Muller v. Plue*, 45 Neb. 701, 64 N. W. 232. **N. H.**—*Eaton v. Badger*, 33 N. H. 228. **N. J.**—*Little v. Fleming*, 3 N. J. L. 552; *Conner v. Sondon*, 3 N. J. L. 529; *Zane v. Pissant*, 2 N. J. L. 319; *Lofton v. Champion*, 2 N. J. L. 157; *Parker v. Frambes*, 2 N. J. L. 145, 157. **N. M.** *Munis v. Herrera*, 1 N. M. 362. **N. Y.** *Goldberg v. Markowitz*, 94 App. Div. 237, 87 N. Y. Supp. 1045; *Townshend v. Wesson*, 4 Duer 342; *Jackson ex dem. Sleight v. Hasbrouck*, 12 Johns. 213; *Van Ness v. Cantine & Radcliff*, 4 Paige 55 (must be a decree or some positive order in the nature of a decree). **N. C.** *Sheppard v. Bland*, 87 N. C. 163. **Ohio.** *Bisbee v. Hall*, Wright 59. **Pa.**—*Book v. Edgar*, 3 Watts 29, execution in a suit in which no judgment has been entered must be void. **Tenn.**—*Berry v. Clements*, 9 Humph. 312; *Roche v. Washington*, 7 Humph. 142; *Jennings v. Pray*, 8 Yerg. 85; *Harlan v. Harlan*, 14 Lea 106; *Barnes v. Hayes*, 1 Swan 304. **Tex.**—*Halsell v. McMurphy*, 86 Tex. 100, 23 S. W. 647, *affirming*, 21 S. W. 777; *McKay v. Paris Exch. Bank*, 75 Tex. 181, 12 S. W. 529, 16 Am. St. Rep. 884; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673; *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443; *Miller v. Koertge*, 70 Tex. 162, 78 S. W. 691, 8 Am. St. Rep. 587; *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Allday v. Whittaker*, 66 Tex. 669, 1 S. W. 794; *Smith v. Miller*, 66 Tex. 74, 17 S. W. 399; *Hart v. McDade*, 61 Tex. 208; *Simpson's Heirs v. Timble*, 44 Tex. 310; *Allison v. Brookshire*, 38 Tex. 199; *Walker v. Emerson*, 20 Tex. 706, 73 Am. Dec. 207; *Criswell v. Ragsdale*, 18 Tex. 443; *Wright v. Wright*, 6 Tex. 29; *Glass v. Shapard*, 37 Tex. Civ. App. 365, 83 S. W. 880; *Beckham v. Medlock*, 19 Tex. Civ. App. 61, 46 S. W. 402, *affirmed*, 93 Tex. 725; *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 751. **W. Va.**—*Rousey v. Stilwagon*, 70 W. Va. 570, 74 S. E. 732; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20. **Wis.**—*Lincoln v. Cross*, 11 Wis. 91.
- [a] **Other Statements of Rule.** Every execution presupposes a judgment of some sort, and the right given to issue an execution implies and presupposes the existence of a judgment. *Sheppard v. Bland*, 87 N. C. 163.
- [b] "Without a valid judgment there can be no valid execution." *Muller v. Plue*, 45 Neb. 701, 64 N. W. 232.
- [c] "There must be a judgment order or decree of court to support an execution, otherwise it will be null and void and will confer no authority on the officer to whom it is directed." *O'Connor v. Stone*, 19 Ky. L. Rep. 1929, 43 S. W. 483.
- [d] "An execution is a writ grounded on the judgment of the court from whence it issues and is supposed to be granted by the court at the request of the party at whose suit it is issued to give him satisfaction on the judgment which he has obtained. We know of no law which authorizes the issuing of an execution unless there be an order, decree or judgment of a court upon which such writ must be based." *Davidson v. Seegar*, 15 Fla. 671.
- [e] **Allowed Claim Against Estate.** Where a claim is filed and allowed against an estate it becomes a judgment upon which execution will issue. *Cohen v. Menard*, 31 Ill. App. 503.
- [f] "An administrator's account is not a judicial demand against those debtors of the succession whose debts, whether represented by notes or otherwise and whether due for the price of



are equally worthless.<sup>46</sup> It is otherwise, however, where the judgment is merely irregular or erroneous, and therefore voidable but not void.<sup>47</sup>

property purchased from the succession or for any other cause, figure upon the account among the assets of the succession; and the homologation of such an account cannot possibly constitute a judgment against such debtors; and therefore no *fi. fa.* can issue upon such a judgment against any of these debtors." *Abshire v. Lege*, 133 La. 254, 62 So. 667.

[g] **Unapproved forms of decrees** furnished to the clerk do not constitute judgments, such as to authorize the issuing of execution thereon. *Winter v. Coulthard*, 94 Iowa 312, 62 N. W. 732.

[h] **An execution will not issue on a bond until any damages and amount actually due have been legally determined.** *Rich v. Warner*, 1 Pin. (Wis.) 646; *Gear v. Shaw*, 1 Pin. (Wis.) 608.

[i] **A judgment setting aside a will is not enforced by execution.** *Dinwiddie v. Shipman*, 183 Ind. 82.

**Form and sufficiency of judgment**, see *infra*, II, B, 1, b, (I), (B), and generally the title "Judgments."

**Conformity of execution to judgment**, see *infra*, II, B, 2, d, (II).

**Conditions precedent to issuance of execution generally**, see *infra*, II, B, 1, i, (II).

**Execution upon dormant judgment**, see *infra*, II, B, 1, b, (VIII).

46. See the following: **U. S.**—*Walker v. Turner*, 9 Wheat. 541, 6 L. ed. 155; *Buxton v. Pennsylvania Lumb. Co.*, 221 Fed. 718; *Chesapeake, etc. Canal Co. v. Barcroft*, 4 Cranch 659, 5 Fed. Cas. No. 2,644. **Ala.**—*Columbiana v. Kelley*, 172 Ala. 336, 55 So. 526. **Ark.**—*Ex parte Cheatham*, 6 Ark. 531, 44 Am. Dec. 525; *Ex parte Woods*, 3 Ark. 532. **Ga.**—*Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926; *Thorpe v. Wray*, 68 Ga. 359; *Butt v. Oneal*, 51 Ga. 358; *Welch v. Butler*, 24 Ga. 445; *Beall v. Blake*, 13 Ga. 217, 58 Am. Dec. 513. **Ill.**—*Colwell v. Swick*, 190 Ill. App. 369. **Ind.**—*Ferrier v. Deutchman*, 111 Ind. 330, 12 N. E. 497; *Marsh v. Sherman*, 12 Ind. 358 (judgment void for want of jurisdiction). **Kan.**—*Schott v. Linseott*, 80 Kan. 536, 103 Pac. 997. **Ky.**—*Aultman & Taylor Co. v. Meade*, 121 Ky. 241, 89 S. W. 137; *Roberts v. Stowers*, 7 Bush 295; *Shaefer v. Gates*,

2 B. Mon. 453, 38 Am. Dec. 164. **Md.**—*Koechlept v. Hook*, 10 Md. 173, 69 Am. Dec. 133. **Mass.**—*Albee v. Ward*, 8 Mass. 79; *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32. **Minn.**—*Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; *Gunz v. Heffner*, 33 Minn. 215, 22 N. W. 386. **Mo.**—*Howell v. Sherwood*, 213 Mo. 565, 112 S. W. 50; *Sanders v. Rains*, 10 Mo. 770; *Burr & Co. v. Mathers*, 51 Mo. App. 470. **Neb.**—*Muller v. Plue*, 45 Neb. 701, 64 N. W. 232, *overruling* *Wilson v. Macklin*, 7 Neb. 50. **N. Y.**—*Cornell v. Barnes*, 7 Hill 35. **Ore.**—*Willamette Real Estate Co. v. Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800. **Pa.**—*Kountz v. Nat. Transit Co.*, 197 Pa. 398, 47 Atl. 350. **Tex.**—*Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Stegall v. Huff*, 54 Tex. 193; *Long v. Garnett*, 45 Tex. 400; *Hollingsworth v. Bagley*, 35 Tex. 345; *Perdew v. Davis*, 31 Tex. 488; *Bowers v. Chaney*, 21 Tex. 363; *Wilson v. Sparks*, 9 Tex. 621; *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291 (*affirmed*, 98 Tex. 611); *Underwood v. Brown*, 29 Tex. Civ. App. 163, 68 S. W. 206; *Schneider v. Gray*, 7 Tex. Civ. App. 25, 26 S. W. 640. **W. Va.**—*A. B. Farquhar Co. v. Dehaven*, 70 W. Va. 738, 75 S. E. 65.

See generally the cases cited in the preceding note.

[a] "A void judgment is in legal effect no judgment. From it no rights can be obtained, being worthless in itself all proceedings founded on it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void." *Freeman on Executions*, sec. 20; *Campbell v. McCahan*, 41 Ill. 45." *Colwell v. Swick*, 190 Ill. App. 369.

**As to validity of sale upon execution issued on void judgment**, see *infra*, II, B, 7.

**Execution issued upon void judgment of justice of peace**, see the title "Justices of the Peace."

47. See the following: **Ala.**—*Barron v. Tart*, 18 Ala. 668. **Cal.**—*Mulford v. Estudillo*, 23 Cal. 94. **Ga.**—*Buice v.*

An amendment of a void judgment does not validate a previously issued execution or the proceedings thereunder.<sup>48</sup>

An execution cannot issue upon the mere finding of the court or jury, even after the expiration of the term at which it was rendered,<sup>49</sup> or upon an award, before a judgment has been entered upon it.<sup>50</sup>

Wherever an order of court has the effect of a judgment, it will support a writ of execution;<sup>51</sup> but not otherwise.<sup>52</sup> Under some statutes, an order or rule for the payment of money will support an execution.<sup>53</sup> But the order or rule must not be conditional.<sup>54</sup>

Upon a judgment revived by *scire facias*, the execution should issue on the original judgment.<sup>55</sup>

Lowman, etc. Min. Co., 64 Ga. 769, 771; Welch v. Butler, 24 Ga. 445. Ill. Smith v. People, 99 Ill. 445. Ky.—Graham v. Lynns, 4 B. Mon. 17, 39 Am. Dec. 493. N. Y.—People *ex rel.* Demarest v. Gorman, 14 N. Y. Supp. 547. Tex.—Smith v. Chenault, 48 Tex. 455; Bowers v. Chaney, 21 Tex. 363; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426.

[a] Compare. Simon v. Underwood, 61 Misc. 369, 391, 115 N. Y. Supp. 65, holding that where a person has been sued by a fictitious name or by a name part of which is designated as fictitious, his real name being unknown, and the person fails to appear, a judgment predicated thereon is irregular, though not void; but no execution may be issued thereon.

[b] Execution levied upon a voidable execution is not a trespass. Mike-ska v. Blum, 63 Tex. 44. See also Smith v. People, 99 Ill. 445.

48. Underwood v. Brown, 29 Tex. Civ. App. 163, 68 S. W. 206. See also Beall v. Blake, 13 Ga. 217, 58 Am. Dec. 513.

[a] **Nunc Pro Tunc of Irregular Judgment.**—Where the effect of an amendment of a judgment nunc pro tunc is to substitute a perfect judgment entry for an imperfect one made on the minutes when the judgment was rendered, as of the time the judgment was originally rendered, such amendment imparts regularity to the execution issued on the judgment imperfectly entered prior to the amendment and to all proceedings thereunder. Ware v. Kent, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132.

49. Ind.—Sare v. Butcher, 141 Ind. 146, 40 N. E. 749. Md.—Truett v. Legg, 32 Md. 147. W. Va.—Lowther v. Davis, 33 W. Va. 132, 10 S. E. 20, last two

cases holding that an execution cannot issue upon a verdict.

[a] An entry, which after stating the case and date recites, "Judgment by default, writ of inquiry, damages assessed at \$77.65, waiver of Ex. as to personalty," is no judgment, and an execution issued thereon is void. Brightman & Co. v. Meriweather, 121 Ala. 602, 25 So. 994. So also, an entry in the minutes, "Verdict for plaintiff; let writ issue," is not a judgment, and execution thereon is void. Stark v. Billings, 15 Fla. 318.

50. Book v. Edgar, 3 Watts (Pa.) 29.

51. Tyler v. Toms, 75 Va. 116; Crawford v. Pickey, 41 W. Va. 544, 23 S. E. 662.

52. Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48.

[a] An order (1) for a judgment will not justify the issuance of an execution. Lincoln v. Cross, 11 Wis. 91. (2) Nor will an order directing a guardian to pay over money in his hands to his successor. Kingsbury v. Hutton, 140 Ill. 603, 30 N. E. 600.

53. Kane v. Rose, 87 App. Div. 101, 84 N. Y. Supp. 111, under a statute providing that where an order directs the payment of a sum of money an execution against the personal property of the party required to pay the same may be issued.

54. Gibbs v. Flight, 4 J. Scott 803, 13 C. B. 803, 76 E. C. L. 803.

55. Miss.—Eastin v. Vandorn, 1 Walker 214. Mo.—Littlefield v. Ramsey, 181 Mo. 613, 80 S. W. 949; Bauer v. Miller, 16 Mo. App. 252. Pa. Grover v. Boon, 124 Pa. 399, 16 Atl. 885, holding, however, that the writ issued upon the revival is only voidable. Vt.—State Treasurer v. Foster, 7 Vt. 52.

(B.) FORM AND SUFFICIENCY.<sup>56</sup> — The judgment, to sustain a valid sale under execution thereon, must be definite and certain.<sup>57</sup> A judgment or decree providing that upon the defendant's failure to pay, execution shall issue, is erroneous.<sup>58</sup> The judgment must be for a specified sum of money or for costs.<sup>59</sup>

The judgment or decree must be final.<sup>60</sup> Execution will not ordinarily

[a] *Compare*, Scherrer v. Caneza, 33 La. Ann. 314, holding that whether the writ issues under the original judgment or that of revival, is immaterial; in either case it is legal.

[b] A judgment of revivor which merely recites the rendition of a former judgment is not such a final judgment as will support an execution. Fitzgerald v. Evans & Hoffman, 53 Tex. 461.

Revival of judgment by scire facias, see generally the title "Judgments, Revival of."

56. Form and sufficiency of judgments generally, see the title "Judgments."

57. Luter v. Rose, 16 Tex. 52.

[a] A judgment entry which, after setting out the verdict of the jury in favor of the plaintiffs, then recites "It is, therefore considered by the court that the plaintiffs have and recover of the defendants," etc., while somewhat informal, is sufficient to support the execution. Simmons v. Sharpe, 138 Ala. 451, 35 So. 415.

[b] A mere irregularity (1) in the judgment, as failure to sign, will not render execution thereon invalid. Pollard v. King, 62 Ga. 103. (2) If a judgment is in excess of the amount declared for, it is an irregularity, but is not a ground to dismiss the levy thereunder. Buice v. Lowman, etc. Min. Co., 64 Ga. 769.

Completeness and certainty of judgments, see generally the title "Judgments."

58. Donalds v. Plumb, 8 Conn. 447, 458, "because the execution is to issue upon a contingency—if they do not pay. It leaves a question for the clerk to settle, when he is called upon for execution, which is not within the jurisdiction of a ministerial officer, viz., whether payment has been made. This is an authority which the court cannot delegate, and which he cannot exercise."

59. U. S.—Hovey v. McDonald, 109

U. S. 150, 160, 3 Sup. Ct. 136, 27 L. ed. 888. N. Y.—Chapman v. Lemon, 11 How. Pr. 235. Ohio.—Hamilton v. Jefferson, 13 Ohio 427. Pa.—Mayor v. Harkins, 1 Phila. 518.

[a] A judgment requiring the payment of money is properly enforced by execution. Hord v. Bradbury, 156 Ind. 30, 59 N. E. 31.

[b] A decree directing the defendant to bring a certain sum of money into court, was upon appeal affirmed. The complainant then filed a petition in the court below for a fieri facias, which was refused, and the case sent to the auditor for an account. An appeal was then taken, and the record only contained the petition, answer and order appealed from. It was held that until there was a decree directing the payment of a sum of money to the complainant, he was not entitled to a fieri facias. Owings v. Worthington, 4 Md. 260.

Execution as method of enforcing order or judgment for costs, see 5 STANDARD PROC. 974, et seq.

60. See the following: Ala.—Thompson v. Perryman, 45 Ala. 619. Colo. Hoehne v. Trugillo, 1 Colo. 161, 91 Am. Dec. 703. Conn.—Mather v. Chapman, 6 Conn. 54. Del.—Daniel v. Cooper, 2 Houst. 506. D. C.—Bieber v. Fecheimer, 9 App. Cas. 548. Ky.—Smith v. Hornback, 3 A. K. Marsh. 392. Md. Truett v. Legg, 32 Md. 147; Griffith v. Lynch, 21 Md. 575. Nev.—Kapp v. Seventh Judicial District Court, 32 Nev. 264, 107 Pac. 95. N. Y.—Strobridge v. Strobridge, 21 Hun 288. Okla. Annis v. Bell, 10 Okla. 647, 64 Pac. 11. Tex.—Flanary v. Wade, 102 Tex. 63, 113 S. W. 8; Busby v. Schrank (Tex. Civ. App.), 174 S. W. 295; Stockwell v. Melbern (Tex. Civ. App.), 168 S. W. 405; Texas Co. v. Beddingfield, 53 Tex. Civ. App. 10, 114 S. W. 894 (judgment which fails to dispose of all the parties to the controversy is not a final judgment authorizing the issuance of an execution). Vt.—Town of Waldren v. Clark, 50 Vt. 383.



issue upon a mere interlocutory judgment or decree.<sup>61</sup> Where the judgment is for a contingent liability, no execution can issue thereon until the sum actually due is ascertained.<sup>62</sup> But execution may issue on a judgment, which does not settle every claim of the parties.<sup>63</sup>

**Provision for Execution.**—Since the very act of awarding a money recovery is of itself an award of execution,<sup>64</sup> it is not necessary to the issuance of an execution that it be provided for in the judgment<sup>65</sup> or

**Definition of final judgment,** see 14 STANDARD PROC. 770, et seq.

61. See *Del.*—Daniel *v.* Cooper, 2 Houst. 506. *D. C.*—Bieber *v.* Fecheheimer, 9 App. Cas. 548. *Md.*—Griffith *v.* Lynch, 21 Md. 575. *Pa.*—Schmidt *v.* Haas, 8 Del. Co. 133. *Va.*—Shackelford *v.* Apperson, 6 Gratt. (47 Va.) 451.

[a] Thus an interlocutory order for alimony pendente lite will not be enforced except where special statutory provision warrants it. Kapp *v.* District Court, 32 Nev. 264, 107 Pac. 95.

[b] Though circumstances may exist which will warrant the court, or a judge in vacation, to allow process of execution on an interlocutory decree, these circumstances must be shown, and if not shown, it is improper to allow it. Shackelford *v.* Apperson, 6 Gratt. (47 Va.) 451.

**Definition of interlocutory judgment,** see 14 STANDARD PROC. 770, et seq.

62. Rusk *v.* Sackett, 28 Wis. 400.

63. Bourguignon *v.* Boudousquie, 7 Mart. N. S. (La.) 156.

As to necessity for judgment settling all the issues in the cause, see the title "Judgments."

64. Hidalgo *v.* Crossfield, 17 Phil. Isl. 466; Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

[a] **Inherent Power To Enforce Judgment.**—"In the absence of statutory provisions to the contrary, and speaking generally, all courts which have power and jurisdiction to render judgments have inherent powers to enforce such judgments, for 'if a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction. A court without the means of executing its judgment and decrees would be an anomaly in jurisprudence, not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed, and the power to pronounce necessarily implies the power of execution.' (United States *v.* Drennan, Hemp. 325.)" Hidalgo *v.* Cross-

field, 17 Phil. Isl. 466. And see Central Nat. Bank *v.* Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. ed. 807.

[b] Not inherent in federal courts but dependent upon act of congress. Fink *v.* O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196.

[c] An execution is the "fruit and life of every suit," to the power to render judgments, and it must be assumed that a court has the power to enforce its own judgments by executions, unless that power is withheld by statute in clear terms. Bailey *v.* Winn, 113 Mo. 155, 20 S. W. 21.

65. *U. S.*—Richards *v.* Harrison, 218 Fed. 134. *Mo.*—McManus *v.* Price, 246 Mo. 438, 152 S. W. 3, judgment need not formally award execution even at common law. *N. Y.*—Otis *v.* Forman, 1 Barb. Ch. 30. *Ore.*—Banning *v.* Roy, 47 Ore. 119, 82 Pac. 708, 114 Am. St. Rep. 908. *Phil. Isl.*—Hidalgo *v.* Crossfield, 17 Phil. Isl. 466. *Tenn.*—Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876. *Tex.*—Roberts *v.* Connellee, 71 Tex. 11, 17, 8 S. W. 626; Ryan *v.* Raley, 48 Tex. Civ. App. 187, 106 S. W. 750; Taylor *v.* Doom, 43 Tex. Civ. App. 59, 95 S. W. 4; Hartz *v.* Hausser (Tex. Civ. App.), 90 S. W. 63 (award of execution adds nothing to the judgment); Loan, etc. Co. *v.* Campbell, 27 Tex. Civ. App. 52, 65 S. W. 65; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Carson *v.* Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395 (affirmed, 93 Tex. 637). *Vt.*—Little *v.* Cook, 1 Aik. 363, 15 Am. Dec. 698.

See also the title "Judgments."

[a] A decree may be enforced by execution, although it does not in express terms award execution. *U. S.*—Richards *v.* Harrison, 218 Fed. 134. *Miss.*—Isom *v.* McGehee's Heirs, 45 Miss. 712, under a decree ordering payment of claims by an administrator. *N. Y.*—Otis *v.* Forman, 1 Barb. Ch. 30. *Tenn.*—See also Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

[b] The right to use the process of

decree; but the award is made as a matter of course.<sup>66</sup>

(C.) **NECESSITY FOR ENTRY OR DOCKETING OF JUDGMENT.**<sup>67</sup> — The cases are not in accord as to whether it is a necessary prerequisite that the judgment shall have been formally entered or docketed, some holding that such procedure is necessary,<sup>68</sup> while others hold that writs of execution may be issued without the necessity of docketing or entering the judgment.

the court to enforce the collection of the debt arises from the decree of obligation to pay, and not from any language of the judgment. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

[c] "Award of execution is not an integral part of a judgment." *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655.

[d] In *Richards v. Harrison*, 218 Fed. 134, the court said that "while it is true that ordinarily judgments contain the recital that, if not paid, a writ of execution shall issue therefor, such recital is a mere repetition of that which the law has already pronounced. The method for the enforcement of the judgment is that prescribed by statute and the rules of the court, and such method can neither be enlarged by additional recitals, nor can it be said to be defective because the judgment does not recite the terms and conditions of the law."

[e] "The rule that the law awards an execution on a decree or judgment for a specific sum of money is not entirely superseded by the Court's declaration of a lien on particular property and an order of sale. The only effect of such declaration and order upon that rule is to delay the issuance of the execution until the order of sale is complied with and the net proceeds of the sale credited. This delay fully meets the provisional portion of the decree or judgment, and finds the unsatisfied balance of the recovery in the same legal plight as the whole recovery would have been in originally if there had been no declaration of lien and order of sale, and, this being true, the clerk is authorized to issue an execution for such balance without the Court's special direction to do so." *Hyder v. Butler*, 103 Tenn. 289, 52 S. W. 876.

[f] **Judgment Against Executor.** Where a statute makes it the duty of the clerk to issue an execution against the estate when the judgment is

against an executor, it is not necessary that the judgment expressly so direct. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072.

**Necessity for judgment or decree in foreclosure proceedings to provide for execution against other property of the mortgagor, see the title "Mortgages."**

**Necessity for execution to recite judgment, see *infra*, II, B, 2, c.**

66. **Mo.**—*Bush v. White*, 85 Mo. 339; *Maloney v. Real Estate B. & L. Assn.*, 57 Mo. App. 384. **Phil. Isl.**—*Hidalgo v. Crossfield*, 17 Phil. Isl. 466. **Tenn.** *Hyder v. Butler*, 103 Tenn. 289, 52 S. W. 876. **Vt.**—*Little v. Cook*, 1 Aik. 363, 15 Am. Dec. 698. **W. Va.**—*Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655. 67. See generally 14 STANDARD PROC. 990, 1041.

**Necessity for docketing judgment where execution runs to another county than county in which judgment rendered, see *infra*, II, B, 1, g, (II).**

68. **U. S.**—*King v. French*, 2 Sawy. 441, 14 Fed. Cas. No. 7,793; *Harris v. Wheeler*, 8 Blatchf. 81, 11 Fed. Cas. No. 6,130. **Mich.**—*Dewey v. Dewey*, 151 Mich. 586, 115 N. W. 735. **N. J.** *Smith v. Trenton Delaware Falls Co.*, 20 N. J. L. 116. **N. Y.**—*Harris v. Elliott*, 163 N. Y. 269, 57 N. E. 406, 31 Civ. Proc. 42; *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89; *Kupfer v. Frank*, 30 Hun 74, 65 How. Pr. 396; *Townshend v. Wesson*, 4 Duer 342; *Stoutenburgh v. Vandenburg*, 7 How. Pr. 229; *De Agreda v. Mantel*, 1 Abb. Pr. 130; *Disosway v. Hayward*, 1 Dem. Sur. 175; *Belfer v. Ludlow*, 69 Misc. 406, 126 N. Y. Supp. 130 (*affirmed*, 143 App. Div. 147, 127 N. Y. Supp. 623). See *Prime v. Anderson*, 29 Hun 614, special statute as to the city court of Yonkers. **Tex.**—*Hubbart v. Willis State Bank* (Tex. Civ. App.), 152 S. W. 458; *Hubbart v. Willis State Bk.*, 55 Tex. Civ. App. 504, 119 S. W. 711.

[a] Until the judgment is entered in the judgment book, there is no judgment to authorize or support an execu-

ment, such procedure being considered merely a ministerial act.<sup>69</sup> In some jurisdictions, a judgment rendered in term time need not be

tion. This entry is a condition precedent to the right to the writ. *King v. French*, 2 Sawy. 441, 14 Fed. Cas. No. 7,793.

[b] Under a statute providing for the issuance of execution within five years after the entry of judgment, no execution can issue until after such entry. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565; *Kupfer v. Frank*, 30 Hun 74, 65 How. Pr. 396; *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588.

[c] Judgment Roll Must Be Filed. *Barrie v. Dana*, 20 Johns. (N. Y.) 307; *Marvin v. Herrick*, 5 Wend. (N. Y.) 109; *Bank of Rochester v. Emerson*, 10 Paige (N. Y.) 115; *Blashfield v. Smith*, 27 Hun (N. Y.) 114.

[d] Fractions of a day will not be noticed in determining whether the judgment roll was filed before execution issued, unless to prevent actual injustice. *Small v. M'Chesney*, 3 Cow. (N. Y.) 19; *Clute v. Clute*, 4 Denio (N. Y.) 241.

[e] A substantial compliance with the requirements of the statute providing for docketing the judgment before issuing execution thereon, is all that is necessary. *Appleby v. Barry*, 2 Robt. (N. Y.) 689.

[f] In South Carolina, the failure of the judgment creditor to enter his judgment, before issuing execution to enforce the same, is an irregularity of which no one but the defendant in the action in which the judgment was recovered has the right to take advantage. *Kennedy v. Kennedy*, 86 S. C. 483, 497, 68 S. E. 664; *Mason & Risch Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755.

[g] When the mandate of the supreme court goes to the court below, it is necessary that that court, with a view to execution, should enter a further judgment in accordance with the mandate. *Schell v. Cochran*, 107 U. S. 625, 628, 2 Sup. Ct. 827, 27 L. ed. 543.

69. U. S.—*Clements v. Berry*, 11 How. 398, 12 L. ed. 745. Ala.—See *McLaren v. Anderson*, 81 Ala. 106, 8 So. 188. Ark.—*Lowenstein v. Caruth*, 59 Ark. 588, 28 S. W. 421. Cal.—*Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Lynch v. Kelly*, 41 Cal. 232;

*Hastings v. Cunningham*, 39 Cal. 137; *Sharp v. Lumley*, 34 Cal. 611. See *Gray v. Palmer*, 28 Cal. 416, under §209 Practice Act. Ga.—*Fisher v. Jones Co.*, 114 Ga. 648, 40 S. E. 700; *Davis v. Barker*, 1 Ga. 559. Ill.—*People v. Petit*, 266 Ill. 628, 107 N. E. 830; *Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335; *Day v. Graham*, 6 Ill. 435. La.—*Savoil v. Thibodaux*, 29 La. Ann. 51; *Fink v. Lallande*, 16 La. 547. Mo.—*Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515. Mont.—*Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563. N. C.—*Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

See also *Drake v. Harrison*, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717.

[a] The right of a party, in whose favor any judgment is rendered, to have execution, follows eo instanti, upon the rendition of the judgment; the rendition of the judgment is the judicial act upon which the execution rests, its entry upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy. *Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515.

[b] A valid judgment rendered will support and validate an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time the execution issued. It is sufficient if the record evidence is in existence when proof of the judgment becomes necessary. *Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515.

[c] In *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725, the court said: "Our conclusion upon the authorities is that docketing is only for the purpose of giving a lien, and is not a condition precedent to issuing an execution. If there is a docketed judgment in force at the sale of realty under execution, the sale relates the title back to the date of such docketing. If no docketed judgment is in force under which the execution is issued, the title as to the defendant relates back to the levy, but



formally written upon the record before execution may be issued;<sup>70</sup> but where the judgment is entered by the clerk in vacation upon a confession, such judgment must be formally written up by the clerk before an execution can be legally issued.<sup>71</sup>

**Entry Nunc Pro Tunc.**<sup>72</sup> — It is held that the irregularity caused by the issuance of an execution prior to the entry or docketing of the judgment may be cured by the making of an entry nunc pro tunc.<sup>73</sup>

**(II.) Judgment by Confession.**<sup>74</sup> — Execution may properly issue on a judgment by confession,<sup>75</sup> but only, however, where the judgment is

is subject to docketed judgments, in favor of other plaintiffs, in force at the date of the sale.<sup>76</sup>

70. *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505; *People v. Petit*, 266 Ill. 628, 107 N. E. 830; *Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335; *Day v. Graham*, 6 Ill. 435; *Popper v. Meager*, 33 Ill. App. 19.

71. *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505; *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358; *Cummins v. Holmes*, 109 Ill. 15; *Ling v. King*, 91 Ill. 571; *Poppers v. Meager*, 33 Ill. App. 19; *Humphreys v. Swain*, 21 Ill. App. 232.

[a] If execution be issued prior to entry of the judgment, it may be attacked collaterally, and is not validated by a subsequent entry. *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358; *Cummins v. Holmes*, 109 Ill. 15; *Ling v. King*, 91 Ill. 571; *Humphreys v. Swain*, 21 Ill. App. 232.

72. **Right to enter judgment nunc pro tunc**, see generally 14 STANDARD PROC. 1017.

73. *Ala.*—*Ware v. Kent*, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132. *Ia.*—*Doughty v. Meek*, 105 Iowa 16, 74 N. W. 744, 67 Am. St. Rep. 282. *Ky.* *Graham v. Lynn*, 4 B. Mon. 17, 39 Am. Dec. 493. *Minn.*—*Hoerr v. Meihofner*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674. *N. Y.*—*Chichester v. Cande*, 3 Cow. 39, 15 Am. Dec. 238; *Blivin v. Bleakley*, 23 How. Pr. 124; *Stoutenburgh v. Vandenberg*, 7 How. Pr. 229; *Clute v. Clute*, 4 Denio 241, 3 Denio 263. *Tex.*—*Hubbart v. Willis State Bank* (Tex. Civ. App.), 152 S. W. 458. *Wis.*—*Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828; *Drake v. Harrison*, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717.

[a] The entry of the judgment nunc pro tunc effects a relation back and vitalizes the original judgment as of the date of its original rendition, and

cures the irregularity in the issuance of the execution or order of sale. *Hubbart v. Willis State Bank* (Tex. Civ. App.), 152 S. W. 458.

[b] In *Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828, the court said: "We see no reason for holding that in such case it is necessary to withdraw the execution from the hands of the sheriff, and redeliver it to him, or to issue a new execution, in order to make it effective."

[c] During the pendency of the motion to quash the writ of execution, the judgment may be entered nunc pro tunc, with the effect of removing the ground of quashal, and making good the writ and the acts done under it. *Graham v. Lynn*, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493.

74. **As to judgments by confession**, see 14 STANDARD PROC. 791, 837.

75. **Confession in Person.**—(1) *Watson v. Taylor*, 21 Wall. (U. S.) 378, 22 L. ed. 576. (2) Or by attorney. *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. ed. 52; *Allen v. Norton*, 6 Ore. 344.

[a] **Warrant of Attorney.**—Execution may issue on a judgment entered upon bond and warrant of attorney for a stated sum given as indemnity to the plaintiff without seire facias, suggestion, or other proceedings to ascertain the damages. *McCann v. Farley*, 26 Pa. 173. See also *Bauduy v. Bradun*, 1 Har. (Del.) 182, holding that "on a judgment confessed on bond with collateral condition an execution may issue."

[b] **Execution (1) issued on a judgment confessed to defraud creditors** is not void but only voidable. *Pitkin v. Burnham*, 62 Neb. 385, 87 N. W. 160. (2) See also *Shallcross v. Deats*, 43 N. J. L. 177, holding that the defendant in a confessed judgment cannot be relieved, although it appears that there was no consideration for the judgment,

final,<sup>76</sup> and other statutory requirements have been complied with.<sup>77</sup>

(III.) **Judgments by Default and Without Service of Process.**<sup>78</sup> — Execution issues upon a judgment by default, taken after due service of process in the cause.<sup>79</sup> But where there is no personal service of process on the defendant, and no appearance by him, in a suit which is merely in personam, a general execution against his property is invalid.<sup>80</sup> Early statutes allowing execution in such case upon the

if it also appears that the judgment was confessed with intent to defraud creditors. Such a judgment may be questioned, however, by other judgment and execution creditors of the defendant, and, as to them, the judgment and the execution thereon will be vacated and set aside.

[c] **Equitable Control.**—Executions upon such judgments are controlled under the equitable powers of the courts in some states, in such manner that no injustice may be done to defendants. *McCann v. Farley*, 26 Pa. 173.

[d] **The misnomer of a defendant** in a judgment by confession upon a warrant of attorney by such wrong name is no defense to an execution on the judgment. *Holten v. Pyle*, 6 Houst. (Del.) 432.

[e] **For Portion of Debt Not Due.**

(1) A warrant of attorney to confess judgment may authorize the attorney to consent to the immediate issuance of execution for the part of the debt not yet due, but unless such consent is given in the answer, or otherwise, execution for that part of the debt is unauthorized and should be set aside. *Sloane v. Anderson*, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21. (2) See also *Jones v. Dilworth*, 63 Pa. 447, wherein the court said: "The party in issuing execution upon a judgment entered by warrant of attorney, proceeds at his peril; and if he issues his writ when nothing is due, or for too much, he subjects himself to the summary correction of the court to set it aside or reduce it, and payment of costs for his untrue demand."

76. On a judgment by confession entered by the clerk in vacation, execution may not issue before the record of the judgment is complete. *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358; *Cummins v. Holmes*, 109 Ill. 15; *Ling v. King & Co.*, 91 Ill. 571; but in term time it may. *Swaim v. Humphreys*, 42 Ill. App. 370; *Poppers v. Meager*, 33 Ill. App. 20; *Weigley v. Matson*, 24

Ill. App. 178, 125 Ill. 64, 16 N. E. 881.

**Necessity generally for final judgment as basis of execution**, see *supra*, II, B, 1, b, (I), (B).

77. *Rasmussen v. Hagler*, 15 N. D. 542, 108 N. W. 541.

[a] A judgment by confession in the clerk's office on warrant of attorney, without process regularly issued and served upon or accepted by defendant is void on its face; hence execution thereon is void. *Farquhar v. Dehaven*, 70 W. Va. 738, 75 S. E. 65.

78. **Judgments by default generally**, see 14 STANDARD PROC. 854, et seq.

79. See *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218. But see *Patterson v. Mayfield's Curator*, 10 La. 220, holding that "in cases in which the party has actually been served with process, but has neglected to plead, and judgment was taken against him by default, the Code of Practice disallows a resort to the *via executiva*."

[a] **Where the sole entry of judgment** is on the trial docket, and minutes of the court, in the words, "judgment by default," execution is improperly issued. *Page v. Coleman*, 9 Port. (Ala.) 275.

80. See the following: **Ala.**—*Grayham & Christian v. Roberds*, 7 Ala. 719. **Ark.**—*Ex parte Cheatham*, 6 Ark. 531, 44 Am. Dec. 525. **Cal.**—*Wiseman v. McNulty*, 25 Cal. 230. **Ill.**—*Clymore v. Williams*, 77 Ill. 618, citing *Young v. Campbell*, 10 Ill. 80. **Kan.**—*Case v. Hannahs*, 2 Kan. 490. **Miss.**—*Smith v. State*, 13 Smed. & M. 140. **N. H.**—*Eaton v. Badger*, 33 N. H. 228. **N. C.**—*Johnson v. Whilden*, 88 S. E. 225. **S. C.**—*Tobin v. Addison*, 2 Strobb. 3.

[a] **Service by publication** is insufficient, where the suit is merely in personam, to authorize a general execution against the property of a non-resident or absent defendant. In fact, no execution can issue unless property of such non-resident or absent defendant is previously brought under the control of the court by seizure or some

giving of a bond<sup>81</sup> are in contravention of the fourteenth amendment to the federal constitution.<sup>82</sup>

(IV.) Foreign Judgments. — Executions will not issue on foreign judgments;<sup>83</sup> it is enforced through a new judgment obtained in an action brought for that purpose.<sup>84</sup>

(V.) Satisfied Judgments.<sup>85</sup> — The issuing of an execution upon a judgment which has been paid or otherwise wholly satisfied is unauthorized and void.<sup>86</sup> An execution, issued in such a case, cannot

other equivalent act. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. And see *U. S.*—*Morton v. Smith*, 2 Dill 316, 17 Fed. Cas. No. 9,867; *Morton v. Root*, 2 Dill. 312, 17 Fed. Cas. No. 9,866. *Ark.*—*Meeks v. Black*, 83 Ark. 419, 104 S. W. 147. *Ia.*—*Cassidy v. Woodward*, 77 Iowa 354, 42 N. W. 319. *Mo.*—*Cravens v. Moore*, 61 Mo. 178. *Ohio.*—*Wood & Pond v. Stanberry*, 21 Ohio St. 142. *S. C.*—*Stanley v. Stanley*, 35 S. C. 94, 14 S. E. 675. *Tex.*—*Wrought Iron Range Co. v. Brooker*, 2 Wills. Civ. Cas., §225. *Wash.*—*Clifford v. Pateros Transfer Co.*, 71 Wash. 665, 129 Pac. 369.

81. *Conn.*—*Smith v. Silliman*, 8 Conn. 111; *Marey v. Russ*, 1 Root 176. *Me.*—*Davis v. Stevens*, 57 Me. 593. *Mass.*—*Pease v. Morris*, 138 Mass. 72. *Vt.*—*Phelps v. Parks*, 4 Vt. 488.

82. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

83. *U. S.*—*Hilton v. Guyot*, 159 U. S. 113, 230, 16 Sup. Ct. 139, 40 L. ed. 95; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. ed. 177; *Cruz v. O'Boyle*, 197 Fed. 824; *Sherrard v. Ponsonby*, 1 Cranch C. C. 131, 21 Fed. Cas. No. 12,772. See also *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. ed. 366; *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. ed. 810; *Wabash R. Co. v. Tourville*, 179 U. S. 322, 21 Sup. Ct. 113, 45 L. ed. 210. *D. C.*—*Waddill v. Cabell*, 10 Mackey 597. *Fla.*—*Carter v. Bennett*, 6 Fla. 214. *La.*—*Jones v. Murphy*, 18 La. Ann. 634; *Kilgore v. Planters' Bank*, 3 La. Ann. 693. *Okla.*—*Needles v. Frost*, 2 Okla. 19, 35 Pac. 574. *Ore.*—*De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. *Pa.*—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 613.

[a] Full Faith and Credit.—Though a judgment recovered in one state, as

to matters of evidence, is entitled to full faith and credit in another state, the same faith and credit are not due to subsequent acts under it, such as issuing and returning of execution. *Carter v. Bennett*, 6 Fla. 214. See also *D. C.*—*Waddill v. Cabell*, 10 Mackey 597. *Okla.*—*Needles v. Frost*, 2 Okla. 19, 35 Pac. 574. *Pa.*—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 613.

84. *U. S.*—*Hilton v. Guyot*, 159 U. S. 113, 230, 16 Sup. Ct. 139, 40 L. ed. 95; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. ed. 177. *D. C.*—*Waddill v. Cabell*, 10 Mackey 597. *Fla.*—*Carter v. Bennett*, 6 Fla. 214. *Okla.*—*Needles v. Frost*, 2 Okla. 19, 35 Pac. 574. *Ore.*—*De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. *Pa.*—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 613.

[a] In *Hilton v. Guyot*, 159 U. S. 113, 230, 16 Sup. Ct. 139, 40 L. ed. 95, Chief Justice Fuller said: "Judgments are executory while unpaid, but in this country execution is not given upon foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose."

As to actions on foreign judgments, see *infra*, III.

85. As to satisfaction of judgments, see the title "Judgments, Satisfaction of."

86. *Fla.*—*Griffin v. Lacourse*, 31 Fla. 125, 12 So. 665; *Mathews v. Hillyer*, 17 Fla. 498. *Ga.*—*Knight v. Morrison*, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405. *Ill.*—*Hoag v. Starr*, 69 Ill. 365; *Tompkins v. Fifth Nat. Bank*, 53 Ill. 57; *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *McHenry v. Watkins*, 12 Ill. 233. *Ind.*—*State v. Salvers*, 19 Ind. 432; *Laval v. Rowley*, 17 Ind. 36; *Glover v. Horton*, 7 Blackf. 295. *Ia.*—*Soukup v. Union Inv. Co.*, 84 Iowa



be the foundation of a valid sale or conveyance,<sup>87</sup> made either to a person having actual or constructive notice of the facts,<sup>88</sup> or made

418, 51 N. W. 167, 35 Am. St. Rep. 317; Drefahl v. Tuttle, 42 Iowa 177; Bones v. Aiken, 35 Iowa 534. **Kan.**—Walrath v. Walrath, 27 Kan. 395; Worden v. Jones, 1 Kan. App. 501, 40 Pac. 1071. **Ky.**—O'Conner v. Stone, 19 Ky. L. Rep. 1929, 43 S. W. 483. **La.**—New Orleans v. Smith, 24 La. Ann. 405; Brooks v. Hardwick, 5 La. Ann. 675. **Mass.**—Kennedy v. Dunclee, 1 Gray 65; Brackett v. Winslow, 17 Mass. 153; Hammatt v. Wyman, 9 Mass. 138. **Minn.**—Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841. **Miss.**—Doe *ex dem.* Reynolds v. Ingersoll, 11 Smed. & M. 249, 49 Am. Dec. 57; Morris v. Lake, 9 Smed. & M. 521, 48 Am. Dec. 724. **Mo.**—St. Francis Mill Co. v. Sugg, 83 Mo. 476; Huff v. Morton, 83 Mo. 399; State *ex rel.* Colvin v. Six, 80 Mo. 61; Hull v. Sherwood, 59 Mo. 172; McClure v. Logan, 59 Mo. 234; Durette v. Briggs, 47 Mo. 356; Weston v. Clark, 37 Mo. 568; Wyatt v. Fromme, 70 Mo. App. 613; Johnson v. Greve, 60 Mo. App. 170. **Neb.**—Pope v. Benster, 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703. **N. Y.**—Carpenter v. Stilwell, 11 N. Y. 61; Wood v. Colvin, 2 Hill 566, 38 Am. Dec. 598; Swan v. Saddlemire, 8 Wend. 676; Lewis v. Palmer, 6 Wend. 367; Jackson v. Bowen, 7 Cow. 13. See Brown v. Feeter, 7 Wend. 301. **Ore.**—Snipes v. Beezley, 5 Ore. 420. **Tenn.**—Keeling v. Heard & Hickerson, 3 Head 592; Lintz v. Thompson, 1 Head 456, 73 Am. Dec. 182. **Tex.**—Terry v. O'Neal, 71 Tex. 592, 9 S. W. 673; Huggins v. White, 7 Tex. Civ. App. 563, 27 S. W. 1066, *affirmed*, 93 Tex. 664; Singer Mfg. Co. v. Herman Herschlerode Mfg. Co., 1 White & W. Civ. Cas., §741. **Vt.**—Pierston v. Gale, 8 Vt. 509, 30 Am. Dec. 487. **Va.**—Richardson v. Wymer, 104 Va. 236, 51 S. E. 219.

See also Wood v. Currey, 57 Cal. 208. But see Abercrombie's Admr. v. Chandler, 9 Ala. 625; Luddington v. Peck, 2 Conn. 700, holding that an alias execution, issued after the original one had been paid, but returned undorsed, on a judgment not appearing from the record to be satisfied is a valid execution. See also Van Campen v. Snyder, 3 How. (Miss.) 66, 32 Am. Dec. 311, holding valid an execution issued after one returned indorsed "unsatisfied."

[a] The writ of execution becomes functus officio upon the payment of the judgment. **N. Y.**—Carpenter v. Stilwell, 11 N. Y. 61. **N. C.**—Murrell v. Roberts, 33 N. C. 424, 53 Am. Dec. 419. **Mass.**—Hammatt v. Wyman, 9 Mass. 138.

[b] Issuing an execution against the principal's property sufficient to pay the debt, discharges the surety and the debt as to him is satisfied, and if such levy be subsequently abandoned, the surety's goods may not be levied upon. Finley v. King, 1 Head (Tenn.) 123.

[c] As a discharge in bankruptcy effects a discharge of a judgment upon a debt due before the bankruptcy, execution cannot be issued thereon. **N. J.**—Linn v. Hamilton, 34 N. J. L. 305. **N. Y.**—Boyd v. Vanderkemp, 1 Barb. Ch. 273. **N. C.**—Dawson v. Hartsfield, 79 N. C. 334; Withers v. Stinson, 79 N. C. 341.

Discharge in bankruptcy as a ground for relief from enforcement of execution, see *infra*, IV.

As to effect of issuing execution while the judgment debtor is imprisoned under a commitment on a prior execution upon the same judgment, see *infra*, II, C.

How Objection Made.—Execution issued upon a satisfied judgment may be quashed on motion (see *infra*, IV); or relief may be had by audita querela. See 3 STANDARD PROC. 875.

[d] Issuance of execution by the clerk creates a strong presumption that the judgment appears from the record to be unsatisfied. Armel v. Lendrum, 47 Iowa 535.

87. See *infra*, II, B, 7.

[a] "No conveyance can be good, which rests upon that which is null and void." Kennedy v. Dunclee, 1 Gray (Mass.) 65; Thrower v. Vaughan, 1 Rich. L. (S. C.) 18.

88. **Cal.**—Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. **Ga.**—New England, etc. Co. v. Robson, 79 Ga. 757, 4 S. E. 251; Knight v. Morrison, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405. **Ill.**—Russell v. Hugunin, 2 Ill. 562, 33 Am. Dec. 423. **Ind.**—Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; State v.

to an innocent and bona fide purchaser,<sup>49</sup> though there are authorities holding that the latter acquires good title when no satisfaction has been entered of record.<sup>50</sup> Payment of a judgment by a codefendant.<sup>51</sup>

Salvers, 19 Ind. 432; Laval v. Rowley, 17 Ind. 36. **Ia.**—Drefahl v. Tuttle, 42 Iowa 177. **Mass.**—Kennedy v. Dunklee, 1 Gray 65. **Minn.**—Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841. **Miss.**—Doe ex dem. Reynolds v. Ingersoll, 11 Smed. & M. 249, 49 Am. Dec. 57; Morton v. Grenada, etc. Academies, 8 Smed. & M. 773. **Mo.**—Baird v. Given, 170 Mo. 302, 70 S. W. 697; Huff v. Morton, 83 Mo. 399; Nesbit v. Neill, 67 Mo. 275; Weston v. Clark, 37 Mo. 568; Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336. **Neb.**—Pope v. Benster, 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703. **N. Y.**—Benton v. Hatch, 122 N. Y. 322, 25 N. E. 486; Carnes v. Platt, 59 N. Y. 405; Craft v. Merrill, 14 N. Y. 456; Wood v. Colvin, 2 Hill 566, 38 Am. Dec. 598; Swan v. Saddlemire, 8 Wend. 676; Jackson v. Anderson, 4 Wend. 474; Jackson v. Cadwell, 1 Cow. 622; Jackson v. Bowen, 7 Cow. 13. **N. C.**—Murrell v. Roberts, 33 N. C. 424, 53 Am. Dec. 419. **Pa.**—Hoffman v. Strohecker, 7 Watts 86, 32 Am. Dec. 740. **Tenn.**—Keeling v. Heard, 3 Head 592. **Tex.**—Terry v. O'Neal, 71 Tex. 592, 9 S. W. 673.

[a] **Creditor Chargeable With Notice.** "The plaintiff in an execution is deemed to have notice of vices or irregularities affecting the validity of the proceedings; and defects affecting a sale to a purchaser with actual notice of them will also affect a sale to the plaintiff in the writ, whether he had actual notice or not." Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841.

89. **Ind.**—State v. Salvers, 19 Ind. 432; Laval v. Rowley, 17 Ind. 36. **Mass.**—Kennedy v. Dunklee, 1 Gray 65. **Mo.**—Baird v. Given, 170 Mo. 302, 70 S. W. 697; Huff v. Morton, 83 Mo. 399; McClure v. Logan, 59 Mo. 234; Durette v. Briggs, 47 Mo. 356. **N. J.**—Simmons v. Vandegrift, 1 N. J. Eq. 55. **N. Y.**—Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Carpenter v. Stilwell, 11 N. Y. 61; Neilson v. Neilson, 5 Barb. 565; Swan v. Saddlemire, 8 Wend. 676; Wood v. Colvin, 2 Hill 566, 38 Am. Dec. 598 (assignee of bona fide purchaser). But see Jackson v. Cadwell, 1 Cow. 622. **N. C.**—Murrell v. Roberts, 33 N. C. 424, 53 Am. Dec.

419. **Tex.**—Owen v. Navasota, 44 Tex. 517; Hardin v. Clark, 1 Tex. Civ. App. 565, 21 S. W. 977.

90. **Miss.**—Van Campen v. Snyder, 3 How. 66, 32 Am. Dec. 311. **Mo.**—Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336. **Pa.**—Hoffman v. Strohecker, 7 Watts 86, 32 Am. Dec. 740.

[a] **Reason.**—"It would not be for the plaintiff and defendant, under such circumstances, to complain, as the injury would result from their own fraud, or negligence, in not causing satisfaction to be entered on the judgment. It would be imposing upon a purchaser at sheriff's sale the necessity of ascertaining whether the debt had been paid. He has a right to purchase on the faith of the records of the court, which import verity." Hoffman v. Strohecker, 7 Watts (Pa.) 86, 32 Am. Dec. 740.

[b] **Doctrine of Estoppel.**—In Wood v. Colvin, 2 Hill (N. Y.) 566, 38 Am. Dec. 598, it is said: "If a purchaser can acquire a title under a satisfied judgment, it must be on the ground that there has been some fault on the part of the judgment debtor. If he stands by without taking any measures to arrest the sale, and without giving notice of the payment, and suffers a purchaser in good faith to part with his money, he may be estopped from afterwards alleging the payment to defeat the title of the purchaser."

91. **Where a judgment is joint,** against two defendants, both are regarded as principals, unless by proof, aliunde, one of them is shown to be surety for the other; and when one of such defendants, claiming to be surety for the other, pays off the judgment, without any judicial determination of the question of his suretyship, he cannot have execution for his use on the judgment. Laval v. Rowley, 17 Ind. 36. And see **Ga.**—Patterson v. Clark, 101 Ga. 214, 28 S. E. 623. **Ill.**—Russell v. Hugunin, 2 Ill. 562, 33 Am. Dec. 423. **Ia.**—Drefahl v. Tuttle, 42 Iowa 177; Bones v. Aiken, 35 Iowa 534. **Mass.**—Hammatt v. Wyman, 9 Mass. 138. **Mo.**—Hull v. Sherwood, 59 Mo. 172. **Okla.**—Bank of Stockham v. Weins, 12 Okla. 502, 71 Pac. 1073.

by an officer holding the writ of execution,<sup>92</sup> or by any stranger to it,<sup>93</sup> operates as an extinguishment of it, and will preclude the issuance of an execution, unless the judgment is assigned to such person or he is subrogated to the rights of the judgment-creditor.

The partial satisfaction of a judgment does not prevent the issuance of an execution so long as there is a balance due thereon.<sup>94</sup>

(VI.) **Vacated Judgment.** — After a judgment or decree has been vacated or set aside, no execution can issue.<sup>95</sup> If issued, it falls with the judgment, when set aside, without any express order to quash the execution.<sup>96</sup>

(VII.) **Lost Judgments.** — The fact that the record of the judgment has been lost does not destroy the judgment-creditor's right to an execution.<sup>97</sup>

**92. If an officer pays off an execution** (1) to the judgment creditor, without an assignment or purchase of the judgment, it is an absolute discharge of the execution, and the officer cannot hold the execution, as unsatisfied, and enforce it for his own benefit. *Harwell v. Worsham*, 2 Humph. (Tenn.) 524, 37 Am. Dec. 572; *Lintz v. Thompson*, 1 Head (Tenn.) 456, 73 Am. Dec. 182. And see *Garth v. McCampbell*, 10 Mo. 154; *Carpenter v. Stilwell*, 11 N. Y. 61; *Sherman v. Boyce*, 15 Johns. (N. Y.) 443; *Beach v. Vandenburg*, 10 Johns. (N. Y.) 361; *Reed v. Pruyn*, 7 Johns. (N. Y.) 426; *Jones v. Wilson*, 3 Johns. (N. Y.) 434. (2) But where the sheriff takes an assignment of the judgment, he is thereafter entitled to the issuance of an execution upon such judgment. *Heilig v. Lemly*, 74 N. C. 250, 21 Am. Rep. 489. See also *Murphy & Bros. v. Swadener*, 33 Ohio St. 85.

**93. St. Francis Mill Co. v. Sugg**, 83 Mo. 476; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673. Compare, *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

See generally the title "**Subrogation.**"

**94. Harper v. Terry**, 16 La. Ann. 216.

**95. N. Y.**—*Spaulding v. Lyon*, 2 Abb. N. C. 203. **R. I.**—*Tyler v. Superior Court*, 30 R. I. 107, 73 Atl. 467, 23 L. R. A. (N. S.) 1045. **Tenn.**—*State v. Thompson*, 118 Tenn. 571, 102 S. W. 349, 20 L. R. A. (N. S.) 1. **Tex.** *Wright v. Wright*, 6 Tex. 29.

[a] Where a joint judgment is entered against two, and the judgment is subsequently, on motion, opened as to one of the defendants, execution

should not issue against the other defendant, until the issue as to the liability of the first has been disposed of. *Struthers v. Lloyd*, 14 Pa. 216. And see *Merrifield v. Cottage Piano Co.*, 238 Ill. 526, 87 N. E. 379.

[b] **Pendency of an action to vacate** the judgment does not deprive the judgment creditor of his right to an execution. *Livermore v. Hodgkins*, 54 Cal. 637.

[c] **The mere pendency of a motion to open a judgment** does not of itself stay proceedings without an order to that effect, but the court, when it makes a rule absolute to open judgment, may order execution to proceed, just as it may impose any other conditions on which the relief asked will be afforded. But in the absence of any special order it would seem that an opened judgment is not a final judgment in the full sense of the term, upon which execution may issue without special leave. *Savage v. Kelly*, 11 Phila. (Pa.) 525.

**Issuance pending appeal**, see *infra*, II, B, 1, b, (X).

**96. Francis v. Francis**, 192 Mo. App. 710, 179 S. W. 975; *Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235. See the title "**Judgments,**" XIV.

**97. Strain v. Murphy**, 49 Mo. 337; *Whitworth v. Thompson*, 8 Lea (Tenn.) 480; *Childress v. Marks*, 2 Baxt. (Tenn.) 12; *Faust v. Echols*, 4 Coldw. (Tenn.) 397; *Randall v. Payne*, 1 Tenn. Ch. 137, 145.

[a] Where it appears in substance that a judgment was rendered, and it recites facts sufficient to give the court jurisdiction, and the judgment has not been reversed and no proceed-



(VIII.) *Dormant Judgments.*—While the authorities agree that an execution cannot regularly issue upon a dormant judgment unless it be revived,<sup>98</sup> they do not agree as to the result, if it be issued without revivor a few holding that it is void,<sup>99</sup> and that a sale thereunder is void,<sup>1</sup> especially as to one who acquired title to the property from the judg-

ings taken to rehear the case upon its merits, execution may issue to enforce the same, though the record of the judgment be lost. *Childress v. Marks*, 2 East. (Tenn.) 12.

[b] *The proper practice*, is to apply, after notice, to the court where the judgment was rendered, and upon satisfactory proof of the rendition of the judgment and of the loss of the record, execution may be awarded. **Ky.**—*Fleece v. Goodrum*, 1 Duv. 306. **Tenn.**—*Shannon's Code*, §4800; *Boyers v. Webb*, 1 Lea 696; *Faust v. Echols*, 4 Coldw. 397. **Tex.**—*Vernon's Sayle's Civ. St.*, §6778, et seq. **Eng.**—*Cheeswright v. Franks*, 6 Dowl. P. C. 471.

[c] *Issuance of execution irregular* where made before substitution of destroyed judgment record (*Beekham v. Medlock*, 19 Tex. Civ. App. 61, 46 S. W. 402. And see *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Cyrus v. Hicks*, 20 Tex. 483), and may be enjoined. *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Cyrus v. Hicks*, 20 Tex. 483. *Compare*, *McCormick v. Nichols* (Tex. Civ. App.), 35 S. W. 526, holding that the issuance of the execution after the loss of the judgment record and before its substitution, is but an irregularity, which is not available collaterally.

[d] *Presumption.*—Where an execution states the existence of a judgment upon which it is founded, but the record is lost, it is a natural presumption that such a judgment did in fact exist and if the question is contested it should be left to the jury to determine whether it did exist. *Walker v. Emerson*, 20 Tex. 706, 73 Am. Dec. 207.

98. See the following: **U. S.**—*Veitch v. Farmers' Bank*, 3 Cranch C. C. 81, 28 Fed. Cas. No. 16,910; *McDonald v. White*, 1 Cranch C. C. 149, 16 Fed. Cas. No. 8,769; *Azearati v. Fitzsimmons*, 3 Wash. 134, 2 Fed. Cas. No. 690. **Ala.**—*McCall v. Rickaby*, 85 Ala. 152, 4 So. 424. **Ark.**—*Hanly v. Carneal*, 14 Ark. 524; *Bracken v. Wood*, 12 Ark. 605. **Ga.**—*Albridge v. Cole*, 136 Ga. 593, 71 S. E. 891. **Ill.**—*Mellwain v. Kaistens*,

152 Ill. 135, 38 N. E. 555; *Weis v. Tiernan*, 91 Ill. 27; *Hernandez v. Drake*, 81 Ill. 34. **Ia.**—*Denegre v. Haun*, 13 Iowa 240. **Kan.**—*Denny v. Ross*, 70 Kan. 720, 79 Pac. 502, dormant judgment does not authorize issuance of an execution; *State v. McArthur*, 5 Kan. 280; *Ballinger v. Redhead*, 1 Kan. App. 434, 40 Pac. 828. **Ky.**—*Cropper v. Gaar's Exr.*, 151 Ky. 376, 151 S. W. 913; *Pollard v. Pollard*, 4 Mon. 359; *Lockhart v. Yeiser & Co.*, 2 Bush 231. **Md.**—*Wright v. Ryland*, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; *Mitchell v. Chesnut*, 31 Md. 521. **Mich.**—*Parsons v. Wayne Circuit Court*, 37 Mich. 287. **Miss.**—*Bacan v. Red*, 27 Miss. 469. **N. J.**—*Seely v. Norris*, 3 N. J. L. 624. **N. Y.**—*Cary v. Clark*, 3 Edw. Ch. 274. **N. C.**—*Brown v. Long*, 36 N. C. 190, 36 Am. Dec. 43. **Ore.**—*Eddy v. Coldwell*, 23 Ore. 163, 31 Pac. 475. **Pa.**—*Smith v. Wehrly*, 157 Pa. 407, 27 Atl. 700; *Inquirer Printing Co. v. Wehrly*, 157 Pa. 415, 27 Atl. 703; *Wheelen v. Phillips*, 140 Pa. 33, 21 Atl. 239; *Esser v. Smith*, 15 Phila. 144; *Marx v. Goldsmith*, 14 W. N. C. 173; *Davis v. McHenry*, 11 W. N. C. 304. **Tenn.**—*Henry v. Wilson*, 9 Lea 176; *Hess v. Sims*, 1 Yerg. 143. **Tex.**—*North v. Swing*, 24 Tex. 193; *Lubbock v. Vince*, 5 Tex. 415; *Spiller v. Holinger* (Tex. Civ. App.), 148 S. W. 338. **Vt.**—*Fletcher v. Mott*, 1 Aik. 339. **Wash.**—*Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118. **Wis.**—*Ansley v. Haney*, 1 Pin. 387.

[a] It will not be sufficient to have the scire facias issued on the same day that the writ is issued. *Miller v. Miller*, 147 Pa. 545, 23 Atl. 811.

*Necessity for valid, subsisting judgment*, see *supra*, II, B, 1, b, (I), (A).

As to revival of judgment, see the title "Judgments and Decrees, Revival of."

99. All proceedings upon a judgment while it is dormant are void. *Denny v. Ross*, 70 Kan. 720, 79 Pac. 502.

1. *Welch v. Butler*, 24 Ga. 445.

Sales under execution generally, see *infra*, II, B, 7.

ment-debtor during the life of the judgment lien.<sup>2</sup> But the great majority held that it is not void, but voidable at the option of the defendant in execution,<sup>3</sup> unless by some act he is estopped to assert,<sup>4</sup> waives,<sup>5</sup> or

2. *Harvey v. Golding*, 77 Neb. 289, 109 N. W. 220, *distinguishing* *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. 847, wherein the execution was assailed by the judgment debtor himself, and it was held that it was voidable, but not void, and *modifying* *Link v. Connell*, 48 Neb. 574, 67 N. W. 475, and *Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228.

3. **U. S.**—*Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. 532, 40 L. ed. 633; *Goshorn v. Alexander*, 2 Bond 158, 10 Fed. Cas. No. 5,630. **Ala.**—*Christian & Graft Grocery Co. v. Michael*, 121 Ala. 84, 25 So. 571; *Gardner v. Mobile & Northwestern Railroad Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777; *Draper v. Nixon*, 93 Ala. 436, 8 So. 489; *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810; *Leonard v. Brewer*, 86 Ala. 390, 5 So. 306; *Sandlin v. Anderson*, 76 Ala. 403; *Steele v. Tutwiler*, 68 Ala. 107; *Brevard's Exrs. v. Jones*, 50 Ala. 221. **Ill.**—*Cottingham v. Springer*, 88 Ill. 90; *Hernandez v. Drake*, 81 Ill. 34; *Morgan v. Evans*, 72 Ill. 586. **Ind.**—*Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707. **Ia.**—*Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437. **Md.**—*Elliott v. Knott*, 14 Md. 121; *Miles v. Knott*, 12 Gill & J. 442. **Mo.**—*Carson v. Walker*, 16 Mo. 68. **N. Y.**—*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565; *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Union Bank v. Sargeant*, 53 Barb. 422, 35 How. Pr. 87; *Jackson ex dem. M'Crea v. Bartlett*, 8 Johns. 361; *Woodcock v. Bennet*, 1 Cow. 711, 13 Am. Dec. 568; *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640. **N. C.**—*McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769; *Lytle v. Lytle*, 94 N. C. 683 (irregular but not void); *Ripley v. Arledge*, 94 N. C. 467; *Jacobs v. Burgwyn*, 63 N. C. 193; *Brown v. Long*, 36 N. C. 190, 36 Am. Dec. 43; *Dawson v. Shepherd*, 15 N. C. 497; *Oxley v. Mizle*, 7 N. C. 250. **Ohio.**—*Green v. Cutright*, *Wright* 738. **Pa.**—*Sherrard's Exrs. v. Johnston*, 193 Pa. 166, 44 Atl. 252, 74 Am. St. Rep. 680; *Smith v. Wehrly*, 157 Pa. 407, 27 Atl. 700; *Vastine v. Fury*, 2 Serg. & R. 426; *Speer v. Sample*, 4 Watts 367;

*Righter v. Rittenhouse*, 3 Rawle 273; *Sylvester v. De Witt*, 34 Pa. Super. 205. **S. C.**—*Lawrence v. Grambling*, 13 S. C. 120; *Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Tex.**—*Laughter v. Seela*, 59 Tex. 177; *Meador Co. v. Aringdale*, 58 Tex. 447; *Riddle v. Turner*, 52 Tex. 145; *Bogges v. Howard*, 40 Tex. 153; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4; *Cleveland v. Tittle*, 3 Tex. Civ. App. 191, 22 S. W. 8. **Vt.**—*Willard v. Whipple*, 40 Vt. 219; *Catlin v. Merchants' Bank*, 36 Vt. 572; *Porter v. Vaughn*, 24 Vt. 211; *Fletcher v. Mott*, 1 Aik. 339. **Va.**—*Beale's Admr. v. Botetourt*, 10 Gratt. (51 Va.) 278. **Wis.**—*Jones v. Davis*, 22 Wis. 421; *Mariner v. Coon*, 16 Wis. 465. **Eng.**—*Blanchenay v. Burt*, 4 Ad. & El. (N. S.) 707, 45 E. C. L. 707.

[a] "An execution issued on such a judgment is not void, but irregular and voidable, and it cannot be successfully attacked collaterally." *Draper, Matthis & Co. v. Nixon*, 93 Ala. 436, 8 So. 489.

[b] "The execution is only voidable, and the sheriff is bound to obey it, though it may be set aside at the instance of the defendant." *Ripley v. Arledge*, 94 N. C. 467.

Effect of execution issued without leave of court, see *infra*, II, B, 1, i, (II), (C), (I).

4. He is not estopped by being present at the sale, making no objection thereto, when he had no knowledge that the execution was issued on a dormant judgment. *Herzberg Bros. v. Hollis*, 119 Ala. 496, 24 So. 842.

5. *Catlin v. Merchants Bank*, 36 Vt. 572, right to object to irregularities in this respect may be waived.

[a] Objecting to the issuance of the writ upon certain grounds is waiver of irregularities not specified and such waiver will not be allowed to be repudiated and avoided, without an assertion or claim of payment or other substantial defense. *McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769.

[b] Consent may be presumed from failure to object to the writ or by the act of the defendant in paying money on the execution. *Lawrence v. Grambling*, 13 S. C. 120.

fails to seasonably raise the point.<sup>6</sup> Where the latter rule prevails, a stranger to the judgment, who purchases thereunder, without notice gets a title, good<sup>7</sup> at least as against collateral attack.<sup>8</sup>

(IX.) **Transcripts or Abstracts of Judgments of Inferior Courts.**—(A.) **IN GENERAL.**—Statutes sometimes provide for the filing with the clerk of a superior court of a transcript or abstract of the judgment entered in an inferior court, and for the issuance of executions thereon in the same manner and with the same effect as though the judgment had been rendered in the superior court.<sup>9</sup>

6. **N. Y.**—*Bank of Genesee v. Spencer*, 18 N. Y. 150. **S. C.**—*Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Va.**—*Beale's Admr. v. Botetourt*, 10 Gratt. (51 Va.) 278.

[a] Neglect on the part of the defendant to make his motion with due diligence would constitute a sufficient reason for denying the motion in such case. *Bank of Genesee v. Spencer*, 18 N. Y. 150.

7. *Lytle v. Lytle*, 94 N. C. 683; *Ripley v. Arledge*, 94 N. C. 467.

[a] It is erroneous for a court to set aside an execution issued on a dormant judgment where property has been purchased under it. The purchaser of property at a sale, under an execution issued on a dormant judgment, has a right to intervene and appeal from an order of the court setting such execution aside. *Murphrey v. Wood*, 47 N. C. 63.

[b] Even if it had been necessary to have leave of court to issue the execution, the execution having issued and sale upon it without objection from the judgment debtor, it cannot afterwards be questioned, and the sale made upon it would be valid and cannot be questioned by other judgment creditors. *Leonard v. Broughton*, 120 Ind. 536, 22 N. E. 731.

8. A sale under a dormant judgment is not void but only voidable, and can only be attacked in a direct proceeding instituted for that purpose. It cannot be attacked in a collateral proceeding. *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

9. See generally the statutes, and the following: **Ariz.**—Rev. St., 1913, §1351. **Cal.**—Code Civ. Proc., §§897, 898, 899 (execution may issue to any county in the state other than the county in which the judgment was rendered); *People v. Doe*, 31 Cal. 220; *Kerns v. Graves*, 26 Cal. 156. **Colo.**

Rev. St., 1908, §3758. **Idaho.**—Rev. Code, 1908, §§4733, 4734, 4735. **Ill.** Ann. St., 1913, §6996; *Merriek v. Carter*, 205 Ill. 73, 68 N. E. 750; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Wooters v. Pinkel*, 25 N. E. 791. **Iowa.**—Code, 1897, §§4537, 4538. **Kan.**—Gen. St., 1909, §§6112, 6114; *Rahm v. Soper*, 28 Kan. 529; *Treptow v. Buse*, 10 Kan. 170; *Hamilton v. Thomson*, 3 Kan. App. 8, 44 Pac. 437. **Ky.**—*Austin v. Payne*, 7 Bush 480. **Mich.**—*Howell's St.*, 1913, §§12, 293, 12,294; *Wedel v. Green*, 70 Mich. 642, 38 N. W. 638. **Minn.**—Rev. Laws, 1905, §3942; *Boe v. Irish*, 69 Minn. 493, 72 N. W. 842. **Miss.**—Code, 1906, §3979; *Smith v. Mixon*, 73 Miss. 581, 19 So. 295. **Mo.**—Rev. St., 1909, §7527; *Scharff v. McGaugh*, 205 Mo. 344, 103 S. W. 550; *Sachse v. Clingsmith*, 97 Mo. 406, 11 S. W. 69; *Ruby v. Hannibal & St. Joe R. Co.*, 39 Mo. 480. **Neb.**—Rev. St., 1913, §§8131, 8133; *Cabon v. Gruenig*, 18 Neb. 562, 26 N. W. 253. **N. J.**—*Tasto v. Kloppe*, 43 N. J. L. 448. **N. Y.**—Code Civ. Proc., §§3017, 3043; *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; *Young v. Remer*, 4 Barb. 412. **N. C.**—*Broyles v. Young*, 81 N. C. 315. **N. D.**—Code Civ. Proc., 1905, §7093; *Enderlin Inv. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36. **Ohio.**—Page v. Adams Ann. Gen. Code, §§11,659, 11,662. **Okl.**—Rev. Laws, 1910, §5217. **Ore.**—Lord's Laws, §2442. **Pa.**—Purd. Dig., vol. 2, p. 1516; *Brexel v. Man*, 6 Watts & S. 343; *Mougenot v. Vernon*, 23 Pa. Super. 165 (under Act of May 9, 1889, P. L. 176). **S. D.**—Code Civ. Proc., 1910, §325. **Tex.**—*Vernon's Sayles' Civ. St.*, 1914, Art. 1711 (providing for execution out of the district court on judgments of county court certified to it and recorded in the minutes of the district court);



(B.) HOW AND WHEN TRANSCRIPT OBTAINED AND FILED. — (1.) *In General.* A strict compliance with the statutes is necessary before the judgment of the lower court can be converted, for the purposes of execution, into a judgment of the superior court by filing a transcript thereof.<sup>10</sup> Under some statutes, it is the duty of the justice, upon the filing of an affidavit setting forth that there are not sufficient goods and chattels belonging to the judgment-debtor liable to execution, within the county in which the judgment was rendered, to issue the transcript.<sup>11</sup>

**Nature of Proceeding To Obtain.** — The proceeding to obtain a transcript of a judgment for the purpose of an execution thereon is wholly an *ex parte* one.<sup>12</sup> No notice to the defendant is necessary.<sup>13</sup>

*Richards v. Belcher*, 6 Tex. Civ. App. 284, 25 S. W. 740, judgment must be recorded in minutes of district court before execution issues. *Wash.*—*Grant v. Cole*, 23 Wash. 542, 63 Pac. 263. *W. Va.*—Code, 1913, §2672; *Sterringer v. Mackie & Co.*, 57 W. Va. 63, 49 S. E. 942; *Erb v. Hendricks*, 50 W. Va. 28, 40 S. E. 338. *Wis.*—*St.*, 1898, §2900; *Sullivan v. Miles*, 117 Wis. 576, 94 N. W. 298.

[a] **The proceeding is a special one**, authorized only by the statute, is not according to the course of the common law, and, after execution has been issued from the circuit court, certiorari will lie to review the proceedings for the purpose of ascertaining their validity. *Wedel v. Green*, 70 Mich. 642, 38 N. W. 638.

[b] **Transcript Must Be Actually Filed.**—*Carr v. Youse*, 43 Mo. 28, 39 Mo. 346, 90 Am. Dec. 470; *Sterringer v. Mackie & Co.*, 57 W. Va. 63, 49 S. E. 942.

[c] **Failure To Enter.**—The failure of the court to observe a purely administrative duty in entering and docketing a transcript from a justice's court will not invalidate an execution issued on such transcript. *Shepard v. Schrutt*, 162 Mich. 485, 128 N. W. 772.

[d] **Transcript on Appeal Not Sufficient.**—A transcript filed in pursuance of the statute that regulates appeals from the justice court cannot be made to serve as a transcript to become the basis of a judgment lien and of an execution. *Chapman v. Raleigh*, 3 Ore. 34.

[e] **Transcript of Revived Judgment.**—A transcript of the proceedings under which a judgment is revived before a justice warrants the issuance of an execution from the superior court. *Bauer v. Miller*, 16 Mo. App. 252.

[f] **When Abstract Insufficient.**

Where the statute provides for the filing of a transcript of the judgment, the filing of an abstract merely is not a compliance with the statute, and confers no authority upon the clerk of the superior court to issue an execution on such judgment. *Sterringer v. Mackie & Co.*, 57 W. Va. 63, 49 S. E. 942. And see *Dearborn v. Patton*, 4 Ore. 58.

[g] **Constitutionality of Statutes.** A statute providing for the issuance of executions upon a justice's transcript held not to be unconstitutional in that it does not comply with a law relative to the amount in controversy, as affecting the jurisdiction of the superior court. *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

**Time for issuance on transcripts or abstracts of judgments of inferior courts**, see *infra*, II, B, 1, f, (VI).

**Procuring issuance on transcript or abstracts of judgments of inferior courts**, see *infra*, II, B, 1, i, (IV).

10. *Hamilton v. Thomson*, 3 Kan. App. 8, 44 Pac. 437; *Berkery v. Wayne Circuit Judge*, 82 Mich. 160, 46 N. W. 436; *Doty v. Dexter*, 61 Mich. 348, 28 N. W. 123; *O'Brien v. O'Brien*, 42 Mich. 15, 3 N. W. 233; *Peck v. Cavell*, 16 Mich. 9; *Jewett v. Bennett*, 3 Mich. 198.

11. *Howell's Mich. St.*, 1913, §12, 293; *Shepard v. Schrutt*, 163 Mich. 485, 128 N. W. 772; *Denver v. Connolly*, 92 Mich. 549, 52 N. W. 1003; *Doty v. Dexter*, 61 Mich. 348, 28 N. W. 123; *Smith v. Circuit Judge*, 46 Mich. 338, 9 N. W. 440; *O'Brien v. O'Brien*, 42 Mich. 15, 3 N. W. 233.

12. *Berkery v. Wayne Circuit Judge*, 82 Mich. 160, 46 N. W. 436; *Jewett v. Bennett*, 3 Mich. 198; *Tasto v. Klop-ping*, 43 N. J. L. 448.

13. *Matthews v. Miller*, 47 N. J. L. 414, 1 Atl. 464.

(2.) *At Whose Instance Obtained.* — The transcript or abstract is issued at the instance of the person in whose favor the judgment is rendered,<sup>14</sup> or his agent,<sup>15</sup> or any person interested therein, whether by assignment or otherwise.<sup>16</sup> The justice of the peace has no authority, on his own motion, however, to certify a transcript of the judgment to the superior court.<sup>17</sup>

(3.) *When Filed.* — Such a transcript cannot regularly be filed before execution can lawfully issue upon the judgment.<sup>18</sup> And where an execution in the inferior court is necessary, a transcript of the judgment cannot be filed before the return day of the execution issued by the justice.<sup>19</sup> Nor can it be filed after the expiration of the statutory period allowed for issuing execution from the justice's court, without a revivor.<sup>20</sup>

14. Cal.—Code Civ. Proc., §897; *People v. Doe*, 31 Cal. 220. Colo.—Rev. St., 1908, §3758. Idaho.—Rev. St., 1908, §4733. Ill.—Ann. St., 1913, §6996; *Thornley v. Moore*, 106 Ill. 496. Ind.—Burns' Ann. St., 1914, §642; *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243. Kan.—Gen. St., 1909, §6112. Mich.—Howell's St., 1913, §12,293; *Shepard v. Schruttt*, 163 Mich. 485, 128 N. W. 772; *Doty v. Dexter*, 61 Mich. 348, 28 N. W. 123. Minn. Rev. Laws, 1905, §3942. Mo.—Rev. St., 1909, §7527; *Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369. Neb.—Rev. St., 1913, §8131. N. Y.—Code Civ. Proc., §3017. N. D.—Code Civ. Proc., 1905, §7093; *Enderlin Inv. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36. Ohio.—Page & Adams' Ann. Gen. Code, §11,659. Okla.—Rev. Laws, 1910, §§5217, 5219. Ore.—Lord's Laws, §2442. Pa.—2 Purd. Dig., p. 1517; *Mougenot v. Vernon*, 23 Pa. Super. 165 (under Act of May 9, 1889, P. L. 176). S. D.—Code Civ. Proc., 1910, §325; *Phillips v. Norton*, 18 S. D. 530, 101 N. W. 727. W. Va.—Code, 1913, §2672; *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338.

15. Burns' Ann. Ind. St., 1914, §642; *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243.

[a] Affidavit cannot be made by the agent or attorney after the death of the plaintiff. *Doty v. Dexter*, 61 Mich. 348, 28 N. W. 123.

16. Colo.—Rev. St., 1908, §3758. Mich.—Howell's St., 1913, §12,293. Mo. Rev. St., 1909, §7527; *Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369.

[a] The administrator of a plaintiff

cannot secure a transcript for such purpose, under a statute which gives plaintiff only such right. *Thornley v. Moore*, 106 Ill. 496. See also *Doty v. Dexter*, 61 Mich. 348, 28 N. W. 123.

17. *Thornley v. Moore*, 106 Ill. 496.

18. *Vroman v. Thompson*, 42 Mich. 145, 3 N. W. 306; *O'Brien v. O'Brien*, 42 Mich. 15, 3 N. W. 233 (under a statute providing that a transcript may be filed "whenever an execution may by law be issued"). And see *Howell's Mich. St.*, 1913, §12,292.

19. *Norton v. Quimby*, 45 Mo. 388; *Dillon v. Rash*, 27 Mo. 243.

Necessity for execution in justice's court, see *infra*, II, B, 1, i, (IV), (A).

20. *Lindgren v. Gates*, 26 Kan. 135; *Pears v. Goff*, 76 Mo. 92; *Bick v. Maddox*, 87 Mo. App. 30. And see *Bauer v. Miller*, 16 Mo. App. 252.

[a] But see *contra*, *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390, holding that the section providing that execution "may issue at any time within five years after entry of judgment" rendered in the justice's court, simply limits the right to have execution within such time only to the justice's court, and that it does not limit the right to transcript it to the district court and have execution issued thereon after the expiration of such period of time. And see *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36.

[b] Under a statute limiting the time during which a judgment remains a lien, a sheriff's sale of lands under an execution, issued upon a transcript of a judgment of the justice's court filed after the statutory period, is not void for want of revival and leave of

An execution issued on a transcript prematurely filed,<sup>21</sup> or issued before the transcript has been filed,<sup>22</sup> is void.

(4.) *Form and Sufficiency of Transcript or Abstract*—The right to file the transcript depends, not upon the facts existing, but upon the transcript reciting and showing the requisite facts.<sup>23</sup> And where the transcript is insufficient, the execution issued thereon is void.<sup>24</sup> The transcript should show on its face the rendition of a judgment in the inferior court,<sup>25</sup> and where an execution and a nulla bona return are required as a condition precedent to filing the transcript,<sup>26</sup> it should show that a valid execution was issued by the lower court,<sup>27</sup> and duly returned nulla bona by the proper officer.<sup>28</sup>

court, but is voidable in a direct proceeding by the execution-defendant, instituted before the sale. *Martin v. Prather*, 82 Ind. 535.

21. *Vroman v. Thompson*, 42 Mich. 145, 3 N. W. 306; *O'Brien v. O'Brien*, 42 Mich. 15, 3 N. W. 233.

22. *Sterringer v. Mackie & Co.*, 57 W. Va. 63, 49 S. E. 942.

23. *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80.

[a] Where the transcript does not recite facts sufficient to authorize the issuance of an execution thereon in the first instance, the defects and irregularities cannot be supplied after it has issued. *Schmitt v. Weber*, 239 Ill. 377, 387, 88 N. E. 268.

24. *Bigelow v. Booth*, 39 Mich. 622.

25. *Johnson v. Hubbard*, 269 Ill. 532, 109 N. E. 975, the judgment written up in the justice's docket cannot be looked to as an aid to issuance of execution.

26. See *infra*, II, B, 1, i, (IV).

27. Ill.—*Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823 (in favor of plaintiff in the judgment). Mo.—*Ruby v. Hannibal & St. Joe R. Co.*, 39 Mo. 480, prior to the amendment of 1907. Can.—*Jones v. Paxton*, 19 Ont. App. 163; *Burgess v. Tully*, 24 U. C. C. P. 549.

[a] A copy of the execution and the return of the officer upon the same is sometimes required in the transcript. See the statutes and *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355, holding that the failure of the copy of the execution issued on the judgment to show that it was signed by the justice was fatal. But it has been held that it is not essential to

the validity of the execution issued from the superior court, or the sale under it, that the transcript embrace a copy of the execution by the justice and the nulla bona return by the officer, where the sheriff's deed recites the fact of such issue and return. *Waddell v. Williams*, 50 Mo. 216.

28. Ill.—*Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823. Mo.—*Ruby v. Hannibal & St. Jo R. Co.*, 39 Mo. 480; *Linderman v. Edson*, 25 Mo. 105. N. J.—*Nimmo v. Howard*, 42 N. J. Eq. 487, 10 Atl. 712; *Matthews v. Miller*, 47 N. J. L. 414, 1 Atl. 464; *Tasto v. Klopping*, 43 N. J. L. 448. Can.—*Jones v. Paxton*, 19 Ont. App. 163; *Burgess v. Tully*, 24 U. C. C. P. 549.

[a] *Sufficient Returns*.—Under a statute requiring that the return on the execution shall state that "defendant has no goods or chattels whereon to levy the same," a return of "No property found" has been held sufficient. *Bick v. Paris*, 124 Mo. App. 341, 101 S. W. 716.

[b] So also, a constable's return: "This execution returned not satisfied, there being no property found to levy the same on," has been held sufficient. *Ruby v. Hannibal & St. Jo R. Co.*, 39 Mo. 480. See *Scharff v. McGaugh*, 205 Mo. 344, 103 S. W. 550; *Littlefield v. Ramsey*, 181 Mo. 613, 80 S. W. 949; *Poineer v. Bagnall*, 49 N. J. L. 226, 7 Atl. 858; *Newman v. Van Dyne*, 42 N. J. Eq. 485, 7 Atl. 897; *Nimmo v. Howard*, 42 N. J. Eq. 487, 10 Atl. 712.

[c] In *Scharff v. McGaugh*, 205 Mo. 344, 353, 103 S. W. 550, the court said: "If such returns comply with the spirit of the statute and are substantially in form, they are well enough."



Authentication. — The transcript of the judgment must be properly authenticated.<sup>29</sup>

(C.) EFFECT OF FILING TRANSCRIPT. — It is sometimes provided that after the filing and docketing of the transcript in the superior court, the judgment of the inferior court shall have the same effect as a judgment of the superior court.<sup>30</sup> These statutes, however, do not generally contemplate making the judgment of the justice's court a judgment of the superior court, except for the purposes of issuing execution.<sup>31</sup>

[d] The following returns have been held insufficient: (1) "Not satisfied." *Langford v. Few*, 146 Mo. 112, 47 S. W. 927. (2) "Wholly unsatisfied." *McDowell v. Clark*, 68 N. C. 117. (3) "No part satisfied." *Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750.

[e] An execution returned "not satisfied by levying on the property of A. and making \$29," is insufficient; it must show that A. had no more goods, etc. *Burke v. Flournoy*, 4 Mo. 116.

[f] A return stating, "I return the within execution, after searching the premises, dissatisfied, not finding any goods to cover the amount of the judgment," is not a compliance with the statute as it, in effect, merely declares that the officer could not find enough to pay the entire amount of the execution. *Tasto v. Kloppling*, 43 N. J. L. 448.

29. An authentication of a transcript of a judgment by a justice of the peace in the following form: "I certify that the foregoing contains an entry made on my docket. (Signed) A. B., J. P.," is sufficient. *Franse v. Owens*, 25 Mo. 329.

[a] It is not absolutely necessary that the certificate be a part of the transcript, if admitted without objection. *Bauer v. Miller*, 16 Mo. App. 252.

[b] The certificate of the justice is prima facie evidence on which the clerk of the circuit court may issue execution though defects may be shown on motion to quash. *Ruby v. Hannibal & St. Jo R. Co.*, 39 Mo. 480. See also *Johnson v. Latta*, 84 Mo. 139, 142.

30. See generally the statutes, and the following: *Colo.*—Rev. St., 1908, §3758; *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380, 133 Am. St. Rep. 54. Ill. Ann. St., 1913, §6996; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823;

*Seymour, Morgan & Allen v. Haines*, 104 Ill. 557. Iowa.—Code, Supp. 1907, §4538; *Miller v. Rosebrook*, 136 Iowa 158, 113 N. W. 771; *Klepfer v. Keokuk*, 126 Iowa 592, 102 N. W. 515; *Rand & Co. v. Garner*, 75 Iowa 311, 39 N. W. 515. Mich.—Howell's St., 1913, §12,295; *Cole v. Potter*, 135 Mich. 326, 97 N. W. 744, 106 Am. St. Rep. 398; *Wileox v. Lantz*, 107 Mich. 1, 64 N. W. 735; *Doty v. Dexter*, 61 Mich. 348, 23 N. W. 123; *Arnold v. Thompson*, 19 Mich. 333; *Jewett v. Bennett*, 3 Mich. 198. Mo.—*Carpenter v. King*, 42 Mo. 219; *Tracy v. Whitsett*, 51 Mo. App. 149. N. J.—*Matthews v. Miller*, 47 N. J. L. 414, 1 Atl. 464. S. D.—Code Civ. Proc., 1910, §325. Wis.—St., 1898, §2900; *Sullivan v. Miles*, 117 Wis. 576, 94 N. W. 298.

31. Ill.—*Thornley v. Moore*, 106 Ill. 496; *Seymour, Morgan & Allen v. Haines*, 104 Ill. 557. Ind.—*Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455. Ia. *Klepfer v. Keokuk*, 126 Iowa 592, 102 N. W. 515; *Wilson v. Robinson*, 61 Iowa 357, 16 N. W. 209. Neb.—*Farmers' State Bank v. Bales*, 64 Neb. 870, 90 N. W. 945; *Moores v. Peycke*, 44 Neb. 405, 62 N. W. 1072. N. C.—*Daniel v. Laughlin*, 87 N. C. 433; *Broyles v. Young*, 81 N. C. 315. N. D.—Code Civ. Proc., 1905, §7093; *Enderlin Inv. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36. S. D.—*Phillips v. Norton*, 18 S. D. 530, 101 N. W. 727. W. Va.—*Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338.

See also *People v. Doe*, 31 Cal. 220; *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829.

[a] The judgment still remains the judgment rendered by the justice of the peace; the statute but gives an additional means of having execution: *i. e.*, it may be satisfied in the same manner as a judgment of the superior court.

(X.) Where Appeal Taken.<sup>32</sup> — An execution cannot be issued upon a judgment from which an appeal is pending, where a proper stay bond has been filed,<sup>33</sup> or where the appeal operates as a stay.<sup>34</sup>

c. *From What Tribunal and by Whom Issued.*<sup>35</sup> — (I.) In General. Unless otherwise provided by statute, an execution can issue only from the court in which the judgment was rendered,<sup>36</sup> even though the court attempting to issue execution has concurrent jurisdiction with the court rendering judgment.<sup>37</sup> If the execution issue from a court having no jurisdiction of the subject-matter, it is void, however formal it may be.<sup>38</sup>

Upon Transcript. — Where a transcript of the judgment has been filed in a court of another county, execution may not issue from the latter court,<sup>39</sup> unless the statute so provides, as is sometimes the

McMann v. Superior Court, 74 Cal. 106, 15 Pac. 448; Seymour, Morgan & Allen v. Haines, 104 Ill. 557. And see Ind. Brown v. Wuskoff, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243. Neb.—Farmers' State Bank v. Bales, 64 Neb. 870, 90 N. W. 945. N. D.—Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36.

[a] "It was never intended by the statutes thus providing for a manner of enforcement to forbid the court entering the judgment from controlling the same in respect of other matters authorized by law" in the case, to set aside a default. Klepfer v. Keokuk, 126 Iowa 592, 102 N. W. 515.

As to the right of the court in which the judgment was rendered, to open, vacate or set aside after the filing of a transcript, see the title "Judgments."

32. From what tribunal execution issues after appeal taken, see *infra*, II, B, 1, c, (II).

33. Annis v. Bell, 10 Okla. 647, 64 Pac. 11; Texas Trunk Ry. Co. v. Jackson Bros., 85 Tex. 605, 22 S. W. 1030. See also Gruner v. Westin, 66 Tex. 209, 18 S. W. 512; Woodson v. Collins, 56 Tex. 168; Shapard v. Bailleul, 3 Tex. 26.

[a] Where no stay bond has been filed execution may issue. Sewell v. Johnson, 165 Cal. 762, 134 Pac. 704, Ann. Cas. 1915B, 645; Sewell v. Price, 164 Cal. 265, 128 Pac. 407; Texas Trunk Ry. Co. v. Jackson Bros., 85 Tex. 605, 22 S. W. 1030; Castro v. Illies, 22 Tex. 479, 495, 73 Am. Dec. 277. See also Gruner v. Westin, 66 Tex. 209, 18 S. W. 512.

34. See the title "Supersedeas and Stay of Proceedings."

35. By whom execution against person issued, see *infra*, II, C.

36. Fla.—Davidson v. Seegar, 15 Fla. 671. Ind.—Shattuck v. Cox, 97 Ind. 242; Robinson v. Clement, 73 Ind. 29. Ia.—Mudge v. Livermore, 148 Iowa 472, 123 N. W. 199; Furman v. Dewell, 35 Iowa 170. Kan.—Gresienger v. McCarter, 9 Kan. App. 886, 61 Pac. 507 (sale on execution issued from court of different county than that by which it was rendered, will be enjoined). La. Langridge v. Judge, 46 La. Ann. 29, 14 So. 427; State v. Livaudais, 39 La. Ann. 984, 3 So. 185; Compton v. Airial, 9 La. Ann. 496. Mo.—Bailey v. Winn, 113 Mo. 155, 20 S. W. 21; Paxon v. Talmage, 87 Mo. 13. N. Y.—Clarke v. Miller, 18 Barb. 269, 15 Wend. 578; Niles v. Perry, 29 How. Pr. 192. Okla. Garnett v. Goldman, 39 Okla. 516, 135 Pac. 410; McGinnis v. Seibert, 37 Okla. 272, 134 Pac. 396; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330. Ore.—Love-lady v. Burgess, 32 Ore. 418, 52 Pac. 25; Willamette R. E. Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514.

[a] The court rendering the judgment has exclusive jurisdiction to award an execution for the collection thereof. Rusk v. Sackett, 28 Wis. 400.

37. Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

[a] An execution so issued by the clerk of a court having concurrent jurisdiction is absolutely void. Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

38. Ia.—Armell v. Lendrum, 47 Iowa 535. Ind.—Marsh v. Sherman, 12 Ind. 358. Tenn.—Trötter v. Nelson, 1 Swan 7.

39. Ind.—Shattuck v. Cox, 97 Ind. 242. Ia.—Mudge v. Livermore, 148

case.<sup>40</sup> Under some statutes, after an abstract or transcript of a judgment of an inferior court is filed and docketed in a superior court, the former has no power to issue execution on the judgment,<sup>41</sup> though under other statutes the contrary is true.<sup>42</sup>

Where a court has been abolished, the court which assumes the jurisdiction theretofore exercised by the other court, has power to issue execution on the judgment of the court so discontinued.<sup>43</sup>

Iowa 472, 123 N. W. 199; *Brunk v. Moulton Bank*, 121 Iowa 14, 95 N. W. 238; *Furman v. Dewell*, 35 Iowa 179; *Seaton v. Hamilton & Co.*, 10 Iowa 394. Okla.—*Garnett v. Goldman*, 39 Okla. 576, 135 Pac. 410 (prior to statute of 1910); *Hudson v. Ely*, 36 Okla. 576, 129 Pac. 11. Ore.—*Lovelady v. Burgess*, 32 Ore. 418, 52 Pac. 25. S. D. *Bostwick v. Benedict*, 4 S. D. 414, 57 N. W. 78. Wash.—*Bramel v. Ratliff*, 54 Wash. 581, 103 Pac. 817; *Humphries v. Sorensen*, 33 Wash. 563, 74 Pac. 690; *Briggs v. Murray*, 29 Wash. 245, 69 Pac. 765.

40. See the following: Md.—*Harden v. Moores*, 7 Har. & J. 4. Okla.—*Rev. L.*, 1910, §5148; *Garnett v. Goldman*, 39 Okla. 516, 135 Pac. 410. Utah. *Comp. Laws*, 1907, §3232, may issue in any county in which a transcript of the judgment is filed and docketed. Wis.—*Chase v. Ostrom*, 50 Wis. 640, 7 N. W. 667.

[a] **Dormant Judgment.**—An execution cannot be issued by the court of the county in which the transcript of the judgment has been filed without a revival, when none can be issued because of dormancy in the county where the original judgment was rendered. *Beck v. Church*, 113 Pa. 200, 6 Atl. 57. But see *Smith v. Gosline*, 2 Pa. Co. Ct. 15.

41. Cal.—*Kerns v. Graves*, 26 Cal. 156, only the county clerk can issue the execution that is to be executed in another county. Ind.—See *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243. Ia.—*Code*, Supp. 1907, §4538; *Klepfer v. Keokuk*, 126 Iowa 592, 102 N. W. 515; *Little v. Devendorf*, 109 Iowa 47, 79 N. W. 476; *Stover v. Elliott*, 80 Iowa 329, 45 N. W. 901; *Rand & Co. v. Garner*, 75 Iowa 311, 39 N. W. 515. Kan.—*Rahm v. Sopher*, 28 Kan. 529. Mich.—*Howell's St.*, 1913, §12,343; *Hitchcock v. Circuit Judge*, 96 Mich. 297, 55 N. W. 841; *Davison v. Elliott*, 9 Mich. 252. N. Y.—*Gray v. Lieben*, 8 Civ. Proc. 48; *Parker v. Con-*

*ner*, 15 Jones & S. 522; *Oberwarth v. McLean*, 7 Daly 70; *Ex parte Thompson*, 5 Cow. 31. N. D.—*Enderlin Inv. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36; *Acme Harvester Co. v. Magill*, 15 N. D. 116, 106 N. W. 563. Ore.—*Lovelady v. Burgess*, 32 Ore. 418, 421, 52 Pac. 25.

[a] Under a statute providing that "from the time of docketing the judgment in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the state, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued upon a judgment of the superior court," the clerk only can issue an execution that is to be executed in another county. *Kerns v. Graves*, 26 Cal. 156. But as against property within the county in which the judgment is rendered, execution is to issue from the justice's court. *Campbell v. Wickware*, 19 Cal. 145.

42. Mo. Rev. St., 1909, §7529.

43. Ill.—*Harris v. Cornell*, 80 Ill. 54; *Lee v. Newkirk*, 18 Ill. 550. Kan. *Hansford v. Burdge*, 8 Kan. App. 162, 55 Pac. 472. N. Y.—*Wegman v. Childs*, 41 N. Y. 159. N. C.—*Matthews v. Heath*, 33 N. C. 244. N. D.—*Mercantiles' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653. Tex.—*Campbell v. Townsend*, 26 Tex. 511; *Masterson Irr. Co. v. Foote* (Tex. Civ. App.), 163 S. W. 642.

[a] But see *Martin v. Craven*, 123 Ga. 780, 55 S. E. 962, wherein, under the particular statute, it was held that the clerk of the court to which the jurisdiction was transferred could not issue execution upon judgments of the abolished court.

[b] On the abolishing of a common pleas court the clerk of the circuit court has authority to issue executions on transcripts of judgments of justices of the peace, duly recorded and dock-



When a cause is transferred from one court to another on account of the incompetency of the judge, the execution issues from the latter court.<sup>44</sup>

(II.) After Appeal. — Statutes sometimes provide that an appellate court may award an execution to carry its decision into effect.<sup>45</sup> At the common law, such was the practice where the original record was sent up to the court to which the review was taken.<sup>46</sup> But when a judgment has been affirmed and the cause remanded by the appellate court to the court wherein the judgment was originally rendered, the general rule is that the prevailing party is entitled to have execution issue upon such judgment from the court thus reinvested with the custody of the record.<sup>47</sup> The same practice also obtains in some states

eted in the common pleas court. *Mavity v. Eastbridge*, 67 Ind. 211.

44. *Henderson v. Henderson's Admr.*, 66 Ala. 556.

45. Mo. Rev. St., 1909, §2085; *M'Nair v. Lane*, 2 Mo. 57; *Musser v. Harwood*, 23 Mo. App. 495 (wherein supreme court reversed judgment and entered judgment for costs in favor of appellant).

46. *Altman v. Johnson*, 2 Mich. N. P. 41. And see *People v. Corey & Briggs*, 19 Wend. (N. Y.) 633.

47. Ala.—*Howard v. Deans*, 151 Ala. 608, 44 So. 550; *Anniston Loan & Trust Co. v. Stickney*, 132 Ala. 587, 31 So. 465.

Cal.—*Mayor of Marysville v. Buchanan*, 3 Cal. 212, district court has no authority to prevent the immediate execution of the judgment of an appellate court upon remittitur. Colo. *Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265.

Ky.—*Hawkins v. Craig*, Sneed 191. La.—*Amet v. Boyer*, 42 La. Ann. 831, 8 So. 588; *Wells v. Merz & Sheriff*, 23 La. Ann. 392; *Lovelace v. Taylor*, 6 Rob. 92. Mo.—*Block v. Morrison*, 112 Mo. 343, 20 S. W. 340; *Slagel v. Murdock*, 65 Mo. 522; *Walter v. Tabor*, 21 Mo. 75; *Wilburn's Admr. v. Hall*, 17 Mo. 471; *Meyer v. Campbell*, 12 Mo. 603. Neb.—*State v. Sheldon*, 26 Neb. 151, 42 N. W. 335. N. J.—*Reading v. Reading*, 6 N. J. L. 186. Ohio.—*Bisbee v. Hall*, Wright 59; *Howard v. Abbey*, 2 Ohio Dec. 64.

[a] In the absence of instructions to the contrary from the plaintiff in the judgment, it is the duty of the clerk of the lower court to speedily issue execution on receipt of the certificate of affirmance from the clerk of the appellate court. *Northern Alabama R. Co. v. Lowery* (Ala.), 57 So. 260;

*Howard v. Deems*, 151 Ala. 608, 44 So. 550.

[b] No order of the lower court is necessary to issue execution after cause remanded. Cal.—*Mayor of Marysville v. Buchanan*, 3 Cal. 212. Mo.—*Walter v. Tabor*, 21 Mo. 75; *Wilburn's Admr. v. Hall*, 17 Mo. 471; *Musser v. Harwood*, 23 Mo. App. 495. Tex.—*Lemmel v. Pauska*, 54 Tex. 505; *Govan v. Bynum*, 17 Tex. Civ. App. 180, 43 S. W. 319. As to necessity for order of court previous to issuance of execution, see generally *infra*, II, B, 1, i, (11), (C).

[c] But a sale made under execution issued from the appellate court is not void in such case, though voidable by a timely motion to quash. *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340. See also *Meyer v. Campbell*, 12 Mo. 603.

[d] Judgment Against Sureties on Supersedeas Bond.—(1) But when a judgment for money is, upon appeal with a supersedeas bond, affirmed with judgment against the appellant and the sureties on the bond, execution should issue on the judgment of the appellate court and not upon the judgment appealed from. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820. See also *Blair v. Sanborn*, 82 Tex. 686, 18 S. W. 159. (2) The judgment of the appellate court fixes the liability of every person and determines the highest sum for which execution may issue; while the judgment of the lower court does not fix the liability of the sureties on the appeal bond, nor authorize an execution for the costs of appeal, nor for any damages that may be awarded by the appellate court. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

where the judgment of the lower court is reversed and an original money judgment entered in the appellate court.<sup>48</sup> If an appeal is dismissed by consent,<sup>49</sup> or abandoned,<sup>50</sup> execution should issue, as if no appeal had been taken.

If upon appeal, there is a trial *de novo*, the judgment rendered is the judgment of such appellate court, and execution is to be issued from such court.<sup>51</sup>

(III.) Duty of Clerk. — The duty of issuing the execution usually devolves upon the clerk of the court which rendered the judgment.<sup>52</sup>

48. The same practice that applies in respect of affirmed judgments also is applicable in all cases wherein any original affirmative judgment is rendered in the appellate court, and where the judgment below is reversed and an original money judgment is entered, it has always been the practice to certify such judgment to the court from which the appeal was taken to the end that it should there be enforced and for execution upon it to issue out of that court, and not out of the appellate court. "This practice probably originated in the considerations that this [supreme] court is in a general sense without jurisdiction to try in the first instance issues arising upon the levy of executions, its jurisdiction being appellate only, and that it is also without the equipment of a jury to which the parties to executions would be entitled on issues growing out of levies." But now in addition to these underlying considerations, by provision of the legislature the clerk of the supreme court is required to certify to the clerks of the courts from which appeals have been taken, the judgment of the supreme court whether it be an affirmance or a reversal of the judgment below, or other action of the supreme court upon such causes, to the end that execution may issue in the court below. *Anniston Loan & Trust Co. v. Stickney*, 132 Ala. 587, 31 So. 465.

49. *Clark's Exrs. v. Farrar*, 3 Mart. O. S. (La.) 212.

50. See *Muller v. Boone*, 63 Tex. 91; *Shapard v. Bailleul*, 3 Tex. 26.

51. Ga.—*Brown v. Wilson*, 59 Ga. 604. Md.—*Griffith v. Etna Fire Ins. Co.*, 7 Md. 102. N. J.—Anonymous, 3 N. J. L. 753. S. C.—*Pringle v. Lansdale*, 3 McCord 489, provided for by statute. S. D.—*Winton v. Knott*, 7 S. D. 179, 63 N. W. 753. Tex.—*McKay*

*v. Irion*, 4 Wills. Civ. Cas., §184, 15 S. W. 123, creditor must answer in damages if he cause an execution to issue out of the lower court or receive the benefits of one so issued after an appeal and trial *de novo*.

[a] When a judgment is affirmed in the superior court, the practice is to sue out execution there without taking the cause down by a *procedendo*. *Seely v. Beon*, 1 N. J. L. 135.

52. See the following: U. S.—*Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253. Ala.—Code, 1907, §3272, subd. 11; *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559, 50 L. R. A. (N. S. 553; *Hudson v. Modowell*, 64 Ala. 481; *Kyle v. Evans*, 3 Ala. 481, 37 Am. Dec. 705. Cal.—*Smith v. Morse*, 2 Cal. 524. Ind.—*Nunemacher v. Ingle*, 20 Ind. 135. Ia.—*Mudge v. Livermore*, 148 Iowa 472, 123 N. W. 199. Kan.—Gen. St., 1909, §6033. Mont.—*Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 63 L. R. A. 325, 101 Am. St. Rep. 544. N. C.—*Sheppard v. Bland*, 87 N. C. 163; *McKethan v. McNeil*, 74 N. C. 663. Phil. Isl.—*Hidalgo v. Crossfield*, 17 Phil. Isl. 466.

[a] An execution from the county court, issued by the clerk *de facto* and signed by him officially, is not illegal because the clerk practiced law at the time, and was one of the attorneys of record for the plaintiff in the execution. *Blount v. Wells*, 55 Ga. 282.

[b] "It is not indispensable to the regularity of an execution, that it should be issued by the clerk, or a duly qualified deputy. If the clerk thinks proper, he can engage the services of an assistant to write for him; and if the execution is made out and subscribed with his name, by his direction, and under his supervision, or if made and subscribed with his name, and afterwards adopted by him, it would in point of law, be as much his act, as if the labor had been performed

And since the issuance of an execution is a mere ministerial act,<sup>53</sup> if the judgment-creditor regularly applies for execution on his judgment within the period of the statute of limitations,<sup>54</sup> the clerk can exercise no discretion as to whether or not he will issue it.<sup>55</sup>

d. *For Whom Issued.*<sup>56</sup>—As a general rule, no person but the party in whose favor a judgment is rendered, his agent or attorney of record, can control or order execution to enforce the judgment.<sup>57</sup> And while it is generally the duty of the clerk of the court in which the judgment is rendered to issue an execution when called upon to do

with his own hand." McMahan & Evans v. Colclough, 2 Ala. 68.

[c] When the court has no clerk, the judge or justice himself must perform the imperative duty of issuing execution; but when the court has a clerk in whose hands is intrusted the court seal, and who is charged with the keeping of the court records and the issuance of process under the seal of the court, the imperative duty of issuing the writ of execution manifestly devolves upon him, unless in a particular case the judge elects to perform the duty himself instead of intrusting it to his ministerial officer. Hidalgo v. Crossfield, 17 Phil. Isl. 466.

53. See *supra*, II, B, 1, a.

54. As to application for issuance of writ, see *infra*, II, B, 1, i, (II), (C).

55. Ala.—Hudson v. Modawell, 64 Ala. 481. Mass.—Briggs v. Wardwell, 10 Mass. 356. Mich.—Jenness v. Lapeer Co. Circuit Judge, 42 Mich. 469, 4 N. W. 220. Mo.—State v. Renick, 157 Mo. 292, 57 S. W. 713. P. I.—Hidalgo v. Crossfield, 17 Phil. Isl. 466.

[a] When applied to for the issuance of an execution, if the application proceeds from a proper party, the only inquiry the clerk can make is, whether the record of the court shows a judgment or decree authorizing the same. Beyond that he cannot look, and inquire whether there is not matter which will discharge the parties, or any of them, from liability. Hudson v. Modawell, 64 Ala. 481.

[b] The difficulty of executing a judgment because of uncertainty therein is no concern of the clerk; his duty is to issue the writ in the manner provided by law. State v. Bondy, 15 La. Ann. 573, 77 Am. Dec. 198.

As to procedure to compel issuance, see *infra*, II, B, 1, j, (I).

56. For whom execution against person issued, see *infra*, II, C.

57. U. S.—Wills v. Chandler, 2 Fed.

273. Cal.—Lerch v. Gallup, 67 Cal. 595, 8 Pac. 322. Fla.—Davidson v. Seegar, 15 Fla. 671. Ind.—Lewis v. Phillips, 17 Ind. 108. Ia.—*Ex parte* Hampton, 2 Gr. 137. Ky.—Pollard v. Pollard, 4 Mon. 359. La.—State v. Pillsbury, 35 La. Ann. 408. Miss. Treadwell v. Herndon, 41 Miss. 38; Osgood & Co. v. Brown, 1 Freeman's Ch. 392. Mo.—Davis v. McCann, 143 Mo. 172, 44 S. W. 795.

See also *infra*, II, B, 2, d.

[a] Officers of court, or witnesses to whom fees are due, cannot order execution on a judgment owned by another. *Ex parte* Hampton, 2 Greene (Ia.) 137.

[b] But in Cortez v. San Francisco Superior Court, 86 Cal. 274, 24 Pac. 1011, it was held that a commissioner to whom fees and expense money had been decreed had such an interest as to entitle him to an execution.

[c] An attorney (1) may have execution issued on a judgment obtained through him. Rogers v. Marshal, 1 Wall. (U. S.) 644, 17 L. ed. 714; Erwin v. Blake, 8 Pet. (U. S.) 18, 26, 8 L. ed. 852; Union Bank v. Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60. (2) But the issuing of an execution on the judgment is not such an act as requires the direct agency of the attorney in the case; it may be issued by the plaintiff himself (Jones v. Spears, 56 Cal. 163), (3) or by a new attorney employed by the plaintiff for that purpose. Knox v. Randall, 24 Minn. 479, 495, without any formal substitution or notice.

[d] A foreign administrator may not have execution issued unless he has complied with all the statutory provisions affecting his authority. Jackson v. Scandland, 65 Miss. 481, 4 So. 552.

[e] The state may have an execution on a judgment rendered in the



so,<sup>58</sup> it is not the duty of the clerk to see that an execution is issued and placed in the hands of the sheriff without an authorization or direction of the plaintiff, his agent or attorney.<sup>59</sup> But the issuance of an execution without authority of the plaintiff will not render the sale thereunder void.<sup>60</sup>

name of the governor. *Ex parte Pryor*, 9 Ark. 257.

[f] **Alien Enemy.**—Where the plaintiff in a suit, becomes an alien enemy, after judgment, the court will not, on motion, stay or set aside the execution. *Buckley v. Lyttle & Thompson*, 10 Johns. (N. Y.) 117.

**Issuance of execution at instance of wife on judgment confessed by husband in her favor**, see 11 STANDARD PROC. 808.

[g] **Ratification by the judgment creditor of the act of sureties on an undertaking on appeal in ordering execution to issue** is shown where he accepted the money made under it in full payment and satisfaction of his judgment. *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322.

58. See *supra*, II, B, 1, c, (III).

59. **U. S.**—*Wills v. Chandler*, 1 McCrary 276, 2 Fed. 273. **Ill.**—*Wickliff v. Robinson*, 18 Ill. 145. **Ind.**—*Wells v. Bower*, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174; *State v. Wilkins' Admr.*, 21 Ind. 216; *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315; *Nunemacher v. Ingle*, 20 Ind. 135; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457. **Ia.** *Ex parte Hampton*, 2 G. Gr. 137. **Ky.** *Burton v. McFarland*, 3 Ky. L. Rep. 536. **Miss.**—*Osgood & Co. v. Brown*, Freem. Ch. 392. **Mo.**—*Davis v. McCann*, 143 Mo. 172, 44 S. W. 795; *Beedle v. Mead*, 81 Mo. 297; *Burton v. Deleplain*, 25 Mo. App. 376, 382. **Vt.** *Smith v. Howard*, 41 Vt. 74. **Wis.** *Chase v. Ostrom*, 50 Wis. 640, 7 N. W. 667.

[a] Where, in the entry of a judgment, by agreement of the parties, it is ordered by the court that an execution shall issue thereon, but shall not be levied on the defendant's property for a specified period, except in a certain event, it does not thereby become the duty of the clerk to issue such execution without directions so to do from the plaintiff, his agent or attorney. *State v. Wilkins' Admr.*, 21 Ind. 216.

[b] **Custom of Clerk.**—The fact that

it has been the custom of the clerk of the court to issue executions upon all judgments rendered at the next preceding term whether directed to do so or not, does not change the rule requiring the direction of the plaintiff. *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795.

[c] A justice who has given a judgment for the plaintiff, and has been directed by him not to issue an execution until after the time for taking an appeal has expired, is not bound to issue an execution until the plaintiff requests it. *Tingle v. Pullium*, 4 Blackf. (Ind.) 442.

[d] **Presumption of Direction.**—The presumption is, in the absence of proof otherwise, that a clerk issues an execution only under the direction of some person authorized to control the issuance of the writ. *Niantic Bank v. Dennis*, 37 Ill. 381. And see *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

[e] The clerk cannot refuse to issue an execution for the reason that the court has not specifically so directed, the judgment being in itself an order directing execution. *State v. Renick*, 157 Mo. 292, 57 S. W. 713. See also *supra*, II, B, 1, b, (I), (B).

[f] The clerk of the court to whom the transcript of a judgment rendered and docketed in another county has been sent by the party or attorney obtaining such judgment, together with an execution thereon duly signed and filled out, except the dates of the filing of such transcript and docketing of such judgment by him, and with directions to file the transcript, docket the judgment, and then fill the blanks in the execution and deliver it to the sheriff, may act as the clerk or agent of the party or attorney giving such directions, in so doing. *Chase v. Ostrom*, 50 Wis. 640, 7 N. W. 667.

60. *Wells v. Bower*, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174; *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315.

[a] The plaintiff may ratify the act of the clerk in issuing the writ with-

**Upon Assigned Judgment.** — Where a judgment has been assigned execution issues upon the application of the assignee but in the name of the assignor.<sup>61</sup>

c. *Against Whom Issued.*<sup>62</sup> — It is a general rule that no execution can issue against the property of a person who is not a party<sup>63</sup> to the

out specific direction, and render it valid. *Wells v. Bower*, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Clarkson v. White & Arnold*, 4 J. Marsh. (Ky.) 529.

[b] **One who claims in the character of a judgment creditor** cannot avail himself of a mere irregularity, such as the issuing of the execution by the clerk without the authority of the creditor, to defeat a consummated sale. It is, as a general rule, only the execution defendant who can avail himself of an irregularity upon a direct attack. *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

61. U. S.—*Selz v. Unna*, 6 Wall. 327, 18 L. ed. 799. Ala.—*Steele v. Thompson*, 62 Ala. 323. Ill.—*Elliot v. Sneed*, 2 Ill. 517. Ia.—*McWilliams v. Myers*, 10 Iowa 325. La.—*King v. Dwight*, 3 Rob. 2, *distinguishing* *Fluker v. Turner*, 5 Mart. (N. S.) 707. Miss. Code, 1906, §3975; *Vanbouden v. Reily*, 6 Smed. & M. 440. Mo.—*Fiske v. Lamoreaux*, 48 Mo. 523. N. Y.—*Wilgus v. Bloodgood*, 33 How. Pr. 289. Tex.—*Owens v. Clark*, 78 Tex. 547, 15 S. W. 101. Wash.—*Rem. & Bal.'s Code*, §519. Wis.—*St.*, 1898, §2963.

[a] **The assignee of the judgment has full authority over it** and it is his right to demand execution thereon in the name of the assignor, and it is the duty of the clerk to comply with the demand when made. The assignee may control the execution through an attorney, or an agent, and the instructions of the attorney or agent are of the same force as if they had proceeded from him personally. *Steele v. Thompson*, 62 Ala. 323.

[b] **Where the assignor dies**, the writ should still issue in the name of the deceased assignor. *Holmes v. McIndoe*, 20 Wis. 657. See also *Garvin v. Hall*, 83 Tex. 295, 18 S. W. 731.

[c] **The assignor has no control over the execution issued thereon by the assignee.** *Clarke v. Hogeman*, 13 W. Va. 718.

[d] **Under a statute providing that**

in case of a transfer in an action, it may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted, the court may allow or direct an execution to issue in favor of the assignee. *McGregor v. Wells, Fargo & Co.*, 1 Mont. 142.

[e] **Where the assignment is as security for a debt**, the assignor may issue execution in his own name, particularly where he has retained the right and has the assent of the assignee to do so. *Collins v. Smith*, 75 Wis. 392, 44 N. W. 510.

62. **Against whom execution against person issues**, see *infra*, II, C.

**Execution on judgment against several defendants**, see *infra*, II, B, 1, k.

63. U. S.—*Walker v. Colby Wringer Co.*, 14 Fed. 517. Ala.—*Joseph v. Joseph*, 5 Ala. 280; *Harris v. Carter's Admsrs.*, 3 Stew. 233. Ia.—*Berry v. Wood & Sons*, 106 Iowa 327, 76 N. W. 799. Ky.—*Bridges v. Caldwell's Exrs.*, 2 A. K. Marsh. 195. Miss.—*Treadwell v. Herndon*, 41 Miss. 38; *New Orleans, J. & G. N. R. R. Co. v. Rollins*, 36 Miss. 384. N. C.—*Binford v. Alston*, 15 N. C. 351. Pa.—*King v. Winley*, 26 Leg. Int. 254. P. I.—*Rabino v. Ravida*, 14 Phil. Isl. 704. Tex.—*Battle v. Guedry*, 58 Tex. 111.

[a] **Execution can issue only against the person named in the judgment**, and a judgment and execution against *Freeman H.* will not authorize a sale of the property of *Truman H.*, although the latter may be the individual intended. *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277. See also *Formento v. Robert*, 27 La. Ann. 445.

[b] **Where a son becomes indebted for the purchase price of goods to the plaintiff, who, by mistake, secures a judgment against the father**, execution cannot issue against the son for the seizure and sale of such goods. *Crouse v. Bailey*, 56 Hun 645, 10 N. Y. Supp. 273, 11 N. Y. Supp. 910.

[c] **Judgment Debtor Not Real Party in Interest.**—Where interveners took judgment against an insolvent

original judgment, or made such by some proceeding subsequent thereto.<sup>64</sup>

**Against Discharged Bankrupt.** — Where the judgment debtor has been relieved of liability on a judgment by virtue of a discharge in bankruptcy, execution cannot issue against him.<sup>65</sup>

**Against Married Women.** — The right to issue execution against the property of a married woman is treated elsewhere in this work.<sup>66</sup>

**Against State or Municipality.** — The question as to whether an execution may properly issue against the property of a state,<sup>67</sup> or municipality,<sup>68</sup> or of the United States,<sup>69</sup> will be discussed elsewhere.

**Against Private Corporations or Partnerships.** — The question of whether execution lies against the property of a private corporation,<sup>70</sup> or partnership,<sup>71</sup> is treated in other titles.

f. *Time of Issuance.*<sup>72</sup> — (I.) **When Execution May Issue.** — By the common law, as soon as final judgment was signed execution might issue, unless there was a writ of error pending or an agreement or stipulation to the contrary;<sup>73</sup> and this rule still exists in some of the

plaintiff, knowing that the action was brought in plaintiff's name without her knowledge, not as the real party in interest, but to prevent them from collecting any judgment they might secure, the fraud does not authorize an execution against the real party in interest. That one party practices a fraud upon another does not entitle the latter to sell the property of the former upon a judgment which they elected to take against a third. *Berry v. Wood & Sons*, 106 Iowa 327, 76 N. W. 799.

**Property subject to execution,** see generally *infra*, II, B, 3.

64. *Treadwell v. Herndon*, 41 Miss. 38; *New Orleans, J. & G. N. R. R. Co. v. Rollins*, 36 Miss. 384, *citing* *Bacon Abr. c. 4*; 2 *Tuck. Com.* 340.

[a] "Nor can any person be made defendant to the execution, by such subsequent proceeding, who is not chargeable with the debt or demand." *New Orleans, J. & G. N. R. R. Co. v. Rollins*, 36 Miss. 384, *citing* *Bac. Abr. Executor, F. G.*, and 2 *Lord Raym.* 768. See also *Treadwell v. Herndon*, 41 Miss. 38, 48. In such case a scire facias is necessary. *Treadwell v. Herndon*, 41 Miss. 38. See also *infra*, II, B, 1, h, (IV) and (V); III.

[b] In *Hanson v. Barnes*, 3 Gill & J. (Md.) 359, the court said: "The general principle, that where a new person is to be benefited, or charged by the execution of the judgment, there ought to be a scire facias to make him

a party, is admitted; but it cannot apply to a case, where the new party becomes interested, after the process is regularly in the hands of the officer for execution."

65. *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Dawson v. Hartsfield*, 79 N. C. 334; *Withers v. Stinson*, 79 N. C. 341.

**Discharge in bankruptcy as ground for relief from enforcement of execution,** see *infra*, IV.

66. See 11 *STANDARD PROC.* 807, et seq.

67. See *infra*, II, B, 3, e, and generally the title "States and Territories."

68. See *infra*, II, B, 3, e, and generally the title "Municipal Corporations."

69. See *infra*, II, B, 3, e, and generally the title "United States."

70. See 5 *STANDARD PROC.* 670, et seq.

71. See *infra*, II, B, 3, j, and generally the title "Partnership."

72. **Time of issuance of execution against person,** see *infra*, II, C.

**Time of issuance of executions after death of sole defendant,** see *infra*, II, B, 1, h, (IV), (D).

73. *Stevens v. Manson*, 87 Me. 436, 32 Atl. 1002; *Miller v. O'Rannon*, 4 Lea (Tenn.) 398, *citing* *Tidd's Pr.*, 994. And see *Wait v. Garth, Barnes' Notes* 261, 94 Eng. Reprint 906, and *supra*, II, B, 1, b, (I), (C).



states,<sup>74</sup> though generally execution may not issue under modern statutes until after the judgment has been entered.<sup>75</sup>

**On Judgment Note.**—It is improper to issue execution on a judgment note until the expiration of the day on which the note was payable.<sup>76</sup> Where the note is payable in instalments execution may issue upon the instalments as they fall due.<sup>77</sup>

**Statutory Periods of Time.**—Under some statutes, the clerk shall issue execution as soon after the judgment of the court as practicable.<sup>78</sup> Others provide that certain definite periods of time should elapse after the rendition of the final judgment,<sup>79</sup> or after the adjournment of the term,<sup>80</sup> before execution may issue. Such statutes, being for the benefit

74. Execution issues as soon as the record of the proceedings is read and signed. *Logan v. Sult*, 152 Ind. 434, 53 N. E. 456; *Jones v. Carnahan*, 63 Ind. 229; *Willson v. Binford*, 54 Ind. 569; *Carpenter v. Vanscoten*, 20 Ind. 50.

[a] As soon as the judgment is entered, and before the filing of the judgment roll. *Sharp v. Lumley*, 34 Cal. 611.

75. See generally the statutes cited *infra*, II, B, 1, f, (II), note.

**Necessity for entry and docketing,** see *supra*, II, B, 1, b, (I), (C).

76. *Shoemaker v. Shirliffe*, 1 Dall. (U. S.) 133, 1 L. ed. 69; *Taylor v. Jacoby*, 2 Pa. 495.

[a] An execution issued before the day the note is payable may be set aside. *Ottwell v. Messick*, 4 Houst. (Del.) 542.

[b] But the defendant may waive this right by agreement and allow the writ to issue on the date the note falls due. *Roemer v. Denig*, 18 Pa. 482.

[c] Execution cannot issue upon a note not due, merely for failure to pay the interest due, where there is no provision therefor. *Reilly v. Nestle*, 2 W. N. C. (Pa.) 600.

77. *Sloane v. Anderson*, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

[a] An execution issued for the whole debt before some of the instalments were due, is only voidable and must be respected until vacatd. *State v. Platt*, 5 Har. (Del.) 429. See *Steele v. Tutwiler*, 68 Ala. 107.

78. See generally the statutes, and Shannon's Code (Tenn.), §4732; *Weaver v. Smith*, 102 Tenn. 47, 50 S. W. 771. See also *Pollard's Va. Code*, 1904, §3581.

[a] In *Miller v. O'Bannon*, 4 Lea (Tenn.) 393, the court said: "The Code prescribes the time within which it is made the duty of the proper of-

ficer to issue execution, without interfering with the common-law rule: . . . But, as under our practice, it is in the power of the Court, during the term, to set aside a judgment, the execution cannot properly issue until the expiration of the term without an order of court. . . ."

79. See generally the statutes, and the following: **Ark.**—*Kirby's Dig.*, 1904, §3214; *Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462; *Lowenstein v. Caruth*, 59 Ark. 588, 592, 28 S. W. 421. **Ky.**—*Carroll's St.*, 1915, §1653. **Me.** *Stevens v. Manson*, 89 Me. 436, 32 Atl. 1002 (not until after expiration of twenty-four hours); *Allen v. Portland Stage Co.*, 8 Me. 207. **Mass.**—*Rev. Laws*, 1902, ch. 177, §16 (not until after expiration of twenty-four hours); *Washington Nat. Bank v. Williams*, 190 Mass. 497, 77 N. E. 383; *Penniman v. Cole*, 8 Mete. 496. **N. H.**—*Pub. St.*, 1901, ch. 231, §1, not for twenty-four hours. **R. I.**—*Gen. Laws*, 1909, ch. 303, §2, not for twenty-four hours. **Tenn.** *Shannon's Code (Supp.)*, p. 714. **Tex.** *Vernon's Sayles' Civ. St.*, 1914, §3715 (not until after the expiration of twenty days from and after the rendition of final judgment); *Bumpass v. Morrison*, 70 Tex. 756, 8 S. W. 596 (fact that court has not adjourned immaterial). **Vt.**—*Pub. St.*, 1906, §2143 (not for twenty-four hours); *Haggood v. Goddard*, 26 Vt. 401; *Allen v. Carty*, 19 Vt. 65; *Mattocks v. Judson*, 9 Vt. 343.

[a] But execution may be issued immediately, if the debtor is about to remove, secrete or fraudulently dispose of his property. *Vernon's Sayles' Tex. Civ. St.*, 1914, §3719. See also *Shay v. Morton*, 16 N. J. L. 378; *Krumeick v. Krumeick*, 14 N. J. L. 39.

80. *Ala. Code*, 1907, §§4079-4083; *Miss. Code*, 1906, §3958.

of the judgment debtor may be waived by him at his option.<sup>81</sup>

(II.) **Period Within Which Execution Must Issue.**—(A.) **AT COMMON LAW.** At common law the party recovering a judgment was obliged to sue out execution within a year and a day after the judgment was perfected.<sup>82</sup> If the execution was not sued out within such time, the court concluded, *prima facie*, that the judgment was satisfied, or execution released. The creditor was strictly held to that limitation, and, if he failed to issue execution during that time, he lost his right to issue an execution as a matter of course,<sup>83</sup> and was compelled, if the

81. **Mass.**—*Washington Nat. Bank v. Williams*, 190 Mass. 497, 77 N. E. 333; *Washington Nat. Bank v. Williams*, 188 Mass. 103, 74 N. E. 470. **N. Y.**—*Berry v. Riley*, 2 Barb. 307; *Kimball v. Munger*, 2 Hill 364. **Pa.** *Morrison & Co. v. Baker*, 9 Pa. Super. 637.

[a] One of two defendants may waive so as to bind both. *Anonymous*, 2 Hill (N. Y.) 278.

[b] What constitutes such waiver is a question of law for the court. *Washington Nat. Bank v. Williams*, 188 Mass. 103, 74 N. E. 470.

[c] A direction by the debtor as to the payment of money collected under the writ held to be a sufficient waiver. *Bell v. Bell*, 1 How. Pr. (N. Y.) 71.

82. See the following: **Ala.**—*Perkins v. Brierfield Iron, etc. Co.*, 77 Ala. 403; *Jewett v. Hoogland*, 30 Ala. 716. **Ark.** *Hanly v. Carneal*, 14 Ark. 524; *Bracken v. Wood*, 12 Ark. 605. **Del.**—*Cooper v. May*, 1 Harr. 18. **D. C.**—*Thomson v. Beveridge*, 3 Mackey 170. **Fla.**—*Jordan v. Petty*, 5 Fla. 326; *Moseley v. Edwards*, 2 Fla. 429. **Ill.**—*Hernandez v. Drake*, 81 Ill. 34; *Chase v. Frost*, 60 Ill. 143; *People v. Peek*, 4 Ill. 118. **Ind.**—*Doe v. Harter*, 1 Ind. 427. **Ia.** *Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437; *Von Puhl v. Rucker*, 6 Iowa 117. **Kan.**—*State v. McArthur*, 5 Kan. 280. **Ky.**—*Pollard v. Pollard*, 4 Mon. 359; *Haskins v. Helm*, 4 Litt. 399. 11 Nov. Dec. 133; *Noe v. Conyers*, 6 J. J. Marsh. 514. **Md.**—*Hagerstown Bank v. Thomas*, 35 Md. 511; *Mitchell v. Chestnut*, 31 Md. 521. **Minn.**—*Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. **Miss.**—*Abbey v. Commercial Bank*, 31 Miss. 434. **Mo.**—*Coddard v. Delaney*, 181 Mo. 564, 80 S. W. 886; *Bolton v. Landsdown*, 21 Mo. 399. **Neb.**—*Miller v. Finn*, 1 Neb. 134. **N. Y.**—*Bank of Greece v. Spencer*, 18 N. Y. 159. **N. C.**—*Weaver v. Cohn*, 12 N. C. 237. **N. D.**—*Weisbecker*

*v. Cahn*, 14 N. D. 390, 104 N. W. 513. **Ohio.**—*Lytle v. Cincinnati Mfg. Co.*, 4 Ohio 459. **Ore.**—*Eddy v. Caldwell*, 23 Ore. 163, 31 Pac. 475, 37 Am. St. Rep. 672. **Pa.**—*Speer v. Sample*, 4 Watts 367; *Righter v. Rittenhouse*, 3 Rawle 273. **S. C.**—*Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Tenn.** *Whitworth v. Thompson*, 8 Lea 480; *Deberry v. Adams*, 9 Yerg. 52; *Hess v. Sims*, 1 Yerg. 143. **Vt.**—*Catlin v. Merchants' Bank*, 36 Vt. 572; *Porter v. Vaughn*, 24 Vt. 211. **Va.**—*Beale's Admr. v. Botetourt*, 10 Gratt. (51 Va.) 278; *Smith's Admr. v. Charlton's Admr.*, 7 Gratt. (48 Va.) 425. **Wis.** *Mariner v. Coon*, 16 Wis. 465. **Eng.** *Hiscocks v. Kemp*, 3 Ad. & El. 676, 30 E. C. L. 312, 111 Eng. Reprint 571.

83. **Ala.**—*Perkins v. Brierfield Iron, etc. Co.*, 77 Ala. 403. **Ia.**—*Von Puhl v. Rucker*, 6 Iowa 187. **Md.**—*Mitchell v. Chesnut*, 31 Md. 521. **Mo.**—*Bolton v. Landsdown*, 21 Mo. 399. **Pa.**—*Pennock v. Hart*, 8 Serg. & R. 369. **Vt.** *Porter v. Vaughn*, 24 Vt. 211. **Va.** *Hutsonpiller's Admr. v. Storer's Admr.*, 12 Gratt. (53 Va.) 579; *Smith's Admr. v. Charlton's Admr.*, 7 Gratt. (48 Va.) 425. **Eng.**—*Hiscocks v. Kemp*, 3 Ad. & El. 676, 30 E. C. L. 312, 111 Eng. Reprint 571.

[a] This presumption was so slight that the plaintiff was not required to make proof that it had not been satisfied, but it devolved upon the defendant to prove the fact. The judgment itself was sufficient to rebut the presumption. *Hernandez v. Drake*, 81 Ill. 34.

84. **Ala.**—*Perkins v. Brierfield Iron, etc. Co.*, 77 Ala. 403. **Fla.**—*Jordan v. Petty*, 5 Fla. 326. **Minn.**—*Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. **N. D.**—*Weisbecker v. Cahn*, 14 N. D. 390, 104 N. W. 513. **Ohio.**—*Lytle v. Cincinnati Mfg. Co.*, 4 Ohio 459. **Pa.**—*Righter v. Rittenhouse*, 3 Rawle 273. **S. C.**—*Ingram v. Belk*,

judgment had been recovered in a personal action, to resort to an original action of debt on the judgment.<sup>65</sup> But in real actions, where the judgment was for land, and the action of debt could not lie, a writ of seire facias could be taken out to revive the judgment, and call the defendant to show cause why execution should not issue.<sup>66</sup> But by an early statute in England the remedy of seire facias was extended to personal judgments on which execution had not issued for a year and a day,<sup>67</sup> so that execution might be sued out upon such revived judgment in the same manner as if the time within which an execution might legally have been issued had not been suffered to lapse.<sup>68</sup>

(B.) STATUTES in this country have variously limited the time within which a party in whose favor judgment is given may have execution thereon as of course.<sup>69</sup>

2 Strobb. 207, 47 Am. Dec. 591. **Eng.** Hiscocks v. Kemp, 3 Ad. & El. 676, 30 E. C. L. 312, 111 Eng. Reprint 571.

See *supra*, II, B, 1, b, (VIII).

85. **Ala.**—Perkins v. Brierfield Iron, etc. Co., 77 Ala. 403; Jewett v. Hoogland, 30 Ala. 716. **Ark.**—Hanly v. Carneal, 14 Ark. 524. **Fla.**—Jordan v. Petty, 5 Fla. 326. **Ia.**—Von Puhl v. Rucker, 6 Iowa 187. **Ind.**—Doe v. Harter, 1 Ind. 427. **Kan.**—State v. McArthur, 5 Kan. 280. **Md.**—Hagerstown Bank v. Thomas, 35 Md. 511; Mitchell v. Chesnut, 31 Md. 521. **Miss.**—Stith v. Parham, 57 Miss. 289. **Mo.**—Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886; Bolton v. Landsdown, 21 Mo. 399. **Neb.** Miller v. Finn, 1 Neb. 254. **N. D.** Weisbecker v. Cahn, 14 N. D. 390, 104 N. W. 513. **Ohio.**—Lytle v. Cincinnati Mfg. Co., 4 Ohio 459. **Pa.**—Righter v. Rittenhouse, 3 Rawle 273. **Eng.**—Hiscocks v. Kemp, 3 Ad. & El. 676, 30 E. C. L. 312, 111 Eng. Reprint 571.

Actions on judgment, see *infra*, III.

86. See generally the cases cited in the preceding note, and the title "Judgments, Revival of."

87. 13 Edw. I, ch. 45. See generally the title "Judgments, Revival of."

88. Von Puhl v. Rucker, 6 Iowa 187.

89. See generally the statutes and the following: **Ala.**—Code, 1907, §§4077, 4147, one year after rendition of judgment. **Ark.**—Kirby's Dig., 1904, §3215 (until collection barred by statute of limitations); Jordan v. Bradshaw, 17 Ark. 106, 65 Am. Dec. 419 (ten years); Hanly v. Carneal, 14 Ark. 524, 527. **Cal.**—Code Civ. Proc., §681 (within five years after entry of judgment);

Jacks v. Johnston, 86 Cal. 384, 24 Pac. 1057; Dorland v. Hansom, 81 Cal. 202, 22 Pac. 552; Bowers v. Crary, 30 Cal. 621; Stout v. Macy, 22 Cal. 647; Isaac v. Swift, 10 Cal. 71, 70 Am. Dec. 698. **Colo.**—Mill's Ann. St., 1912, §4159 (within twenty years from entry); Henry v. Thisler, 155 Pac. 1177; Balfie v. Rumsey, 55 Colo. 97, 133 Pac. 417; Speelman v. Chaffee, 5 Colo. 247, 258. **Del.** Farmers Bank v. Reynolds, 1 Harr. 513; Cooper v. May, 1 Harr. 18. **D. C.** Willett v. Otterback, 9 Mackey 324; Horsey v. Beveridge, 4 Mackey 291; Thomson v. Beveridge, 3 Mackey 170. **Fla.**—Gen. St., 1906, §1613 (within three years after rendition); Jordan v. Petty, 5 Fla. 326. **Ga.**—Rogers v. Smith, 98 Ga. 788, 25 S. E. 753, within seven years after rendition. **Idaho.**—Rev. Codes, 1908, §4470, within five years after entry. **Ill.**—Ann. St., 1913, §6752 (within seven years from time judgment becomes a lien); McIlwain v. Karstens, 152 Ill. 135, 38 N. E. 555; Wilson v. School Trustees, 138 Ill. 285, 27 N. E. 1103; Weis v. Tiernan, 91 Ill. 27; Pierce v. Wade, 19 Ill. App. 185. **Ind.**—Burns' Ann. St., 1914, §716, within ten years after entry. **Ia.**—Code Supp., 1907, §3955 (before judgment barred by statute of limitations or twenty years); Mudge v. Livermore, 148 Iowa 472, 123 N. W. 1199; Boyle v. Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657. **Kan.**—State v. McArthur, 5 Kan. 280, within five years from rendition of judgment. **Ky.** Brittain v. Lankford, 110 Ky. 484, 61 S. W. 1000, until collection barred by statute of limitations. **Md.**—Mitchell v. Chesnut, 31 Md. 521. **Mass.**—Rev.



Laws, 1902, ch. 177, §18, one year after party is first entitled to writ. **Mich.** Ludeman *v.* Hirth, 96 Mich. 17, 55 N. W. 449, 35 Am. St. Rep. 588; *People ex rel. Parsons v. Wayne Circuit Judge*, 37 Mich. 277; *Jerome v. Williams*, 13 Mich. 521. **Minn.**—Rev. Laws, 1905, §4287 (within ten years after entry); *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794; *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; *Erickson v. Johnson*, 22 Minn. 380; *Hanson v. Johnson*, 29 Minn. 181; *Davidson v. Gaston*, 16 Minn. 230. **Miss.**—Code, 1906, §3103 (within seven years after rendition of judgment); *Stith v. Parham*, 57 Miss. 282. And see *Buckner v. Pipes*, 56 Miss. 366. **Mo.**—Rev. St., 1909, §2133 (within ten years after rendition); *Goddard v. Delaney*, 181 Mo. 564, 80 S. W. 886; *Bolton v. Landsdown*, 21 Mo. 399; *Dreyer v. Dickman*, 131 Mo. App. 660, 111 S. W. 616. See *Barton v. Deleplain*, 25 Mo. App. 376, 382. **Mont.**—Rev. Codes, 1907, §6813, within six years after entry. **Neb.**—Rev. St., 1913, §8056 (within five years after rendition); *Dillon v. Chicago, etc. R. Co.*, 58 Neb. 472, 78 N. W. 927; *Cotton v. First Nat. Bank*, 51 Neb. 751, 71 N. W. 711; *Godman v. Boggs*, 12 Neb. 13, 10 N. W. 403; *Miller v. Finn*, 1 Neb. 254. **Nev.**—Rev. Laws, 1912, §5280 (within six years after entry); *Mandlebaum v. Gregovich*, 24 Nev. 151, 160, 50 Pac. 849; *Humboldt M. & M. Co. v. Terry*, 11 Nev. 237, 248. **N. Y.**—Code Civ. Proc., 1915, §1375 (within five years after entry); *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168; *Underwood v. Green*, 56 N. Y. 247; *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Kupfer v. Frank*, 30 Hun 74; *Pierce v. Craine*, 4 How. Pr. 257; *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236; *Nutt v. Cuming*, 22 App. Div. 92, 47 N. Y. Supp. 800. **N. C.**—Rev. St., 1905, §619, within three years after entry. **N. D.**—Rev. Codes, 1905, §7079 (within ten years after entry); *Weisbecker v. Cahn*, 11 N. D. 390, 104 N. W. 513; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 211, 66 Am. St. Rep. 652; *Daisy Roller Mills v. Ward*, 5 N. D. 317, 70 N. W. 271. **Ohio.**—Gen. Code, 1910, §11,663 (within five years from date of judgment); *Lytle v. Cincinnati Mfg. Co.*, 4 Ohio 459. **Okla.**—Rev. Laws, 1910, §5153 (within five years after rendition); *Mc-*

*Ginniss v. Seibert*, 37 Okla. 272, 134 Pac. 396; *Miller & Co. v. Melone*, 11 Okla. 241, 67 Pac. 479, 56 L. R. A. 620. **Pa.**—Purdon's Dig., vol. 2, p. 1515, within a year and a day from the first day of the term at which it was rendered. **P. I.**—Code Civ. Proc., §443 (within five years after entry); *Paterns v. Aguila*, 22 Phil. Isl. 427; *Compania General de Tabacos v. Martinez*, 17 Phil. Isl. 160. **P. R.**—Code Civ. Proc., §239 (within five years after entry); *Millin v. Aldrey*, 16 Porto Rico 373. **R. I.**—Gen. Laws, 1909, ch. 303, §4, within six years from rendition. **S. C.**—Code Civ. Proc., 1902, §310, within ten years from entry. **S. D.**—Code Civ. Proc., 1910, §328 (within five years after entry); *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588. **Tex.**—Vernon's Sayles' Civ. St., 1914, §3717 (within twelve months after rendition); *Mad-dox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567. **Utah.**—Comp. Laws, 1907, §3232, within eight years after entry. **Vt.**—Catlin *v. Merchants' Bank*, 36 Vt. 572. **Va.**—*Dabney v. Shelton*, 82 Va. 349, 4 S. E. 605. **Wash.**—Rem. & Bal. Code, §510 (within five years after entry); *Kelleher v. Wells*, 87 Wash. 323, 151 Pac. 823; *Dalgarno v. Barthrop*, 40 Wash. 191, 82 Pac. 285; *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118. **W. Va.**—Code, ch. 50, §131 (as amended by ch. 45, Acts of 1897); *Thomas v. Higgs & Calderwood*, 68 W. Va. 152, 69 S. E. 654; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Gardner v. Landcraft*, 6 W. Va. 36. **Wis.**—St., 1898, §2968 (within five years after rendition); *McCormick v. Ryan*, 106 Wis. 209, 82 N. W. 137; *Brown v. Hopkins*, 101 Wis. 498, 77 N. W. 899, 1118; *Collins v. Smith*, 75 Wis. 292, 44 N. W. 510.

[a] The provisions of a statute giving plaintiff three years in which to issue execution, applies to a judgment pending at its adoption. *Harris v. Ricks, Hill & Co.*, 63 N. C. 653. See also *Henry v. Thisler (Colo.)*, 155 Pac. 1177.

[b] Where proceedings to enforce stockholders' liabilities and obtain executions against them are brought before the judgment becomes dormant, and are diligently prosecuted, no statute of limitations will run against the judgment creditor pending the litiga-

On Registered Judgments. — Statutes sometimes provide for the registration of a judgment and thereby extend the time during which an execution may issue.<sup>90</sup>

(III.) In Vacation or Legal Holiday. — The right to issue executions in vacation,<sup>91</sup> or upon a legal holiday,<sup>92</sup> has been recognized.

Sunday. — Statutes have provided that upon a proper showing the writ may issue on Sunday.<sup>93</sup>

(IV.) Computing Time. — (A.) IN GENERAL. — The day of the entry of judgment should be excluded in computing the time within which

tion, and his right to proceed to the end will not be barred because more than six years have elapsed since the last execution on the judgment was issued. *Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725.

[c] In Iowa although the lien of a judgment upon real estate expires in ten years as against subsequent purchasers, yet an execution may issue at any time within twenty years, and any land the debtor may own may be levied upon and sold subject to the right of redemption. *Hawkeye Ins. Co. v. Maxwell*, 119 Iowa 672, 94 N. W. 207; *Stahl v. Roost*, 34 Iowa 475.

[d] It will be no sufficient legal excuse for not suing out an execution within a year and a day from the time final judgment was rendered, that a prior attachment had been in continued existence upon the real estate of the debtor, upon which the creditor had his attachment lien. *Catlin v. Merchants' Bank*, 36 Vt. 572.

[e] The suspension of the powers of an administrator whose power and duty it was to cause the writ to issue will not suspend the running of the statute. *Dorland v. Hanson*, 81 Cal. 202.

Effect of failure to take out execution within time limited, see *supra*, 11, B, 1, b, (VIII).

90. See generally the statutes, and Alabama Code, 1907, §4158; *Howard v. Corey*, 126 Ala. 283, 28 So. 682.

[a] Executions always issue upon original judgments and the effect of statutes providing for the registration of judgments is not to give a new judgment, but to create a lien and preserve to the holder the right to have execution at any time within life of the lien, on the original judgment. *Jefferson County Savings Bank v. Miller*, 145 Ala. 237, 40 So. 513.

91. *Christler v. Locke*, 103 Mich. 86, 61 N. W. 263.

[a] "Where judgment is rendered at or near the close of a term of court, so that there is no time during the same term to move for a new trial, or in arrest of judgment, and no such motion is made, the prevailing party is not required to wait until the following term for his execution to issue, but may have it at once." *People ex rel. Gibson v. Clerk of Court*, 14 Mich. 169.

[b] In Iowa the judge is authorized, on application made to him, to enter an order in vacation directing the clerk or sheriff as to the issuance or enforcement of an execution. Code, 1897, §3843. But such an order can be made only after notice to the opposite party. Code, 1897, §§3834-3841; *McConkie v. Landt*, 126 Iowa 317, 101 N. W. 1121.

92. *Paine v. Fresco*, 1 Pa. Co. Ct. 562, 17 W. N. C. 502.

As to right of court to act on holiday, see generally the title "Sunday and Holidays."

93. See generally the statutes and the following: U. S.—*Beebe v. United States*, 161 U. S. 104, 113, 10 Sup. Ct. 532, 40 L. ed. 633; *Blaine v. Ship Charles Carter*, 4 Cranch 328, 2 L. ed. 636. Ala.—*Waldrop v. Friedman*, 90 Ala. 157, 7 So. 510. Ind.—*Burns' Ann. St.*, 1914, §726, may issue on Sunday whenever an affidavit is filed by the plaintiff or some person in his behalf stating that he will lose his judgment, as he has reason to fear and believe, unless process issue on that day. Ia. Code, 1897, §3956, upon affidavit. Ky. *Galot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892. Mass.—*Chesebro v. Barne*, 163 Mass. 79, 39 N. E. 1033. N. H.—*Scribner v. Whiteher*, 6 N. H. 63. N. Y.—*Bacon v. Cropsey*, 7 N. Y. 195. Tenn.—*Miller v. O'Bannon*, 4 Lea 398. Tex.—*House v. Robertson* (Tex. Civ. App.), 34 S. W. 640.

See generally the title "Sunday and Holidays."

an execution may or may not issue, according to some authorities.<sup>94</sup> Where it is a prerequisite to the right to issue execution that the judgment be docketed,<sup>95</sup> the term of limitation in which the execution may or must issue begins to run from the time when the judgment is docketed.<sup>96</sup>

Sundays have been excluded in computing the time within which executions may not issue.<sup>97</sup>

(B.) EFFECT OF SUPERSEDEAS OR STAY.—(1.) *Generally.*—If execution upon a judgment is stayed by order of court,<sup>98</sup> or by operation of law,<sup>99</sup> or upon the agreement of the parties,<sup>1</sup> the time during which it is so stayed must be excluded from the computation of the period within which execution may issue as of course and without a revivor of the judgment.

94. *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794; *Davidson v. Gaston*, 16 Minn. 230. Compare, *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168.

[a] Where the statute prohibits the issuance before a prescribed number of days have lapsed, in the computation of time, the day on which the judgment was entered is to be excluded. *Commercial Bank v. Ives*, 2 Hill (N. Y.) 355.

95. Necessity for docketing judgment, see *supra*, II, B, 1, b, (I), (C); *infra*, II, B, 1, g, (II), and generally the title "Judgments."

96. *Kupfer v. Frank*, 30 Hun (N. Y.) 74.

97. The twenty-four hours which by statute in some states must elapse after the entry of a judgment, before an execution can be issued thereon, are hours exclusive of Sunday. *Peniman v. Cole*, 8 Mete. (Mass.) 496.

[a] Sundays are to be excluded under a statute providing that until the expiration of ten days, "execution shall not issue in any case where a writ of error may be a supersedeas." *Danielson v. Northwestern Fuel Co.*, 55 Fed. 49. See also *Danville v. Brown*, 128 U. S. 503, 9 Sup. Ct. 149, 32 L. ed. 507; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810.

98. See generally the statutes, and the following: U. S.—*Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. ed. 157, under Colorado statute. Cal.—*Code Civ. Proc.*, §681. Colo.—*Mills' Ann. St.*, 1912, §4159. Ill.—*International Pack. Co. v. Cichowicz*, 114 Ill. App. 121. Ky.—*Long v. Morton*, 2 A. K. Marsh. 39 (judgment

stayed until dower allotted); *Pollard v. Pollard*, 4 Mon. 359. Minn.—*Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. N. Y.—*Côte Civ. Proc.*, §1382; *Underwood v. Green*, 56 N. Y. 247. Pa.—*Purd. Dig.*, vol. 2, p. 1515. S. C.—*Guignard v. Glover*, Harp. L. 457. Vt.—*Catlin v. Merchants' Bank*, 36 Vt. 572; *Porter v. Vaughn*, 24 Vt. 211.

[a] In California prior to July 1, 1901, an order staying proceedings did not operate to suspend the running of the statute. *Buell v. Buell*, 92 Cal. 393, 28 Pac. 443; *Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37; *Solomon v. Maguire*, 29 Cal. 227.

99. *Cal. Code Civ. Proc.*, §681.

1. U. S.—*Muncaster v. Mason*, 2 Cranch C. C. 521, 17 Fed. Cas. No. 9,920; *Phillips v. Lowndes*, 1 Cranch C. C. 283, 19 Fed. Cas. No. 11,103. D. C. *Moses v. United States*, 19 App. Cas. 290. Ky.—*Pollard v. Pollard*, 4 Mon. 359; *Nicholson v. Howsley*, Lit. Sel. Cas. 300. Minn.—*Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. N. Y.—*United States v. Hanford*, 19 Johns. 173. Pa.—*Pennock v. Hart*, 8 Serg. & R. 369, 377; *Dunlop v. Speer*, 3 Binn. 169. Vt.—*Porter v. Vaughn*, 24 Vt. 211; *Fletcher v. Mott*, 1 Aik. 339. Va.—*Hutsonpiller's Admr. v. Stover's Admr.*, 12 Gratt. (53 Va.) 579; *Beale's Admr. v. Botetourt*, 10 Gratt. (51 Va.) 278; *Smith's Admr. v. Charlton's Admr.*, 7 Gratt. (48 Va.) 425. Eng.—*Michell v. Cue*, 2 Burr. 660, 97 Eng. Reprint 498; *Hiscocks v. Kemp*, 3 Ad. & El. 676, 30 E. C. L. 312, 111 Eng. Reprint 571; *Watkins v. Haydon*, 2 Black W. 762, 96 Eng. Reprint 446;



(2.) *Pendency of Writ of Error or Appeal.*<sup>2</sup>—The bringing of a writ of error, where it operates as a supersedeas, stops the running of the time within which the execution may issue as of course,<sup>3</sup> and upon the affirmance of the judgment, or other final disposal of the writ of error, the judgment creditor may proceed to execution without a revivor of the judgment.<sup>4</sup> But some statutes provide that a writ of error will not operate as a supersedeas, until bond and security are given; in which event the allowance of the writ of error alone is not sufficient to lengthen the time of issuance of the execution.<sup>5</sup> Where the pendency of an appeal operates to stay proceedings for the enforcement of the judgment the time expiring in consequence thereof will not be included in computing the time within which execution may issue.<sup>6</sup>

Underhill v. Devereux, 2 Wms. Saund. 68, 72, 85 Eng. Reprint 698, note.

[a] Where after an execution had issued, an agreement for a stay of proceedings was made, with a condition that on failure by the defendant to comply with the agreement an execution might issue, it was held that it could be issued after the statutory time without a scire facias. Halliday v. Johnson, 7 N. J. Eq. 638.

[b] The reason assigned for this is that the cesset executio is with the consent and for the benefit of the debtor and he should not be permitted to take advantage of the lapse of time. Hutsonpiller's Admr. v. Storer's Admr., 12 Gratt. (53 Va.) 579. And see Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; Michell v. Cue, 2 Burr. 660, 97 Eng. Reprint 498.

[c] In Porto Rico and the Philippines the period during which execution has been stayed will not be excluded. Compania General de Tabacos v. Martinez, 17 Phil. Isl. 160; Millin v. Aldrey, 16 Porto Rico 373.

2. As a Supersedeas or Stay.—See the title "Supersedeas and Stay of Proceedings."

3. U. S.—Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. ed. 157. Ill.—Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089; International Pack. Co. v. Cichowicz, 114 Ill. App. 121. Mich.—Wright v. King, 107 Mich. 660, 65 N. W. 556. N. Y.—Little v. Harvey, 9 Wend. 157. Ohio.—Lytle v. Cincinnati Mfg. Co., 4 Ohio 459. S. C.—Gibbes v. Mitchell, 2 Bay 120. Vt.—Catlin v. Merchants' Bank, 36 Vt. 572; Porter v. Vaughn, 24 Vt. 211; Fletcher v. Mott, 1 Aik. 339. Va.—Hutsonpiller's Admr. v. Stover's Admr., 12 Gratt. (53 Va.)

579; Smith's Admr. v. Charlton's Admr., 7 Gratt. (48 Va.) 425. Eng.—Winter v. Lightbound, 1 Strange 301, 93 Eng. Reprint 534; Underhill v. Devereux, 2 Wm. Saund. 68, 72, 85 Eng. Reprint 698, note.

[a] As the bringing of the writ of error is the act of the debtor himself, he cannot take advantage of the lapse of the time in which execution might issue after judgment, nor can he be surprised by the delay because that delay was in fact referable to himself. Hutsonpiller's Admr. v. Stover's Admr., 12 Gratt. (53 Va.) 579. See also Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

4. Vt.—Fletcher v. Mott, 1 Aik. 339. Va.—Hutsonpiller's Admr. v. Stover's Admr., 12 Gratt. (53 Va.) 579. Eng.—Winter v. Lightbound, 1 Strange 301, 93 Eng. Reprint 534; Withers v. Harris, 2 Ld. Raym. 806, 92 Eng. Reprint 38; Underhill v. Devereux, 2 Wm. Saund. 68, 72, 85 Eng. Reprint 698 (note); Goodwin v. Grudge, Cro. Eliz. 416, 78 Eng. Reprint 658.

[a] And where the defendant brought his writ of error after the expiration of the year and the day in which execution could issue, it had the effect of reviving the judgment, and plaintiff could have execution issued, without a scire facias, after the nonsuiting of the defendant. Bellasis v. Hanford, Cro. Jac. 364, 79 Eng. Reprint 312. See also Smith's Admr. v. Charlton's Admr., 7 Gratt. (48 Va.) 425.

5. Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089; Lytle v. Cincinnati Mfg. Co., 4 Ohio 459.

6. Cal.—Dewey v. Latson, 6 Cal. 130. Ill.—International Pack. Co. v. Cichowicz, 114 Ill. App. 121. N. Y.—Under-

(C.) **EFFECT OF ENJOINING ISSUANCE OF EXECUTION.**—While there were early English authorities to the effect that when issuance of an execution was stayed for a year or more by injunction, it could not be issued upon the dissolution of the injunction, without a *scire facias*,<sup>7</sup> it is now generally held that the period during which issuance of the writ is enjoined will be excluded from the period within which the execution may issue as of course.<sup>8</sup>

(D.) **WHERE THIRD PARTY CLAIM INTERPOSED.**—Where the creditor is prevented from enforcing his judgment because of a claim interposed by a third person, the running of the statute is suspended until the

wood v. Green, 56 N. Y. 247. **Tex.** Muller v. Boone, 63 Tex. 91.

[a] **Lapse of Appeal.**—When a party, having taken steps to appeal from a judgment against him, fails to file the transcript by the return day of the proper assignment, and abandons it, the appeal will be considered as having terminated with the return day, and execution may issue at any time within a year after the lapse. Muller v. Boone, 63 Tex. 91.

**Effect of appeal as stay, see the title "Supersedeas and Stay of Proceedings."**

7. **Winter v. Lightbound**, 1 Strange 301, 93 Eng. Reprint 534; **Booth v. Booth**, 6 Mod. 288, 87 Eng. Reprint 1029, 1 Salk. 322, 91 Eng. Reprint 285; **Hodson v. Warrington**, 3 P. Wms. 34, 24 Eng. Reprint 958. See also **Lytle v. Cincinnati Mfg. Co.**, 4 Ohio 459; **Hutsonpiller's Admr. v. Stover's Admr.**, 12 Gratt. (53 Va.) 579; **Smith's Admr. v. Charlton's Admr.**, 7 Gratt. (48 Va.) 425.

[a] **The reason given for this was that the court of chancery, not being a court of record, its injunction was not a matter of which the court of law would take notice.** **Hutsonpiller's Admr. v. Stover's Admr.**, 12 Gratt. (53 Va.) 579; **Winter v. Lightbound**, 1 Strange 301, 93 Eng. Reprint 534; **Booth v. Booth**, 1 Salk. 322, 91 Eng. Reprint 285.

8. **U. S.**—**Gottlieb v. Thatcher**, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. ed. 157 (under Colorado statute); **Muncaster v. Mason**, 2 Cranch C. C. 521, 17 Fed. Cas. No. 9,920. **Ark.**—**Lindsay v. Norrill**, 36 Ark. 545. **Cal.**—**Code Civ. Proc.**, §681. But see **Buell v. Buell**, 92 Cal. 393, 28 Pac. 443, prior to the enactment of the amendment to §681, **Code Civ. Proc. Colo.**—**Mills' Ann. St.**,

1912, §4159. **Ga.**—**Cox v. Montford**, 66 Ga. 62. **Ill.**—**International Pack. Co. v. Cichowicz**, 114 Ill. App. 121. **Minn.** **Wakefield v. Brown**, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. **Neb.** **Cotton v. First Nat. Bank**, 51 Neb. 751, 71 N. W. 1119. **N. Y.**—**Code Civ. Proc.**, §1382; **Little v. Harvey**, 9 Wend. 157; **United States v. Hanford**, 19 Johns. 173. **Ohio.**—**Lytle v. Cincinnati Mfg. Co.**, 4 Ohio 459. **S. C.** **Gibbes v. Mitchell**, 2 Bay 120. **Vt.** **Pub. St.**, 1906, §2146; **Catlin v. Merchants' Bank**, 36 Vt. 572; **Porter v. Vaughn**, 24 Vt. 211; **Fletcher v. Mott**, 1 Aik. 339. **Va.**—**Hutsonpiller's Admr. v. Stover's Admr.**, 12 Gratt. (53 Va.) 579; **Beale's Admr. v. Botetourt**, 10 Gratt. (51 Va.) 278; **Smith's Admr. v. Charlton's Admr.**, 7 Gratt. (48 Va.) 425; **Noland v. Seekright**, 6 Munf. (20 Va.) 185. **Eng.**—**Michell v. Cue**, 2 Burr 660, 97 Eng. Reprint 498.

[a] **It makes no difference how long the injunction continues, and, if the parties remain the same, the judgment may, upon the dissolution of the injunction, be enforced without a revivor of the judgment.** **Hutsonpiller's Admr. v. Stover's Admr.**, 12 Gratt. (53 Va.) 579.

[b] **The presumption of payment or release arising from the lapse of time without issuing execution, is repelled by the pendency of an injunction.** **Hutsonpiller's Admr. v. Stover's Admr.**, 12 Gratt. (53 Va.) 579.

[c] **The delay in issuing execution because of an injunction, being the act of the debtor himself, he will not be allowed to take advantage of it, to the prejudice of the creditor.** **United States v. Hanford**, 19 Johns. (N. Y.) 173; **Michell v. Cue**, 2 Burr. 660, 97 Eng. Reprint 498. See **Wakefield v. Brown**, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

claim is disposed of.<sup>9</sup> But the pendency of an action in equity instituted by the creditor to subject certain property to the satisfaction of his judgment will not have the effect of stopping the running of the limitation.<sup>10</sup>

(E.) DEBTOR'S ABSENCE FROM STATE. — It has been held that the time in which the debtor is absent from the state will not be excluded in computing the limits by the statute for the issuance of execution,<sup>11</sup> but the weight of authority seems to be to the contrary.<sup>12</sup>

(V.) Effect of Premature Issuance. — A writ of execution issued prior to the expiration of the time given by the statutes as a beneficial delay to the judgment debtor is not thereby rendered void, but is merely irregular,<sup>13</sup> and must be respected and obeyed by the ministerial officer, until vacated by appropriate legal proceedings,<sup>14</sup> which

9. *Rogers v. Smith*, 98 Ga. 788, 25 S. E. 753.

As to third party claims, see *infra*, II, B, 6.

10. *White & Cochran v. Moore*, 100 Ky. 358, 38 S. W. 505.

11. *Weisbecker v. Cahn*, 14 N. D. 390, 104 N. W. 513, since the absence of the debtor does not prevent the issuance of execution.

12. *Mudge v. Livermore*, 148 Iowa 472, 123 N. W. 199; *Shelden v. Barlow*, 108 Mich. 375, 66 N. W. 338 (by analogy to the statute).

[a] In *Brittain v. Lankford*, 110 Ky. 484, 61 S. W. 1000, under a statute declaring that execution could issue at any time until collection upon the judgment was barred by the statute of limitations (fifteen years), it was held that the absence of the debtor from the state would suspend the running of the statute and the creditor's right to have execution issued would not be barred within the fifteen years.

13. *U. S.*—*United States v. Conway*, *Hempst.* 313, 25 Fed. Cas. No. 14,849; *Dawson v. Daniel*, 2 *Flip.* 305, 7 Fed. Cas. No. 3,669; *Blaine v. Ship Charles Carter*, 4 *Cranch* 328, 333, 2 L. ed. 636. *Ala.*—*Christian, etc. Groc. Co. v. Michael*, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; *Deloach v. Robbins*, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; *Olmstead v. Brewer*, 91 Ala. 124, 8 So. 345; *Waldrop v. Friedman*, 90 Ala. 157, 7 So. 510, 24 Am. St. Rep. 775; *Steele v. Tutwiler*, 68 Ala. 107. *Ga.*—*Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672. *Ill.*—*Shimp v. Hay*, 8 Ill. App. 66. *Ind.*—*Jones v.*

*Carnahan*, 63 Ind. 229. *Ky.*—*Graham v. Lynn*, 4 B. Mon. 17, 39 Am. Dec. 493. *La.*—*Pottery Co. v. Levi & Co.*, 48 La. Ann. 777, 19 So. 752; *Regan v. Washburn*, 39 La. Ann. 1071, 3 So. 178. *Minn.*—*Hoerr v. Meihofers*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674. *Mo.*—*Carson v. Walker*, 16 Mo. 68. *N. Y.*—*Bacon v. Cropsey*, 7 N. Y. 195. *Pa.*—*Wilkinson's Appeal*, 65 Pa. 189; *Stewart v. Stocker*, 13 Serg. & R. 199, 15 Am. Dec. 589. *Tenn.*—*Miller v. O'Bannon*, 4 Lea 398; *Carpenter, Ross & Lockett v. Mechanics Sav. Bank*, 1 Lea 202 (issuance before stay of execution had elapsed). *Tex.*—*Hubbart v. Willis State Bank* (Tex. Civ. App.), 152 S. W. 458; *House v. Robertson* (Tex. Civ. App.), 34 S. W. 640. *Vt.*—*Spring v. Ayer*, 23 Vt. 516. See *Mattocks v. Judson*, 9 Vt. 343.

[a] A statute providing that no process shall issue on any judgment until it has been publicly read in open court and signed (*Burns' Ann. St.*, 1914, §1450) has been held to be merely directory, and an execution issued before such reading and signing is merely irregular and not void. *Jones v. Carnahan*, 63 Ind. 229.

[b] A *feri facias* prematurely issued is a mere irregularity. If the defendant suffers the delay to expire without any action, he waives the prematurity. *Pottery Co. v. Levi & Co.*, 48 La. Ann. 777, 19 So. 752.

14. *Ala.*—*Olmstead v. Brewer*, 91 Ala. 124, 8 So. 345; *Steele v. Tutwiler*, 68 Ala. 107. *Ill.*—*Shrimp v. Hay*, 8 Ill. App. 66. *N. Y.*—*Bacon v. Cropsey*, 7 N. Y. 195. *Tenn.*—*Miller v. O'Bannon*, 4 Lea 398. *Tex.*—*House v. Robertson* (Tex. Civ. App.), 34 S. W. 640.



can be instituted only at the instance of the judgment debtor in a direct proceeding.<sup>15</sup>

(VI.) On Transcript or Abstract of Judgments of Inferior Courts.<sup>16</sup> Some statutes providing for the filing of a transcript or abstract of an inferior court judgment in a superior court, have been construed to prolong the life of the judgment transferred, so that execution may issue thereon at any time within the limit for judgments of the superior court.<sup>17</sup> Under other statutes, however, a contrary view is maintained, that the writ of execution can issue upon the transcript only within the same period of time as it could have issued upon the judgment if it had not been removed by transcript.<sup>18</sup> While under other statutes giving to the act of filing the transcript the same effect as rendering a judgment, it is held that this period begins at the time the transcript is filed and docketed.<sup>19</sup>

g. *To What County Execution May Issue.*—(I.) In General. —At common law an execution could not go beyond the territorial jurisdic-

15. Ala.—*Christian, etc. Groc. Co. v. Michael*, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; *DeLoach v. Robbins*, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; *Olmstead v. Brewer*, 91 Ala. 124, 8 So. 345. Ark.—*State v. Norris*, 19 Ark. 247. Ill.—*Shrimp v. Hay*, 8 Ill. App. 66. Ind.—*Jones v. Carnahan*, 63 Ind. 229. Ky.—*Graham v. Lynn*, 4 B. Mon. 17, 39 Am. Dec. 493. N. Y. *Bacon v. Cropsey*, 7 N. Y. 195. S. C. *Mason & Risch Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755. Tenn. *Miller v. O'Bannon*, 4 Lea 398.

Method of vacating or quashing writ, see *infra*, IV.

16. Transcripts or abstracts of judgments of inferior courts as foundation of execution, see *supra*, II, B, 1, b, (IX), (A).

17. Ia.—*Stover v. Elliot*, 80 Iowa 329; *McCoy & James v. Cox*, 54 Iowa 595, 7 N. W. 44. Mich.—*Cole v. Potter*, 135 Mich. 326, 97 N. W. 774, 106 Am. St. Rep. 398; *Wileox v. Lantz*, 107 Mich. 1, 64 N. W. 735. Mo.—*Carpenter v. King*, 42 Mo. 219; *Tracy v. Whitsett*, 51 Mo. App. 149. N. C.—*Daniel v. Laughlin*, 87 N. C. 433; *Broyles v. Young*, 81 N. C. 315. N. D.—*Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36.

[a] When Period of Limitation Begins to Run.—Even as between the cases holding that the filing of the transcript changes the period of limitation in which execution may issue as

of course, there is a conflict as to when this period begins to run, some holding that it is from the time the judgment was entered by the justice of the peace. Ill.—*Hay v. Hayes*, 56 Ill. 342. Ind.—*Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243. Mich. *Wileox v. Lantz*, 107 Mich. 1, 64 N. W. 735. N. Y.—*People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236. N. D.—*Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36.

18. Cal.—*Kerns v. Graves*, 26 Cal. 156. Neb.—*Farmers' State Bank v. Bales*, 64 Neb. 870, 90 N. W. 945. S. D.—*Phillips v. Norton*, 18 S. D. 530, 101 N. W. 727.

19. Ia.—*Miller v. Rosebrook*, 136 Iowa 158, 113 N. W. 771; *Stover v. Elliot*, 80 Iowa 329, 45 N. W. 901; *Rand & Co. v. Garner*, 75 Iowa 311, 39 N. W. 515; *McCoy & James v. Cox*, 54 Iowa 595, 7 N. W. 44. Mo.—*Carpenter v. King*, 42 Mo. 219; *Tracy v. Whitsett*, 51 Mo. App. 149. S. D. *Williams v. Rice*, 6 S. D. 9, 60 N. W. 153.

[a] The effect of the latter construction, as said in *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36, is to make a justice court judgment superior to a district court judgment, for it gives the person in whose favor the justice court judgment is rendered all the advantages obtainable in the justice court, and also authorizes him, by filing a transcript thereafter, to have the full period for all district court remedies.

tion of the particular court rendering the judgment,<sup>20</sup> at least until execution had been issued therein and returned nulla bona.<sup>21</sup> And this rule still obtains except in so far as it has been changed by statutes.<sup>22</sup> Statutes sometimes provide that executions issued upon any judgment, order or decree rendered in any court of record, may be directed to any county in the state.<sup>23</sup> There are similar provisions in other states permitting the issuance of executions to counties other than that in which the judgment was rendered,<sup>24</sup> though under some circumstances the execution must be directed to the county where the property is situated.<sup>25</sup>

20. *Sappington v. Hoy's Heirs*, 6 Mon. (Ky.) 46.

[a] "At common law, an execution issued by a court having jurisdiction within a limited territory or district, as a county, for example, could only be directed to the officer of that district, territory, or county, in which the judgments were obtained." *Scott v. Maupin*, Hard. (Ky.) 122.

[b] Where the jurisdiction of the court extends throughout the state, an execution may issue to any county therein. *Com. v. Caldwell*, 2 Bibb. (Ky.) 8; *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621.

21. See *infra*, II, B, 1, g, (III).

22. *Ala.*—*Pond v. Griffin*, 1 Ala. 678. *Ky.*—*Sanders' Heirs v. Ruddell*, 2 Mon. 139, 15 Am. Dec. 148; *Mason v. Rogers*, 4 Litt. 375; *Scott v. Maupin*, Hard. 122. *Minn.*—*Gowan v. Fountain*, 50 Minn. 264, 52 N. W. 862. *N. Y.* *People v. Van Eps*, 4 Wend. 387. *Okla.* *Needles v. Frost*, 2 Okla. 19, 35 Pac. 574. *Wis.*—*Bugbee v. Lombard*, 38 Wis. 271, 60 N. W. 414; *Kentzler v. Chicago M. & St. P. R. R. Co.*, 47 Wis. 641, 3 N. W. 369.

[a] "In the absence of special statutory authority, executions cannot run beyond the county where the judgment is rendered, or beyond the jurisdiction of the court that rendered judgment." *Needles v. Frost*, 2 Okla. 19, 35 Pac. 574.

23. See generally the statutes, and the following: *Ark.*—*Kirby's Dig. St.*, 1904, §3206, without first procuring an order of the court for that purpose. *Mich.*—*Rathbun v. Ranney*, 14 Mich. 382. *Mo.*—*Rev. St.*, 1909, §§2176, 2177; *Tinsley v. Savage*, 50 Mo. 141; *Maze v. Griffin*, 65 Mo. App. 377. *Wash.* *Rem. & Bal. Code*, §514.

24. See generally the statutes, and the following: *Cal.*—*Code Civ. Proc.*,

§687. *Fla.*—*Gen. St.*, 1906, §1614. *Ind.* *Burns' Ann. St.*, 1914, §723; *Doe v. Harter*, 1 Ind. 427. *Ia.*—*Code Supp.*, 1907, §3955. *Minn.*—*Rev. Laws*, 1905, §4293, where the judgment is docketed. *Mont.*—*Rev. Codes*, 1907, §6820. *Utah.* *Comp. Laws*, 1907, §3239.

[a] Such statutes do not take away the common-law right of the judgment-creditor to have an execution issue to the county in which the judgment has been rendered. *Scott v. Maupin*, Hard. (Ky.) 122.

[b] Under an early statute in Kentucky an execution might issue to any county where the defendant or his property might be found, where he absented or removed himself or his effects, or resided outside of the jurisdiction of the court. *Young v. Smith*, 10 B. Mon. 293; *Chiles, Sappington, etc. v. Hoy's Heirs*, 6 Mon. 46; *Sanders' Heirs v. Norton*, 4 Mon. (Ky.) 464; *Cox v. Nelson*, 1 Mon. (Ky.) 94, 15 Am. Dec. 89; *McCouns v. Holmes*, 4 Lit. (Ky.) 389.

[c] If a defendant removes from the county in which the judgment was rendered, to any other county, an execution may issue to such county. *Harden & Carson v. Moores*, 7 Har. & J. (Md.) 4.

[d] Where a writ is issued against three, two of whom are in one county and the third in another county, in which latter county, the judgment is rendered, in the absence of special instructions the clerk may issue an execution to either county. *Bank of Cape Fear v. Stafford*, 47 N. C. 98.

25. When the execution requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. *Cal.*—*Code Civ. Proc.*, §687. *Ind.*—*Burns' Ann. St.*, 1914, §723. *Minn.*—*Rev. Laws*,

(II.) Necessity for Docketing Judgment When Issued Out of County of Venue.<sup>26</sup>—Some statutes provide that execution against the property of a judgment debtor, situated in a county other than that in which the judgment was rendered, can only be issued after the judgment has been docketed in such other county, or a transcript filed therein.<sup>27</sup> But in those states where the execution is issued out of the court which rendered the judgment, the transcript thereof and the execution are usually sent to the other county at the same time, the docketing of the

1905, §4293. **Mont.**—Rev. Codes, 1907, §6820. **N. Y.**—Code Civ. Proc., §1365. **S. C.**—Code Civ. Proc., 1902, §306. **S. D.**—Code Civ. Proc., 1910, §332. **Tex.**—Vernon's Sayles' Civ. St., 1914, §3726. **Utah.**—Comp. Laws, 1907, §3239. **Wash.**—Rem. & Bal. Code, §514. **Wis.**—St., 1898, §2971.

26. Necessity for entry or docketing of judgments generally, see 14 **STANDARD PROC.** 988, et seq.; as prerequisite to issuance of execution, see *supra*, II, B, 1, b, (1), (C).

27. See generally the statutes and the following: **Minn.**—Mollison v. Eaton, 16 Minn. 426, 10 Am. Rep. 150; Dodge v. Chandler, 9 Minn. 97. **Miss.** Smith v. Mixon, 73 Miss. 581, 19 So. 295. **N. Y.**—Code Civ. Proc., §1365; Dunham v. Reilly, 110 N. Y. 366, 18 N. E. 89; Nanz v. Oakley, 60 Hun 431, 15 N. Y. Supp. 1; People v. Lott, 21 Barb. 130; Disosway v. Hayward, 1 Dem. Surr. 175; Blivin v. Bleakley, 23 How. Pr. 124; Stoutenburgh v. Vandenberg, 7 How. Pr. 229. **Okla.** Rev. Laws, 1910, §5148. **Pa.**—Lehigh & N. E. R. R. Co. v. Hanhauser, 222 Pa. 248, 70 Atl. 1089; Nelson v. Guffey, 131 Pa. 273, 18 Atl. 1073; Baker v. King, 2 Grant Cas. 254. **S. C.**—Code Civ. Proc., 1902, §306; Loric & Lowrance v. McCreery, 20 S. C. 424. **S. D.** Code Civ. Proc., 1910, §332. **Wis.**—St., 1898, §2971; Bugbee v. Lombard, 88 Wis. 271, 60 N. W. 414; Rogers v. Cherrier, 75 Wis. 54, 43 N. W. 828; Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717; Chase v. Overton, 50 Wis. 640, 7 N. W. 667; Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369; Smith v. Buck, 22 Wis. 577.

[a] **Condition Precedent.**—The docketing of a judgment in the county to which the execution may go is a condition precedent of the authority to issue it, and a statutory power upon condition precedent cannot be executed without compliance with the condition.

The docketing of a judgment in another county is jurisdictional to an execution upon it to that county. *Kentzler v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 641, 3 N. W. 369. And see *Bugbee v. Lombard*, 88 Wis. 271, 60 N. W. 414.

[b] **Both an Authority and a Prohibition.**—The language of the code that executions against property "can be issued only to a county, etc.," seems to involve both an authority and a prohibition; an authority where the judgment is docketed in any county to issue the execution to that county; and a prohibition couched in the word "only" against any such issuance to a county in whose clerk's office there is no such docket. *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89.

[c] **Only the original judgment may be used as a basis for the filing of the transcript in a different county.** The judgment creditor may take as many copies of the original judgment as he may need, and file them in as many different counties, but he cannot take a copy of the record of one of the transferred judgments and make that a basis of a new transfer upon which to sue out an execution. *Nelson v. Guffey*, 131 Pa. 273, 18 Atl. 1073.

[d] **Docketing Not Presumed.**—"The fact of the existence of the judgment in the county of its rendition, and that an execution had been issued to another county, does not afford any presumption of the existence of the independent and material fact essential to its validity; namely, that the judgment had been properly docketed in such (other) county. . . . A mere recital of such docketing, if any there had been, in the execution would not supply the defect in a case such as this, where a judgment duly docketed is indispensable to the validity of the execution." *Bugbee v. Lombard*, 88 Wis. 271, 60 N. W. 414.



judgment in the latter county not being a condition precedent to the issuance of the execution.<sup>28</sup>

(III.) **Issuance in County of Venue as Prerequisite to Issuance Outside.** The common-law rule required as a prerequisite to the issuance of an execution in any other county than that in which the judgment was rendered that execution first issue in the county in which the judgment was rendered and be returned *nulla bona*.<sup>29</sup> This rule still obtains in some jurisdictions by express provision of statute.<sup>30</sup> In others it is modified to the extent that no execution can issue to any other county than that in which the judgment was rendered, or that in which the defendant resides,<sup>31</sup> until execution has issued to one of such

[e] **Effect of Issuance Before Docketing.**—(1) An execution issued to a county other than the one in which the judgment was rendered is valid though taken from the clerk's office before the judgment is docketed in the county to which it runs, but not delivered to the sheriff for service until after the judgment is so docketed. *Hoerr v. Mehofer*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674; *Gowan v. Fountain*, 50 Minn. 264, 52 N. W. 862; *Mollison v. Eaton*, 16 Minn. 426; *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815. (2) But as against the owner seeking to recover his property in replevin, the sheriff cannot justify its seizure under an execution on a judgment transcribed from another county, if the execution was delivered to the sheriff before the judgment was docketed in the county to which the transcript was taken. *Carson v. Fuller*, 11 S. D. 502, 78 N. W. 960.

[f] **Judgment may be docketed nunc pro tunc** in other county thus curing any defect. *Roth v. Schloss*, 6 Barb. (N. Y.) 308; *Blivin v. Bleakley*, 23 How. Pr. (N. Y.) 124; *Stoutenburgh v. Vandenburgh*, 7 How. Pr. (N. Y.) 229.

[g] **Effect of Subsequent Filing of Transcript.**—Where such an execution was prematurely issued and levied, the subsequent filing of the transcript cures the defect as to all persons claiming the property levied upon by a conveyance from the defendant made subsequent to such filing. *Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828.

28. *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

[a] The docketing of the judgment is only for the purpose of giving a lien in such other county, and is not a

condition precedent to issuing an execution. *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; *Lytle v. Lytle*, 94 N. C. 683. See also *Foreman v. Higham*, 35 Iowa 382.

29. See the following: U. S.—*Leshner v. Gehr*, 1 Dall. 330, 1 L. ed. 161. Pa.—*McCormick v. Meason*, 1 Serg. & R. 92. Eng.—*Cowperthwaite v. Owen*, 3 Term R. 657, 100 Eng. Reprint 788.

[a] "The original *feri facias* is so much in nature of a fiction, where the object is to levy on lands in another county, that if a *testatum* is issued without a previous *fi. fa.* the court will give leave to file one afterwards, in order to support the *testatum*." *McCormick v. Meason*, 1 Serg. & R. (Pa.) 92. See *Cowperthwaite v. Owen*, 3 Term R. 657, 100 Eng. Reprint 788; *Palmet v. Price*, 2 Salk. 589, 91 Eng. Reprint 494.

30. *Vernon's Sayles' Tex. Civ. St.*, 1914, §3726; *Norwood v. Orient Ins. Co.* (Tex. Civ. App.), 44 S. W. 188; *Benson v. Cahill* (Tex. Civ. App.), 37 S. W. 1088. See also *Harden v. Moores*, 7 Har. & J. (Md.) 4, 13.

[a] Where two executions are issued to different counties on the same day, the one issued to the county in which the judgment was rendered being returned on that day, in the absence of evidence to the contrary, it will be presumed that it was returned before the execution to the other county was issued. *Brackenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034.

[b] But where the cause is removed to another county at the instance of the defendant, execution may issue to the original county of venue without a return *nulla bona* in the county in which judgment is rendered. *Browning v. Loraw*, 58 Md. 524.

31. *Carroll's Ky. St.*, 1915, §1656;

counties. But in many jurisdictions statutes now provide that executions may issue at the same time to different counties.<sup>32</sup>

(IV.) *Effect of Irregular Issuance to County Other Than County of Venue.* An execution irregularly issued to a county other than the county of venue is not ordinarily void, but voidable only at the instance of the judgment-debtor.<sup>33</sup> There are authorities, however, to the effect that an execution issued out of the county of venue without the judgment having been docketed in such other county or a transcript filed therein is void.<sup>34</sup>

h. *Effect of Death of Parties* — (I.) *Death of Sole Plaintiff.* — (A.) *AT COMMON LAW.* — At common law no execution could issue upon a judgment after the plaintiff therein had died, until the judgment had been revived by scire facias in favor of the legal representatives of the deceased.<sup>35</sup>

Vance's Admx. v. Gray & Saffell, 9 Bush (Ky.) 656.

[a] An execution issued without such a previous return may be set aside by the defendant; but until he does so it must be obeyed by the officer receiving it, and a sale made under it is not void. *Mitchell, etc. v. Fidelity T. & S. V. Co.*, 24 Ky. L. Rep. 62, 67 S. W. 263.

[b] But an affidavit by the plaintiff, his agent or attorney, that there is not sufficient property in either of these counties, authorizes the issuance of execution to other counties. *Carroll's St.*, 1915, §1656, subd. 1; *Gorman v. Glenn*, 25 Ky. L. Rep. 1755, 78 S. W. 873 (St., 1903, §1656); *Vance's Admx. v. Gray & Saffell*, 9 Bush (Ky.) 656.

32. See generally the statutes and the following: *Cal.*—Code Civ. Proc., §687. *Colo.*—*People v. Finch*, 19 Colo. App. 512, 76 Pac. 1120. *Ind.*—*Burns' Ann. St.*, 1914, §718. *Kan.*—*Gen. St.*, 1909, §6033. *La.*—Code Civ. Proc., art. 614. *Mich.*—*Howell's Ann. St.*, 1913, §13,008. *Minn.*—*Rev. Laws*, 1905, §4293. *Mo.*—*Rev. St.*, 1909, §2176; *Hicks v. Ellis*, 65 Mo. 176. *Mont.* *Rev. Codes*, 1907, §6820. *Neb.*—*Rev. St.*, 1913, §8042. *N. J.*—*Rammel v. Watson*, 31 N. J. L. 281. *N. Y.*—Code Civ. Proc., §1365; *Dorland v. Dorland*, 5 Cow. 417; *Hammond v. Mather*, 2 Cow. 456. *N. C.*—*Rev.*, 1905, §622; *Vegelahn v. Smith*, 95 N. C. 254; *McNair v. Ragland*, 17 N. C. 42, 22 Am. Dec. 728. *N. D.*—*Rev. Codes*, 1905, §7102. *Ohio.*—*Elliott v. Elmore*, 16 Ohio 27. *S. C.*—Code Civ. Proc., 1902, §306. *S. D.*—Code Civ. Proc., 1910, §332. *Tex.*—*Vernon's Sayles' Civ. St.*,

1914, §3728. *Utah.*—*Comp. Laws*, 1907, §3239. *Wis.*—*St.*, 1898, §2971.

[a] But in Iowa it is provided that only one writ shall be in existence at the same time. Code Supp., 1907, §3955.

33. *Ky.*—*Soaper v. Howard*, 85 Ky. 256, 3 S. W. 161; *Young v. Smith*, 10 B. Mon. 293; *McConnell v. Brown*, 5 Mon. 478; *Sanders' Heirs v. Ruddell*, 2 Mon. 139; *Cox v. Nelson*, 1 Mon. 94; *Com. for Lee, Lashbrook & Co. v. O'Cull*, 7 J. J. Marsh. 149, 23 Am. Dec. 393; *Mitchell v. Fidelity Tr. & S. Vault Co.*, 24 Ky. L. Rep. 62, 67 S. W. 263. *Minn.*—*Gowan v. Fountain*, 50 Minn. 264, 52 N. W. 862; *Mollison v. Eaton*, 16 Minn. 426, 10 Am. Rep. 150. *N. Y.* *Roth v. Schloss*, 6 Barb. 308; *Blivin v. Bleakley*, 23 How. Pr. 124. *Okla.* *Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. *Pa.*—*Elliott v. McGowan*, 22 Pa. 198. *Tex.*—*Schneider v. Dorsey*, 96 Tex. 544, 74 S. W. 526; *Hodde v. Susan*, 58 Tex. 389; *Hancock v. Metz*, 15 Tex. 205; *Earle v. Thomas*, 14 Tex. 583; *Sydnor v. Roberts*, 13 Tex. 598; *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 55 S. W. 610. See *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

34. *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89 (*disturbance*); *Blivin v. Bleakley*, 23 How. Pr. 124; *Stoutenburgh v. Vandenburgh*, 7 How. Pr. 229; *Nanz v. Oakley*, 60 Hun 431, 15 N. Y. Supp. 1; *Bugbee v. Lombard*, 88 Wis. 271, 60 N. W. 414; *Kentzler v. Chicago, M. & St. P. Ry.*, 47 Wis. 641, 3 N. W. 369.

Necessity for docketing judgment, see *supra*, II, B, 1, b, (I), (C).

35. *Ala.*—*Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127. *Ill.*—*Brown*

(B.) UNDER STATUTE.—(1.) *In General*.—Although some jurisdictions still follow the common-law practice of reviving a judgment by scire facias after the death of a sole plaintiff before issuing execution,<sup>36</sup> in many states the writ of scire facias itself has been abolished or fallen into disuse, and after the death of a sole plaintiff the judgment is revived and the legal representatives or heirs made parties thereto by a statutory proceeding, similar to the one had under the writ of scire facias, before execution may issue.<sup>37</sup> And statutes frequently provide that the death of the sole plaintiff will not delay or prevent the issuance of an execution upon a judgment rendered in his favor before his death,<sup>38</sup> but that on application of the executor<sup>39</sup> or adminis-

*v. Parker*, 15 Ill. 307. **Mass.**—*Hildreth v. Thompson*, 16 Mass. 191. **N. J.**—*Morgan v. Taylor*, 38 N. J. L. 317; *Warwick v. ———*, 20 N. J. L. 116; *Harwood v. Murphy*, 13 N. J. L. 193. **N. Y.**—*Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. D.**—*Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271. **R. I.**—*Tücker v. Carr*, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893. **Va.**—*May v. North Carolina Bank*, 2 Rob. (41 Va.) 60. **Eng.**—*Earl v. Brown*, 1 Wils. K. B. 302, 95 Eng. Reprint 630; *Regina v. Ford*, 2 Ld. Raym. 768, 92 Eng. Reprint 13; *Jefferson v. Morton*, 2 Wms. Saund. 6, 85 Eng. Reprint 540, note.

[a] If death occur after the teste of the writ, it may be executed notwithstanding the death, by the personal representative. *Neil v. Gaut*, 1 Coldw. (Tenn.) 396. See *infra*, II, B, 1, h, (IV), (B).

Revival of judgment by scire facias, see the title "Judgments and Decrees, Revival of."

36. Alabama Code, 1907, §§4149, 4150; *Smith v. Alexander*, 80 Ala. 251; *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127; *Moore & Cocke v. Bell*, 13 Ala. 469.

See generally the title "Judgments and Decrees, Revival of."

37. **Kan.**—Gen. St., 1909, §6031; *Seeley v. Johnson*, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314; *Ballinger v. Redhead*, 1 Kan. App. 434, 40 Pac. 828. **Mich.**—*Jenness v. Circuit Judge*, 42 Mich. 469, 4 N. W. 220. **Mo.**—Rev. St., 1909, §2136; *Goddard v. Delaney*, 181 Mo. 564, 80 S. W. 886. **Neb.**—Rev. St., 1913, §8031. **Ohio.**—*Page v. Adams*, Ann. Code, §11,649; *Cist v. Beresford*,

1 Ohio Cir. Ct. 32, 1 Ohio Cir. Dec. 19. **Okla.**—Rev. Laws, 1910, §5299.

[a] Although the writ of scire facias has been abolished, the procedure provided in lieu thereof is governed essentially by the same general principles. Before execution may issue, the judgment must be revived and the legal representatives made parties to the same. *Vogt v. Daily*, 70 Neb. 812, 98 N. W. 31.

38. See generally the statutes and the following: **Ark.**—*Kirby's Dig.*, 1904, §3216. **Colo.**—*Mills' Ann. St.*, 1912, §4212. **Idaho.**—Rev. Code, 1908, §4475. **Ill.**—*Hurd's Rev. St.*, 1916, ch. 77, §37. **Ia.**—Ann. Code, 1897, §4067. **Ky.**—*Carroll's Code*, 1906, §402.

39. See generally the statutes and the following: **Ind.**—*Armstrong v. McLaughlin*, 49 Ind. 370. **Ky.**—*Carroll's Code*, 1906, §402. **Minn.**—*Lough v. Pitman*, 25 Minn. 120. **Mont.**—Rev. Code, 1907, §6819. **Mo.**—*Simmons v. Heman*, 17 Mo. App. 444. **Nev.**—Rev. Laws, 1912, §5285. **N. Y.**—Code Civ. Proc., §1376; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. D.**—Rev. Code, 1905, §8169; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271. **Pa.**—*Pepper & Lewis's Dig.*, p. 2652, §154 (Act of Feb. 24, 1834, §26); *Gemmell v. Butler*, 4 Pa. 232; *Darlington v. Speakman*, 9 Watts & S. 182. See *Deiser v. Sterling*, 10 Serg. & R. 119, for practice prior to 1834 and also prior to Act of 1791. **P. R.**—Code Civ. Proc., §244; *Fernandez v. Velazquez*, 17 Porto Rico 716. **S. D.**—Probate Code, 1910, §183. **Tex.**—*Vernon's Sayles' Civ. St.*, 1914, §3720. **Utah.**—Comp. Laws, 1907, §3238; *Weaver v. Pickard*, 7 Utah 296, 26 Pac. 581. **Wis.**—St., 1898, §2979.



trator, or the successor in interest<sup>40</sup> of the deceased, execution will issue.

(2.) *Conditions Precedent to Obtaining Issuance of Writ.* — The requirements of the statutes, as to the preliminary steps to be taken by a personal representative or heir before he is entitled to have an execution in his name, on a judgment in favor of a decedent, are imperative and must be strictly complied with.<sup>41</sup> Thus the affidavits required by law must be filed.<sup>42</sup> And if the legal representative of the deceased plaintiff seeks to have execution issued, he must file a copy of the letters testamentary or of administration in the court in which the judgment exists,<sup>43</sup> and, under some circumstances, a bond.<sup>44</sup>

Upon compliance with all conditions precedent, execution will thereafter issue in favor of the legal representatives, heirs or successors in interest, in the same manner as if the judgment or decree were recovered in his name.<sup>45</sup>

(C.) EFFECT OF FAILURE TO REVIVE. — An execution issued after the death of a plaintiff without a prior revivor<sup>46</sup> by scire facias or its

[a] But, though the administrator of the plaintiff may have execution upon the judgment without a revivor, he is entitled to have it revived. *Armstrong v. McLaughlin*, 49 Ind. 370.

40. See generally the statutes and the following: Kan.—*Harris v. Frank*, 29 Kan. 200. Ky.—*Carroll's Code*, §402. Miss.—*Code*, 1906, §3975. Mont.—*Rev. Code*, 1907, §6819. Nev.—*Rev. Laws*, 1912, §5285. N. Y.—*Code Civ. Proc.*, §1376. Utah.—*Comp. Law*, 1907, §3238. Wis.—*St.*, 1898, §2979.

[a] It is not necessary that a judgment which has been assigned should be revived because of the death of the original plaintiff, before execution may be issued in favor of the assignee. *Harris v. Frank*, 29 Kan. 200.

41. *Lee's Admr. v. Thompson*, 132 Ky. 608, 116 S. W. 775; *Mulholland v. Troutman's Admr.*, 10 Ky. L. Rep. 263; *Williams v. Staton*, 4 Ky. L. Rep. 225; *Scott v. Lyons, Solomon & Co.*, 59 Tex. 593.

42. Assignee must file an affidavit showing the assignment. *Miss. Code*, 1906, §3975; *Wis. St.*, 1898, §2979.

[a] Both a successor in interest and a personal representative must file an affidavit stating the fact of the death of the plaintiff. *Miss.—Code*, 1906, §3975, successor in interest. *Tex. Vernon's Sayles' Civ. St.*, 1914, §3720; *Scott v. Lyons, Solomon & Co.*, 59 Tex. 593 (such affidavit condition precedent to right of clerk to issue execution). *Wis.—St.*, 1898, §2979.

[b] A real party in interest, after

the death of the nominal judgment plaintiff, may have execution issued in his name, upon filing an affidavit of such death with the clerk. *Vernon's Sayles' Tex. Civ. St.*, 1914, §3722.

43. Ark.—*Kirby's Dig. St.*, 1904, §3216. Colo.—*Mills' Ann. St.*, 1912, §4212. Ill.—*Hurd's Rev. St.*, 1916, ch. 77, §37; *Brown v. Parker*, 15 Ill. 307. Ia.—*Ann. Code*, 1897, §4067; *Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437. Ky.—*Lee's Admr. v. Thompson*, 132 Ky. 608, 116 S. W. 775; *Williams v. Staton*, 4 Ky. L. Rep. 225. N. J. *Comp. St.*, 1911, p. 4108, §183. Tex. *Vernon's Sayles' Civ. St.*, 1914, §3720; *Scott v. Lyons, Solomon & Co.*, 59 Tex. 593. Wis.—*St.*, 1898, §2979.

[a] This is a condition precedent to the authority of the clerk to issue an execution upon the judgment in the name of the administrator (*Scott v. Lyons, Solomon & Co.*, 59 Tex. 593), and an execution issued without it is subject to quashal. *Lee's Admr. v. Thompson*, 132 Ky. 608, 116 S. W. 775.

44. *Carroll's Codes (Ky. Civ.)*, 1906, §404.

45. Ark.—*Kirby's Dig. St.*, 1904, §3216. Colo.—*Mills' Ann. St.*, 1912, §4212. Idaho.—*Rev. Code*, 1908, §4475. Ill.—*Hurd's Rev. St.*, 1916, ch. 77, §37; *Brown v. Parker*, 15 Ill. 307. Ia.—*Ann. Code*, 1897, §4067.

46. Ala.—*Smith v. Alexander*, 80 Ala. 251; *Graham v. Chandler*, 15 Ala. 342; *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127. Ill.—*Meyer v. Minton*, 106 Ill. 414; *Brown v. Parker*,

statutory substitute has generally been held void, although some courts hold it merely voidable.<sup>47</sup>

(II.) **Death of Co-Plaintiff.** — At common law,<sup>48</sup> and still in some jurisdictions, where a judgment is recovered by several, and one or more of them dies, execution may be issued after the death in favor of the survivors without a revivor;<sup>49</sup> but the death of such plaintiff or plaintiffs should be suggested on the record.<sup>50</sup> Statutes, however, sometimes allow the revival of a judgment after the death of a co-plaintiff in the name of the legal representatives of the deceased plaintiff and the surviving plaintiffs, executions being thereafter sued out by them jointly.<sup>51</sup> And in some jurisdictions, the surviving plaintiff or plaintiffs cannot issue execution, unless the executor or administrator of his deceased co-plaintiff is made a party.<sup>52</sup>

(III.) **Death of All Co-Plaintiffs.** — Statutes sometimes provide for the contingency of the death of all of several co-plaintiffs.<sup>53</sup>

(IV.) **Death of Sole Defendant.** — (A.) **IN GENERAL.** — Under the common-law rule, the death of a sole defendant after judgment but before execution had issued, arrested the suit and execution could not issue thereafter, until the legal representatives or heirs were summoned by a scire facias and the judgment revived against them as parties.<sup>54</sup>

15 Ill. 307. **Ia.**—*Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437. **Kan.** *Sealey v. Johnson*, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314, rule held applicable to an order of sale as well as an execution. **N. J.**—*Morgan v. Taylor*, 38 N. J. L. 317. **N. Y.**—See *Wallace v. Swinton*, 64 N. Y. 188.

47. **Mich.**—*Jenness v. Circuit Judge*, 42 Mich. 469, 4 N. W. 220. **Miss.** *Hughes v. Wilkinson's Lessee*, 37 Miss. 482; *New Orleans, Jackson & Great Northern R. Co. v. Rollins*, 36 Miss. 384. **Pa.**—*Day v. Sharp*, 4 Whart. 339, 34 Am. Dec. 509. **R. I.**—*Tucker v. Carr*, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893.

[a] **Nunc Pro Tunc Order to Revive.**—The omission of plaintiff's administrators to revive a suit before taking out an execution after his death, is only an irregularity and may be cured by an order nunc pro tunc, especially where the debtor has abstained from moving until the judgment was apparently satisfied. *Jenness v. Circuit Judge*, 42 Mich. 469, 4 N. W. 220.

48. *Holt v. Lynch*, 18 W. Va. 567.

49. **Ala.**—Code, 1907, §4151. **Ky.** *Payne v. Payne's Exrs.*, 8 B. Mon. 391. **Mass.**—*Cushman v. Carpenter*, 8 Cush. 388; *Bowdoin v. Jordan*, 9 Mass. 160; *Hamilton v. Lyman*, 9 Mass. 14. **Miss.** Code, 1906, §3974. **Mo.**—Rev. St., 1909,

§2136. **N. J.**—Comp. St., 1911, p. 4108, §182. **N. Y.**—*Howell & Howell v. Eldridge*, 21 Wend. 678. **Tenn.** *Dickinson v. Bowers*, 7 Baxt. 307; *Cabiness v. Garrett*, 1 Yerg. 491.

50. *Cushman v. Carpenter*, 8 Cush. (Mass.) 388; *Bowdoin v. Jordan*, 9 Mass. 160; *Hamilton v. Lyman*, 9 Mass. 14; **N. J.** Comp. St., 1911, p. 4108, §182.

[a] A suggestion made on the clerk's docket has been held equivalent to a suggestion on the record. *Cushman v. Carpenter*, 8 Cush. (Mass.) 388.

51. **Mo.** Rev. St., 1909, §2136; *Gaston v. White*, 46 Mo. 486.

52. *Pepper & Lewis' Pa. Dig.*, p. 2652, §154 (Act of Feb. 24, 1834, §26); *Vernon's Sayles' Tex. Civ. St.*, 1914, §3720. See *Freiler v. Freiler*, 1 Pa. Co. Ct. 265.

53. *Carroll's Codes* (Ky. Civ.), 1906, §402.

54. See the following: **U. S.**—*Mitchell v. St. Maxent's Lessee*, 4 Wall. 237, 18 L. ed. 326; *Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803; *Erwin's Lessee v. Dundas*, 4 How. 58, 11 L. ed. 875; *Walden's Lessees v. Craig's Heirs*, 14 Pet. 147, 10 L. ed. 393. **Ala.**—*Sims v. Eslava*, 74 Ala. 594; *Brown v. Newman*, 66 Ala. 275; *Hurt v. Nave*, 49 Ala. 459; *Beach v. Dennis*, 47 Ala. 262; *Hurst & Ship v. Weathers*, 15 Ala. 417;

Statutes sometimes provide a similar procedure which must be complied with before execution may issue after the death of a sole defendant.<sup>55</sup> Some statutes provide that in case of particular kinds of judgment, as one for the recovery or delivery<sup>56</sup> of real or personal

*Henderson v. Gandy*, 11 Ala. 431. **Ark.**—*Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780; *Bentley v. Cummins*, 9 Ark. 487. **Cal.**—*Smith v. Reed*, 52 Cal. 345. **Del.**—*Cooper v. May*, 1 Harr. 18; *Farmers' Bank v. Reynolds*, 1 Harr. 513. **Ga.**—*Smith v. Lockett*, 73 Ga. 104. **Ind.**—*Decker v. Gilbert*, 80 Ind. 107; *Faulkner v. Larrabee*, 76 Ind. 154. **Ia.**—*Bull v. Gilbert*, 79 Iowa 547, 44 N. W. 815; *Boyle v. Maroney*, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; *Welch v. Battern*, 47 Iowa 147. **Kan.**—*Seeley v. Johnson*, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314; *Halsey v. Van Vliet*, 27 Kan. 474. **Mass.**—*Hildreth v. Thompson*, 16 Mass. 191. **Miss.**—*Treadwell v. Herndon*, 41 Miss. 38; *Davis v. Helm*, 3 Smed. & M. 17. **N. J.**—*Morgan v. Taylor*, 38 N. J. L. 317; *Den v. Humphreys*, 16 N. J. L. 25. **N. Y.**—*Wallace v. Swinton*, 64 N. Y. 188; *Marine Bank v. Van Brunt*, 49 N. Y. 160. **Ore.**—*Watson v. Moore*, 40 Ore. 204, 66 Pac. 814. **Eng.**—*Jefferson v. Morton*, 2 Wms. Saund. 6, 85 Eng. Reprint 540, note. **Can.**—*McCarthy v. Low*, 2 U. C. Q. B. O. S. 387.

55. See generally the statutes and the following: **U. S.**—*Mitchell v. St. Maxent's Lessee*, 4 Wall. 237, 18 L. ed. 226. **Ind.**—*Burns' Ann. St.*, 1914, §651; *Faulkner v. Larrabee*, 76 Ind. 154. **Ia.**—*Code*, 1897, §§4036-4039; *James v. Weisman*, 161 Iowa 488, 143 N. W. 428; *Boyle v. Maroney*, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657. **Kan.**—*Gen. St.*, 1909, §6031; *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550; *Seeley v. Johnson*, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314; *Mendenhall v. Burnette*, 58 Kan. 353, 49 Pac. 93; *Halsey v. Van Vliet*, 27 Kan. 474. **Ky.**—*Carroll's Codes (Ky. Civ.)*, 1906, §407; *Thomas v. Tanner*, 6 Mon. 52; *Handley's Admr. v. Fitzhugh*, 3 A. K. Marsh. 561. **La.**—*Legendre v. McDonough*, 6 Mart. (N. S.) 513. **Neb.**—*Rev. St.*, 1913, §8032. **Ohio.**—*Page & Adams' Ann. Code*, §11, 649 (judgment may be revived by an action brought for that purpose against the legal representatives or they may be made parties in the manner prescribed for the revival of actions before judgment); *Cist v. Beresford*, 1

*Ohio Cir. Ct.* 32, 1 *Ohio Cir. Dec.* 19; *Arnold v. Fuller*, 1 *Ohio* 458. **Okla.**—*Rev. Laws*, 1910, §5299. **Pa.**—*Act of Feb. 24, 1834*, §33; *Bomberger v. Raymond*, 12 Pa. Co. Ct. 460.

See the title "Judgments and Decrees, Revival of."

[a] **Such Statutes Must Be Strictly Complied With.**—**U. S.**—*Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803. **Ill.**—*Wilson v. Lowmaster*, 181 Ill. 170, 54 N. E. 922; *Pickett v. Hartsock*, 15 Ill. 279. **Pa.**—*Cadmus v. Jackson*, 52 Pa. 295.

[b] **Distinction Between Judgments in Rem and in Personam.**—"There seems to be a distinction, as to the effect of the death of a sole defendant after judgment and before execution, between judgments in personam, which cannot be executed except by a writ that authorizes the officer to levy upon any property of the defendant subject to execution, and judgments in rem, which require no writ of execution, and cannot be executed except in the particular manner decreed. In the former class of cases, a writ of execution issued after the death of a sole defendant is void; in the latter class of cases, where the decree is its own authority for execution, and where nothing can be done except what was adjudicated in the lifetime of the parties, it may be executed after the death of a sole defendant." *Kellogg v. Tout*, 65 Ind. 146.

56. See generally the statutes and the following: **Ala.**—*Code*, 1907, §4096. **Ariz.**—*Civ. Code*, 1913, §1361. **Cal.**—*Code Civ. Proc.*, 1915, §686. **Idaho.**—*Rev. Code*, 1908, §4475; *Rose v. Dunbar*, 20 Idaho 1, 115 Pac. 920, Ann. Cas. 1912D, 1046. **Miss.**—*Code*, 1906, §3977. **Mont.**—*Rev. Code*, 1907, §6819. **Nev.**—*Rev. Laws*, 1912, §5285. **N. D.**—*Rev. Code*, 1905, §8169. **Ore.**—*Lord's Laws*, 1910, §220; *Watson v. Moore*, 40 Ore. 204, 66 Pac. 814; *Bower v. Holladay*, 18 Ore. 491, 22 Pac. 553. **P. R.**—*Code Civ. Proc.*, §244; *Fernandez v. Velazquez*, 17 Porto Rico 716. **S. D.**—*Probate Code*, 1910, §183; *Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144. **Utah.**—*Comp. Laws*, 1907,



property, or for the enforcement of a lien thereon,<sup>57</sup> execution may issue without a revival and with the same effect as if the judgment debtor were still living. Other statutes provide generally that on the death of a defendant after final judgment, when no execution has been issued previously to his death,<sup>58</sup> and no will of such deceased defendant shall have been proved nor letters of administration granted upon his estate within a certain period after his death,<sup>59</sup> execution may issue against his goods and lands with the same effect as if death had not occurred. Still other statutes provide for the issuance of execution upon the filing of certain evidence of death and representative capacity.<sup>60</sup>

Where the judgment is a money judgment, some statutes provide that execution shall not issue thereon but that it shall be paid in the due course of administration;<sup>61</sup> others provide, however, that execution may issue thereon, on leave of court for cause shown, as against any property upon which the judgment was a lien at the time of the

§2238; *Weaver v. Pickard*, 7 Utah 296, 26 Pac. 581. **Wyo.**—Comp. St., 1910, §5629; *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

57. See generally the statutes and the following: **Ariz.**—Civ. Code, 1913, §1361. **Cal.**—Code Civ. Proc., 1915, §686. **Idaho.**—Rev. Code, 1908, §4475; *Rose v. Dunbar*, 20 Idaho 1, 115 Pac. 920, Ann. Cas. 1912D, 1046. **Mont.**—Rev. Code, 1907, §6819. **N. D.**—Rev. Code, 1905, §8169. **S. D.**—Probate Code, 1910, §183; *Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144. **Utah.**—Comp. Laws, 1907, §3238; *Weaver v. Pickard*, 7 Utah 296, 26 Pac. 581. **Wyo.**—Comp. St., 1910, §5629; *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

[a] The fact that an attachment is levied upon the debtor's property prior to his death, does not make an ordinary money action one for the enforcement of a lien within the meaning of the statute providing for issuance of execution after the death of the defendant. See **Cal.**—*Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49. **Idaho.**—*Rose v. Dunbar*, 20 Idaho 1, 115 Pac. 920, Ann. Cas. 1912D, 1046. **S. D.**—*Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144.

58. **Ga.**—Code, 1910, §5616; *Hatcher v. Lord*, 115 Ga. 619, 41 S. E. 1007, 61 L. R. A. 353; *Smith v. Lockett*, 73 Ga. 104. **N. J.**—Comp. St., 1911, §186,

p. 4109. **Ore.**—*Lord's Laws*, 1910, §220.

59. **N. J. Comp. St.**, 1911, §186, p. 4109.

60. *Vernon's Sayles' Tex. Civ. St.*, 1914, §3724.

61. See generally the statutes and the following: **Ariz.**—Rev. St., 1913, §894. **Cal.**—Code Civ. Proc., §1505. **Idaho.**—Rev. Code, 1908, §5475. **Mo.**—*Sweringen v. Eberius' Admr.*, 7 Mo. 421, 38 Am. Dec. 463. **N. C.**—*Cowles v. Hall*, 113 N. C. 359, 18 S. E. 329; *Sawyers v. Sawyers*, 93 N. C. 321; *Mauney v. Holmes*, 87 N. C. 428; *Lee v. Eure*, 82 N. C. 428; *Murchison v. Williams*, 71 N. C. 135. **S. D.**—Probate Code, 1910, §183 (if an attachment was actually levied upon decedent's property before his death, the same may be sold to satisfy a money judgment, but otherwise such a judgment is presented to representative); *Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144. **Tex.**—*Vernon's Sayles' Civ. St.*, 1914, §3723; *Bynum v. Govan*, 9 Tex. Civ. App. 559, 29 S. W. 1119. **Utah.**—Comp. Laws, 1907, §3863; *Weaver v. Pickard*, 7 Utah 296, 26 Pac. 581. **Wyo.**—Comp. St., 1910, §5629; *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

[a] An execution is void where issued upon a money judgment and after the death of the judgment debtor. *Smith v. Reed*, 52 Cal. 345; *Weaver v. Pickard*, 7 Utah 296, 26 Pac. 581.

death.<sup>62</sup> Where the right to issue execution upon a judgment against a person since deceased has accrued, it is not waived by presenting it for payment in the course of the administration of the estate of the deceased.<sup>63</sup>

(B.) WHERE WRIT TESTED BEFORE DEATH. — At common law, if the execution was tested in the lifetime of the defendant, it could be taken out and executed after his death, for, by a fiction resorted to, it related back to the judgment and could be tested immediately after rendition thereof;<sup>64</sup> and so, if a judgment was entered in vacation against a defendant who died during the preceding term, an execution tested on a day of such term prior to the defendant's death, could be sued out without a *scire facias*.<sup>65</sup>

62. See generally the statutes, and the following: **Ala.**—Code, 1907, §4096. **Kan.**—Mendenhall v. Burnette, 58 Kan. 355, 49 Pac. 93. **Minn.**—Byrnes v. Sexton, 62 Minn. 135, 64 N. W. 155. **Miss.** Code, 1906, §3977; Alsop v. Cowan, 66 Miss. 451, 6 So. 208. **N. Y.**—Code Civ. Proc., §1380; Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. 13.

[a] Leave of court is obtained on a motion or petition, stating that the judgment was a lien upon the property of the defendant at the time of the death. Alsop v. Cowan, 66 Miss. 451, 6 So. 208.

[b] If an affidavit to the effect that the judgment remains wholly or partly unsatisfied is required by statute an application not so founded is defective. *In re Holmes*, 59 Hun 369, 13 N. Y. Supp. 100.

Necessity generally for leave of court prior to issuance of execution, see *infra*, II, B, 1, i, (II), (C).

[c] A decree (1) of the probate court is also necessary in addition to the leave obtained from the court rendering the judgment. N. Y. Code Civ. Proc., §§1380, 1381; Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. 13; Wallace v. Swinton, 64 N. Y. 188; Alden v. Clark, 11 How. Pr. 209; Atlas Rfg. Co. v. Smith, 52 App. Div. 109, 64 N. Y. Supp. 1044. (2) An execution issued without such a decree of the surrogate court, is wholly unauthorized, and is not merely voidable but is absolutely void. Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. 13.

63. Fowler v. Mickley, 39 Minn. 28, 38 N. W. 684.

64. **U. S.**—Ransom v. Williams, 2 Wall. 313, 17 L. ed. 803; Erwin's Lessee v. Dundas, 4 How. 58, 11 L. ed. 875;

Kane v. Love, 2 Cranch C. C. 429, 14 Fed. Cas. No. 7,608. **Ala.**—Collingsworth v. Horn, 4 Stew. & P. 237, 24 Am. Dec. 753. **Del.**—Graham's Exrx. v. Wilson, 5 Harr. 435; Cooper v. May, 1 Harr. 18. **Miss.**—Davis v. Helm, 3 Smed. & M. 17. **N. J.**—Morgan v. Taylor, 38 N. J. L. 317; Den v. Hillman, 7 N. J. L. 180. **N. Y.**—Stymets v. Brooks, 10 Wend. 206; Woodcock v. Bennet, 1 Cow. 711, 13 Am. Dec. 568; Center v. Billingshurst, 1 Cow. 33; Hay v. Fowler, 1 How. Pr. 127. **N. C.** Sawyers v. Sawyers, 93 N. C. 321; Aycock v. Harrison, 65 N. C. 8. **Pa.** Speers v. Sample, 4 Watts 367. **S. C.** Dibble v. Taylor, 2 Spears 308, 42 Am. Dec. 368. **Tenn.**—Montgomery v. Realhafer, 85 Tenn. 668, 5 S. W. 54, 4 Am. St. Rep. 780; Neil v. Gaut, 1 Coldw. 296; Black v. Planters' Bank, 4 Humph. 367; Gwin v. Latimer, 4 Yerg. 22. **Va.**—May v. State Bank, 2 Rob. (41 Va.) 56, 60, 40 Am. Dec. 726. **Eng.** Waghorne v. Langmead, 1 Bos. & Pul. 571, 126 Eng. Reprint 1071; Bragner v. Langmead, 7 Term R. 20, 101 Eng. Reprint 834.

[a] "The theory or fiction upon which this result is arrived at is, that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant, and the goods being bound from the teste, or presumed issuing, execution upon them is deemed to have commenced in the lifetime of the party, and being an entire thing, may be completed notwithstanding his death." Erwin's Lessee v. Dundas, 4 How. (U. S.) 58, 11 L. ed. 875.

65. **U. S.**—Erwin's Lessee v. Dundas, 4 How. 58, 11 L. ed. 875. **N. J.** Morgan v. Taylor, 38 N. J. L. 317.

By statute in England the application of this rule was limited to the parties themselves, and bona fide purchasers were protected from its operation.<sup>66</sup> And under the practice in most states now, the teste does not relate back to the day of the rendition of the judgment but is dated as of the day of actual issuance.<sup>67</sup>

(C.) EFFECT OF ISSUANCE WITHOUT THE REQUIRED REVIVAL. — An execution issued after the death of a defendant and before a revival of the judgment by scire facias or a statutory proceeding substituted therefor has generally been held void.<sup>68</sup> But in a few jurisdictions it is held merely voidable.<sup>69</sup>

**S. C.**—Dibble *v.* Taylor, 2 Spears 308, 42 Am. Dec. 368.

[a] This was so because a judgment signed in vacation relates to and is considered as a judgment of the first day of the preceding term. Erwin's Lessee *v.* Dundas, 4 How. (U. S.) 58, 11 L. ed. 875.

66. Del.—Graham's Exrx. *v.* Wilson, 5 Harr. 435. **N. J.**—Den *v.* Hillman, 7 N. J. L. 180. **N. Y.**—Center *v.* Billinghamst, 1 Cow. 33.

67. See *infra*, II, B, 2, i.

68. U. S.—Ransom *v.* Williams, 2 Wall. 313, 17 L. ed. 803; Erwin's Lessee *v.* Dundas, 4 How. 58, 11 L. ed. 875. **Ala.**—Meyer *v.* Hearst, 75 Ala. 390; Beach *v.* Dennis, 47 Ala. 262; Henderson *v.* Gandy's Admr., 11 Ala. 431. **Ark.**—Cunningham *v.* Burke, 45 Ark. 267; Blanks *v.* Rector, 24 Ark. 496, 88 Am. Dec. 780; Bentley *v.* Cummins, 9 Ark. 487. **Cal.**—See Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404. **Ill.**—Laffin *v.* Herrington, 16 Ill. 301; Brown *v.* Parker, 15 Ill. 307. **Ind.**—Kellogg *v.* Tout, 65 Ind. 146, 151; Whitehead *v.* Cummins, 2 Ind. 58; Doe *v.* Harter, 1 Ind. 427; State *v.* Michaels, 8 Blackf. 436. **Ia.**—Boyle *v.* Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657. **Kan.**—Seeley *v.* Johnson, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314; Halsey *v.* Van Vliet, 27 Kan. 474. **Ky.**—People's Bank's Assignee *v.* Barbour, 124 Ky. 539, 99 S. W. 608. **Mass.**—Hildreth *v.* Thompson, 16 Mass. 191. **Mo.**—Hardin *v.* McCause, 53 Mo. 255; Bick *v.* Carter, 123 Mo. App. 311, 100 S. W. 531. **N. J.**—Sharp *v.* Humphreys, 16 N. J. L. 25. **N. Y.**—Wallace *v.* Swinton, 64 N. Y. 188; Beard *v.* Sinnott, 6 Jones & S. 536; Prentiss *v.* Bowden, 8 Misc. 420, 28 N. Y. Supp. 666. **N. C.**—Barfield *v.* Barfield, 113 N. C. 230, 18 S. E. 505; Williams *v.* Weaver, 94 N. C. 134; Lee *v.* Eure, 82 N. C.

428; Halso *v.* Cole, 82 N. C. 161; State *v.* Pool, 28 N. C. 288. But see *contra*, Perkins *v.* Bullinger, 2 N. C. 367. **Ohio.**—Cartney's Lessee *v.* Reed, 5 Ohio 221; Massie's Heirs' Lessee *v.* Long, 2 Ohio 287, 15 Am. Dec. 547; Arnold *v.* Fuller's Heirs, 1 Ohio 458. **Pa.**—Cadmus *v.* Jackson, 52 Pa. 295; Bomberger *v.* Raymond, 12 Pa. Co. Ct. 460. But compare, Speer *v.* Sample, 4 Watts 367. **Tenn.**—Puckett *v.* Richardson, 6 Lea 49; Gwin *v.* Latimer, 4 Yerg. 22. **Tex.**—Emmons *v.* Williams, 28 Tex. 776; Bynum *v.* Govan, 9 Tex. Civ. App. 559, 29 S. W. 1119. And see Webb *v.* Mallard, 27 Tex. 80.

[a] Fractions of a day will be noticed where it is necessary to determine whether an execution was void because issued a few hours after the death of the judgment debtor. Prentiss *v.* Bowden, 8 Misc. 420, 28 N. Y. Supp. 666.

Effect of issuance on dormant judgment without revivor, see *supra*, II, B, 1, b, (VIII).

69. **Md.**—Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519. **Miss.**—Harper *v.* Hill, 35 Miss. 63; Hodge *v.* Mitchell, 27 Miss. 560, 61 Am. Dec. 524; Harrington *v.* O'Reilly, 9 Smed. & M. 216, 48 Am. Dec. 704; Mitchell *v.* Evans, 5 How. 548, 37 Am. Dec. 169. **N. H.**—Butler *v.* Haynes, 3 N. H. 21. **Pa.**—Speers *v.* Sample, 4 Watts 367. **R. I.**—Hodges *v.* White, 19 R. I. 717, 36 Atl. 838. **Wis.**—Jones *v.* Davis, 24 Wis. 229.

[a] Reasons for Holding Writ Voidable.—“After judgment there is no way to get the fact of death upon the record, except by a motion to quash or to stay the execution. This would come from the heirs or representatives of the execution defendant. But if the execution is held to be void, there is no need to do this. The heirs are most



(D. TIME OF ISSUANCE.<sup>70</sup> — In some jurisdictions, the statutes regulating the issuance of execution upon a judgment against a deceased debtor often forbid the issuance of the writ until after the expiration of a certain period from the date of death,<sup>71</sup> or the granting of letters testamentary or of administration.<sup>72</sup>

likely to know of the death, and hence are the most proper persons to bring the fact upon the record. A plaintiff ignorant of the death may proceed in good faith with his execution, while the heirs, who know the fact, stand by, allow him to go on and then call him to account for proceeding under a void execution. . . . But if the execution be held to be voidable only, it puts the duty of moving for its stay upon the parties who have an interest in the stay. . . . If it be said that the heirs may be ignorant of the judgment and execution, not being parties to it, a sufficient answer seems to be that, as the judgment against the ancestor is *prima facie* binding upon his estate, there is less chance of injury to their rights in holding the execution to be voidable than to the rights of him who has the execution in holding it to be void. Moreover, the latter course would, in many cases, require the unnecessary trouble and expense of *scire facias*, because the heirs, having no defense against the judgment, might be quite as willing to allow satisfaction to be made on the execution upon the original judgment, as on an execution in *scire facias*. We think, therefore, that if the heirs wish to avoid the execution they should be the ones to proceed." *Hodges v. White*, 19 R. I. 717, 36 Atl. 838.

70. Time of issuance of executions generally, see *supra*, II, B, 1, f.

71. See generally the statutes, and the following: *Ala.*—Code, 1907, §4096, one year, where the judgment is one for money. *Colo.*—Mills' Ann. St., 1912, §4210. *Ill.*—Hurd's Rev. St., 1916, ch. 77, §39 (one year where judgment is for payment of money); *Kinkade v. Gibson*, 209 Ill. 246, 70 N. E. 683; *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726; *Clingman v. Hopkie*, 78 Ill. 152; *Wight v. Wallbaum*, 39 Ill. 554. *Minn.* Rev. Laws, 1905, §4292; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155; *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634. *Miss.*—Code, 1906, §3977 (one year

upon money judgment); *Alsop v. Cowan*, 66 Miss. 451, 6 So. 208. *N. Y.* Code Civ. Proc., §1380 (one year upon money judgment; three years upon judgment which is a lien upon property for ten years); *Nichols v. Chapman*, 9 Wend. 457. *Wis.*—St., 1898, §2978; *French Lumb. Co. v. Theriault*, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910; *Harteaux v. Eastman*, 6 Wis. 410.

[a] The delay on account of the death of the defendant is not considered as any part of the time for issuing execution. *Kinkade v. Gibson*, 209 Ill. 246, 70 N. E. 683.

72. *U. S.*—*Bayley v. Davis*, 215 Fed. 165, under Oregon statute. *Ind.*—*Burns' Ann. St.*, 1914, §651; *Faulkner v. Larabee*, 76 Ind. 154. *Ore.*—*Lord's Laws*, 1910, §220; *Watson v. Moore*, 40 Ore. 204, 66 Pac. 814; *Barrett v. Furnish*, 21 Ore. 17, 26 Pac. 861; *Bower v. Holladay*, 18 Ore. 491, 22 Pac. 553; *Knott v. Shaw*, 5 Ore. 482.

[a] In Missouri prior to 1826, execution could issue after the expiration of eighteen months after the granting of such letters. *Carson v. Walker*, 16 Mo. 68; *Landes v. Perkins*, 12 Mo. 238; *Scott v. Whitehill*, 1 Mo. 691.

[b] An execution issued during the interim between the death and the appointment of a legal representative is subject to quashal. *Watson v. Moore*, 40 Ore. 204, 66 Pac. 814. And see *Bayley v. Davis*, 215 Fed. 165.

[c] *Revival Unnecessary.* — Under such a statute, there is no necessity of the judgment being revived, the only limitation on the right to issue execution after the death of the defendant is that the judgment shall be a valid subsisting lien, and that the writ shall not issue until after the appointment of the administrator or executor, and not within six months thereafter. *Bayley v. Davis*, 215 Fed. 165, under Oregon statute.

[d] *Period may be shortened upon leave obtained from court.* *Lord's Ore. Laws*, 1910, §220; *Knott v. Shaw*, 5 Ore. 482.

(E.) NECESSITY AND FORM OF NOTICE OR DEMAND.<sup>73</sup> — Statutes, under which no revivor is necessary generally provide that notice be given the legal representatives or the heirs of the deceased debtor of the existence of the judgment, before execution will issue thereon.<sup>74</sup> It is not necessary that the creditor state that he intends to take out execution upon the judgment,<sup>75</sup> nor when he will do so.<sup>76</sup>

Notice of Application for Leave To Issue.<sup>77</sup> — Statutes providing for the issuance of execution against the property of a decedent upon leave of court,<sup>78</sup> also provide for the giving of notice of the application for such leave, to the persons whose interests in the property are to be affected,<sup>79</sup> and to the executor or administrator of the judgment debtor.<sup>80</sup>

73. Necessity for notice as prerequisite to issuance of execution, see generally *infra*, II, B, 1, i, (II), (B).

74. See generally the statutes, and the following: **U. S.**—*Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803. **Colo.**—*Mills' Ann. St.*, 1912, §4210. **Ill.**—*Hurd's Rev. St.*, 1916, ch. 77, §39 (three months' notice where money judgment); *Kinkade v. Gibson*, 209 Ill. 246, 70 N. E. 683; *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726; *Coran & Co. v. Pittenger*, 92 Ill. 241; *Clingman v. Hopkie*, 78 Ill. 152; *Brown v. Parker*, 15 Ill. 307; *Pickett v. Hartsock*, 15 Ill. 279. **Pa.**—*Colborn v. Trimpey*, 36 Pa. 463, under Act Feb. 24, 1834, §33.

[a] Demand of Payment.—Where the year after the death of the defendant has elapsed, "no execution should be awarded until the heirs and administrator have an opportunity afforded them to pay the judgment without execution. If they fail to do so on proper demand, it should still be made to appear, before leave to issue execution be granted, that the respondent (defendant) died seized of property which has come to the hands of his heirs or administrator, and which is chargeable by law with the payment of the debts of the deceased." *Eaton v. Youngs*, 41 Wis. 507.

[b] Execution issued without such notice is void. See *Coran & Co. v. Pittenger*, 92 Ill. 241; *Finch v. Martin*, 19 Ill. 105; *Lafin v. Herrington*, 16 Ill. 301.

[c] Notice to the heirs is not required (1) unless the statute specifically provides that it be given. "It would probably be better practice to give such notice, and the failure to do so might be sufficient ground for quashing the execution on a timely ap-

plication." *Bayley v. Davis*, 215 Fed. 165. (2) It is not required, under some statutes, unless there is no legal representative. *Hurd's Ill. Rev. St.*, 1916, ch. 77, §39; *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726.

[d] Non-resident heirs or representatives (1) may be given notice by publication. *Hurd's Rev. St.*, 1916, ch. 77, §39; *Wilson v. Lowmaster*, 181 Ill. 170, 54 N. E. 922; *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726. (2) Otherwise, notice not personally served but delivered to a member of family is insufficient. *Wilson v. Lowmaster*, 181 Ill. 170, 54 N. E. 922. (3) An affidavit for publication of notice, may state the residence of the heirs on information and belief. *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726.

[e] Mistake in Notice.—A notice which apprises the heirs of a judgment recovered in a certain year, while the execution sought to be obtained, is or a judgment of a subsequent year is insufficient. *Pickett v. Hartsock*, 15 Ill. 279.

75. *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726; *Letcher v. Morrison*, 27 Ill. 209.

76. *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726; *Letcher v. Morrison*, 27 Ill. 209.

[a] If the time be stated, the writ need not necessarily issue within such time. *Fitch v. Gray*, 162 Ill. 337, 44 N. E. 726.

77. Notice of application for leave to issue execution generally, see *infra*, II, B, 1, i, (II), (C), (2), (b).

78. See *supra*, II, B, 1, h, (IV), (A).

79. N. Y. Code Civ. Proc., §1381; *Kerr v. Kreuder*, 28 Hun 452.

80. N. Y. Code Civ. Proc., §1381;

(V.) **Death of Co Defendant.**—At common law and under some statutes, issuance of a writ of execution is not prevented or delayed by the death of a part only of a number of defendants; it still issues against all the defendants though operative only as against the survivors, where there was no revivor.<sup>81</sup> But the existence of a statute providing for the issuance of execution against the survivors does not prohibit the reviving of the judgment against the legal representatives or heirs of the deceased co-defendant.<sup>82</sup> Such a revivor is necessary, if execution is also sought as against the estate of the deceased;<sup>83</sup> and some statutes expressly give the option of reviving the judgment as against such representatives or heirs.<sup>84</sup>

*Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13; *Wallace v. Swinton*, 64 N. Y. 188; *Marine Bank v. Van Brunt*, 49 N. Y. 160.

[a] An execution issued without notice to the representatives is wholly unauthorized and void. *Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13.

[b] If the judgment is for the recovery of possession of real property, notice must also be given to the occupants of the land and to the grantees. *Code Civ. Proc. (N. Y.)*, §1376; *Marine Bank v. Van Brunt*, 49 N. Y. 160.

81. **U. S.**—*Ransom v. Williams*, 2 Wall. 313, 17 L. ed. 803; *Erwin's Lessee v. Dundas*, 4 How. 58, 11 L. ed. 875; *Duquesne Nat. Bank v. Mills*, 22 Fed. 611. **Ala.**—*Martin v. Branch Bank*, 15 Ala. 587, 50 Am. Dec. 147; *Thompson v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136; *Jones v. Swift*, 12 Ala. 144. **Ark.**—*Kirby's Dig. St.*, 1904, §3219. **Colo.**—*Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683. **Del.**—*Forbes v. Thompson*, 2 Penne. 530, 47 Atl. 1015. **Ga.**—*Smith v. Lockett*, 73 Ga. 104. **Ill.**—*Reed v. Garfield*, 15 Ill. App. 290. **Ind.**—*Carnahan v. Brown*, 6 Blackf. 93. **Ia.** *Code*, 1897, §4071; *Bull v. Gilbert*, 79 Iowa 547, 44 N. W. 815; *Welch v. Battern*, 47 Iowa 147; *Malony v. Bourne*, 3 Greene 330. **Ky.**—*Carroll's Code*, 1906, §405; *People's Bank's Assignee v. Barbour*, 124 Ky. 539, 99 S. W. 608; *Fleece v. Goodrum*, 62 Ky. 306; *Davies v. Womack*, 8 B. Mon. 383; *Johnston v. Lynch*, 3 Bibb 334. **Miss.**—*Code*, 1906, §3960; *Bowen v. Bonner*, 45 Miss. 10; *Wade v. Watt*, Noble & Mobley, 41 Miss. 248; *Davis v. Helm*, 3 Smed. & M. 17. **Mo.**—*Rev. St.*, 1909, §2137; *Hardin v. McCanse*, 53 Mo. 255. **N. J.** *Comp. St.*, 1911, p. 4109, §187; *Sharp v. Humphreys*, 16 N. J. L. 25. **N. Y.** *Howell v. Eldridge*, 21 Wend. 678; *Day*

*v. Rice*, 19 Wend. 644; *Lucas v. Johnson*, 6 How. Pr. 121. **Ohio.**—*Dieboldt Brewing Co. v. Grabski*, 7 Ohio Cir. Ct. (N. S.) 221. **Pa.**—*Sheetz v. Wynkoop*, 74 Pa. 198. **Tenn.**—*Shannon's Code*, 1896, §4716; *Cheatham v. Brien*, 3 Head 552; *Reams v. McNail*, 9 Humph. 542; *Cabiness v. Garrett*, 1 Yerg. 491. **Tex.**—*Chandler v. Hudson*, 11 Tex. 32. **W. Va.**—*Holt v. Lynne*, 18 W. Va. 567. **Wis.**—*St.*, 1898, §2978. **Eng.** *Pennoir v. Brace*, 1 Salk. 319, 91 Eng. Reprint 282; *Withers v. Harris*, 2 Ld. Raym. 806, 92 Eng. Reprint 38 (see note to 2 Wm. Saund. 72); *Penoyer v. Brace*, 1 Ld. Raym. 244, 91 Eng. Reprint 1059.

[a] The fact that an execution has issued against one co-defendant only will not be prejudicial where the other defendant has died, leaving no property. *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330.

[b] No revivor is necessary because no new person is made liable to the execution. *Howell v. Eldridge*, 21 Wend. (N. Y.) 678.

[c] Affidavit of death must first be filed together with certificate of appointment of representative. *Vernon's Sayles' Tex. Civ. St.*, 1914, §3724.

**Necessity for indorsing fact of death on the writ**, see *infra*, II, B, 2, 1, (I).

82. *Finn v. Crabtree*, 12 Ark. 597.

83. **U. S.**—*Erwin's Lessee v. Dundas*, 4 How. 58, 11 L. ed. 875. **Ala.** *Jones v. Swift*, 12 Ala. 144. **Del.** *Forbes v. Thompson*, 2 Penne. 530, 47 Atl. 1015. **Ky.**—*People's Bank's Assignee v. Barbour*, 124 Ky. 539, 99 S. W. 608.

84. **Miss.**—*Code*, 1906, §3960; *Faison v. Johnson*, 70 Miss. 214, 12 So. 152; *Davis v. Helm*, 3 Smed. & M. 17. **Mo.** *Rev. St.*, 1909, §2137, if concerning real property may be revived. **Tenn.**—*Shan-*



i. *Procuring Issuance of Writ or Writs.*<sup>85</sup> — (I.) In General. An execution against the property generally issues as of right.<sup>86</sup> There may be circumstances, however, under which execution will not issue without some step being taken to procure the issuance of the same.<sup>87</sup>

A party ordinarily may have execution on his judgment though he is at the same time prosecuting an action thereon.<sup>88</sup>

Where Second Judgment Has Been Rendered. — In some jurisdictions the fact that a second judgment may have been rendered in an action upon the first will not prevent the issuance of execution<sup>89</sup> upon the

non's Code, 1896, §4716 (revival by scire facias); *Frierson v. Harris*, 5 Coldw. 146, 94 Am. Dec. 220.

[a] In such a case, a scire facias issued to the heirs "to show cause, if any they have or can, why said judgment should not be revived against them" is not sufficient to authorize the issuance of an execution; the scire facias should be against the heirs "to show cause why execution should not be issued against the real estate of the ancestor, descended to the heirs." *Frierson v. Harris*, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

85. *Procuring issuance of execution against person*, see *infra*, II, C.

*Procuring issuance of alias or pluries writs*, see *infra*, II, B, 9.

86. Ala.—*Hudson v. Modawell*, 64 Ala. 481. Mich.—*Jenness v. Lapeer Circuit Judge*, 42 Mich. 469, 4 N. W. 220. Ore.—*Banning v. Roy*, 47 Ore. 119, 82 Pac. 708, 114 Am. St. Rep. 908.

[a] The right to an execution to enforce a judgment is a valuable one, and can only be taken away or suspended by some act, suit or proceeding for this purpose in compliance with law. It can never be taken away by anything less. *Halmes v. Dovey*, 64 Neb. 122, 89 N. W. 631.

[b] An execution may be issued during the term at which the judgment is rendered, upon the request of the judgment plaintiff, without motion, affidavit, or order of the court. *Carpenter v. Vanscoten*, 20 Ind. 50. Execution issues as matter of course within certain time after judgment. See *supra*, II, B, 1, f, (II).

87. *Prerequisites to issuance*, see *infra*, II, B, 1, i, (II).

*Effect of death of parties upon right to issuance*, see *supra*, II, B, 1, h.

[a] "Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely

to arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied, for his own use; but we know of no statutory provision which can be construed to require that such an order shall be first obtained." *Jones v. Rhoads*, 74 Ind. 510.

88. Ala.—*Kingsland & Co. v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232. Ky.—*White v. Moore*, 100 Ky. 358, 38 S. W. 505. Mass.—*Cushing v. Arnold*, 9 Metc. 23. Minn.—*Kumler v. Ferguson*, 22 Minn. 117. N. Y.—*Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166. N. C.—*McDonald v. Dickson*, 85 N. C. 248.

[a] An equitable action to enforce the satisfaction of a judgment, is merely a cumulative remedy, and does not prevent the plaintiff from collecting his judgment by execution, while the same is pending. *White v. Moore*, 100 Ky. 358, 38 S. W. 505.

[b] If the statutory time has not expired after the rendition of the judgment, it is competent for the creditor to take out an execution, notwithstanding the pendency of an action on such judgment. The execution will be valid, though the levy of it may operate to defeat a recovery in the action. *Cushing v. Arnold*, 9 Metc. (Mass.) 23.

[c] The remedy by execution is cumulative merely, and the statute giving it does not take away the common-law right of suing on the judgment. *Kingsland & Co. v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232.

As to actions on judgments, see *infra*, III.

89. *Howard v. Sheldon*, 11 Paige (N. Y.) 558; *Flagg v. Cooper*, 11 Civ. Proc. (N. Y.) 421, 22 Jones & S. (N. Y.) 50. See more fully the title "Judgments."

first judgment, but according to other authorities the first judgment is merged in the second.<sup>90</sup>

(II.) Prerequisites to Issuance.<sup>91</sup> — (A.) IN GENERAL. — Statutes may prescribe terms upon which executions will issue,<sup>92</sup> and when they do so, no one can dispense with those terms.<sup>93</sup>

The necessity for docketing the judgment as a prerequisite to issuing the writ is treated elsewhere in this article.<sup>94</sup>

(B.) NOTICE AND DEMAND.<sup>95</sup> — In the absence of a statute requiring notice to be given the judgment debtor of the issuance of an execution upon the judgment as a prerequisite to its issuance, none need be given.<sup>96</sup> Under statutes providing that a party in whose favor a judgment is rendered may, at any time within a certain period, have execution issued thereon,<sup>97</sup> no notice to the adverse side need be given prior or as a condition to the issuance of execution.<sup>98</sup> But the circumstances in a particular case may make a notice to the defendant necessary.<sup>99</sup>

[a] Motion for leave to issue execution to revive a dormant judgment may be granted the plaintiff, although he had brought another action for the same debt and recovered judgment therein. *McLean v. McLean*, 90 N. C. 530.

90. See the title "Judgments."

91. Prerequisites to Issuance After Death of Sole Plaintiff.—See *supra*, II, B, 1, h, (1), (B), (2).

92. See generally the statutes, and *Coonce v. Munday*, 3 Mo. 373.

93. Mass.—*Johnson v. Harvey*, 4 Mass. 483. Mo.—*Coonce v. Munday*, 3 Mo. 373. Pa.—*Mausel v. New York, Chicago, etc. Ry. Co.*, 171 Pa. 606, 33 Atl. 377.

94. See *supra*, II, B, 1, b, (I), (C); II, B, 1, g, (II).

95. As prerequisite to issuance after death of sole defendant, see *supra*, II, B, 1, h, (IV), (E).

96. Ga.—*Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95. Ia.—*Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346. Mo.—*Buchanan v. Atchison*, 39 Mo. 503. Pa.—*Reid v. North-Western Ry. Co.*, 32 Pa. 257.

[a] Presumption.—The law presumes that a judgment debtor will take notice of what will follow when a judgment has been recovered against him. *Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346.

97. See *supra*, II, B, 1, f, (II), (B).

98. *Foster v. Young* (Cal.), 156 Pac. 476.

[a] Notice of the rendition or

entry of judgment or of the making and filing of findings, is not a condition precedent to the issuance of an execution. *Foster v. Young* (Cal.), 156 Pac. 476. As to necessity of notice of making and filing findings in general, see 8 STANDARD PROC. 1019.

99. *Hall v. Moore*, 70 Miss. 75, 11 So. 655; *Davis v. Bell*, 57 Miss. 320. See *Barre v. Affleck*, 2 Yeates (Pa.) 274, wherein the execution was issued on a referee's report before notice given to the adverse party.

[a] Where a judgment for a small amount of costs was recovered and no execution issued thereon for a long period of time, during which the debtor was in a position to satisfy the costs, if such effort had been made, but as soon as the defendant was temporarily absent, the creditor speedily had an execution issued and thereunder purchased the defendant's property at a gross inadequacy of price, he will be held to be a trustee for the defendant, unless he shows that he has given notice, by mail or otherwise, to the defendant, warning him of the intended issuance of the writ, and of the threatened levy and sale, and thus afford him a fair opportunity of preventing a sacrifice of his property. *Hall v. Moore*, 70 Miss. 75, 11 So. 655; *Davis v. Bell*, 57 Miss. 320.

After death of defendant, see *supra*, II, B, 1, h, (IV), (E).

Notice of application for leave to issue execution, see *infra*, II, B, 1, i, (II), (C), (2), (b).

A demand for the payment of a judgment is not ordinarily necessary before issuing execution thereon.<sup>1</sup> There may be circumstances, however, under which a demand is necessary.<sup>2</sup>

(C.) LEAVE OF COURT. — (1.) *Necessity for.* — No application for leave to issue an execution is necessary where there is an affirmance of a judgment in the appellate court and a remittitur of the record.<sup>3</sup> Nor is such leave necessary upon the discharge or dissolution of an injunction restraining the enforcement of a judgment,<sup>4</sup> or before issuing execution upon installments falling due where the judgment fixes the date of payment and the amount of each installment.<sup>5</sup> Nor is it required to entitle plaintiff, in a judgment entered by warrant of attorney, to have execution.<sup>6</sup> But under some circumstances leave of court must be obtained.<sup>7</sup> Thus where the judgment rendered is conditional, execution can be issued only upon an application and showing that the condition has been removed.<sup>8</sup>

The necessity for leave of court to issue execution after the death of a sole defendant is treated elsewhere in this title.<sup>9</sup>

*Lapse of Time.* — Where the statutory period within which executions must usually issue has expired, provision is made for issuance

1. *Lamb v. Dart*, 103 Ga. 602, 34 S. E. 160; *Price v. Douglas County*, 77 Ga. 163, 3 S. E. 240.

[a] Where an order for the payment of costs or a sum of money is not conditional, an execution may issue without any demand for their payment. *Lucas v. Johnson*, 6 How. Pr. (N. Y.) 121.

2. Necessity for demand on heirs or personal representatives after death of sole defendant, see *supra*, II, B, 1, h, (IV), (E).

[a] But an objection that a demand was not made before issuing execution goes only to costs, and then only when the money has been tendered. *Adams v. Tracy*, 13 Mo. App. 579.

3. Mo.—*Wilburn's Admr. v. Hall*, 17 Mo. 471. Neb.—*State v. Sheldon*, 26 Neb. 151, 42 N. W. 335. N. J.—*Reading v. Den ex dem. Reading*, 6 N. J. L. 186. Tex.—*Lemmel v. Pauska*, 54 Tex. 505.

4. *Young v. Davis*, 1 Mon. (Ky.) 152.

5. *Chambers v. Harger*, 18 Pa. 15; *Cochran v. Elliott*, 1 Lack. Leg. N. 363; *Skidmore v. Bradford*, 4 Pa. 296. See also *Outen v. Mitchels*, 1 Bibb (Ky.) 360.

[a] "The better practice is to move the court for leave to take out

execution for the installments as they fall due; but this is not absolutely necessary." *Cochran v. Elliott*, 1 Lack. Leg. N. 363; *Skidmore v. Bradford*, 4 Pa. 296.

6. A scire facias is not required to entitle plaintiff, in a judgment entered by warrant of attorney, to have execution. *Templeton v. Shakley*, 107 Pa. 370, 377; *Jones v. Dilworth*, 63 Pa. 447; *McCann v. Farley*, 26 Pa. 173; *Bank of Chester v. Ralston*, 7 Pa. 482; *Reynolds v. Lowry*, 6 Pa. 465; *Skidmore v. Bradford*, 4 Pa. 296.

7. On Deficiency Judgment.—Leave of court must be obtained before issuing execution for a deficiency remaining after a sale of property pledged. *Wilson v. Johnson*, 74 Wis. 337, 43 N. W. 148.

8. *Trively v. Krouse*, 2 Com. Pleas (Pa.) 254; *Shackelford v. Apperson*, 6 Gratt. (47 Va.) 451.

[a] *Option of Judgment Debtor.* If the condition is of such a nature as to leave it to the option of the judgment debtor whether or not to perform it, an execution may be taken out without leave of court after the failure to perform the condition within a reasonable time. *Miller v. Milford*, 2 Serg. & R. (Pa.) 35. See *Coulter v. Lumpkin*, 94 Ga. 225, 21 S. E. 461.

9. See *supra*, II, B, 1, h, (IV), (A).



of execution upon a judgment still unsatisfied upon obtaining leave of court therefor.<sup>10</sup>

A *venditioni exponas* may be issued by the clerk without an order of court.<sup>11</sup>

An execution issued without leave of court, where such is necessary, is not void, but merely voidable.<sup>12</sup>

(2.) *How Obtained.*—(a.) *In General.*—*Scire facias* was originally the method of obtaining the issuance of an execution, where the writ did not issue as of course.<sup>13</sup> It is not now generally resorted to,

10. See generally the statutes, and the following: Cal.—Code Civ. Proc., §685; *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330; *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *Wheeler v. Eldred*, 121 Cal. 28, 53 Pac. 431; *Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552. Idaho.—Rev. Codes, 1908, §4472; *Bashor v. Beloit*, 20 Idaho 592, 119 Pac. 55. Ind.—Burns' Ann. St., 1914, §717; *Leonard v. Broughton*, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347; *Flynn v. Northam*, 44 Ind. App. 333, 89 N. E. 326. Minn.—*Entrop v. Williams*, 11 Minn. 381. Mont.—Rev. Codes, 1907, §6818. N. J.—*Clafin v. Voorhees*, 35 N. J. L. 484. N. Y.—Code Civ. Proc. (Parsons') 1908, §1377; *Van Rensselaer v. Wright*, 121 N. Y. 626, 25 N. E. 3; *Van Voorhis v. Kelly*, 65 How. Pr. 300; *Flanagan v. Tinen*, 53 Barb. 587, 37 How. Pr. 130; *Sacia v. Nestle*, 13 How. Pr. 572; *Pierce v. Craine*, 4 How. Pr. 257; *Field v. Paulding*, 3 Abb. Pr. 139, 1 Hilt. 187. N. C.—Rev., 1905, §620; *Lytle v. Lytle*, 94 N. C. 683. See also *McKethan v. McNeill*, 74 N. C. 663 (application should be made to clerk of the court and not the judge). Ore.—*Murch v. Moore*, 2 Ore. 189. S. C.—Code Civ. Proc., 1902, §303. S. D.—Code Civ. Proc., 1910, §329. W. Va.—*State v. Brookover*, 38 W. Va. 141. Wis.—St., 1898, §2968.

[a] Such statutory provisions may apply to judgments rendered before the passage of the act, as well as subsequently. *Bolton v. Lansdown*, 21 Mo. 399.

[b] Application for leave to issue execution on a judgment rendered therein need not be made before the lapse of five years from the entry of the judgment; and after the expiration of such five years, leave of the court to issue execution on the judgment is unnecessary, when execution has been issued on the judgment within the five years, and returned unsatisfied in

whole or in part. *Wilgus v. Bloodgood*, 33 How. Pr. (N. Y.) 289.

[c] Leave of court will not be presumed but must be made to appear affirmatively. *Rollins v. McIntire*, 87 Mo. 496.

11. *Dryer v. Graham*, 58 Ala. 623; *Holmes v. McIndoe*, 20 Wis. 657.

12. N. Y.—*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168; *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Van Voorhis v. Kelly*, 65 How. Pr. (N. Y.) 300. N. D.—*Dakota Invest. Co. v. Sullivan*, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584, irregularity not rendering sale void. Ore.—*Eddy v. Coldwell*, 23 Ore. 163, 31 Pac. 475, 37 Am. St. Rep. 672. W. Va.—See *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476, may be quashed on motion.

Compare, *supra*, II, B, 1, b, (VIII).

13. See *supra*, II, B, 1, f, (II), (A); II, B, 1, h, (I), (A); (II), B, 1, h, (IV), (A), and generally the title "Judgments and Decrees, Revival of."

[a] *Scire facias* to obtain the issuance of an execution is a judicial writ. *Kennebec Steam Towage Co. v. Rich*, 100 Me. 62, 60 Atl. 702.

[b] The action of *scire facias* to obtain execution upon a prior judgment should be heard and determined by the court which rendered the judgment and which alone has the record of it. *Kennebec Steam Towage Co. v. Rich*, 100 Me. 62, 60 Atl. 702, holding that a statute providing that the superior court "has exclusive jurisdiction of *scire facias* on judgments and recognizances not exceeding five hundred dollars," does not in terms nor by necessary implication take away the inherent jurisdiction of that court over *scire facias* to obtain execution upon its judgments, even though the debt and costs in the aggregate exceed five hundred dollars.

however,<sup>14</sup> the proceeding generally being by motion or petition,<sup>15</sup> in the court in which the judgment was rendered.<sup>16</sup> It is not necessary to set forth the judgment or a copy thereof in the motion or application.<sup>17</sup> But the fact that a judgment remains unsatisfied should be made to appear by affidavit of a party, his agent or attorney.<sup>18</sup> In an application for leave to issue execution against the property of a deceased person, the real estate to be affected by the proceedings should be described.<sup>19</sup> Under a statute providing for the issuance upon leave of execution against the wages, debt, earnings, salary, etc., of a judgment debtor, it should be made to appear that the judgment was

14. See *supra*, II, B, 1, h, (I), (B), (1); II, B, 1, h, (IV), (A), and generally the title "*Judgments and Decrees, Revival of.*"

[a] Proceedings in the nature of *scire facias*, to obtain execution, are no longer necessary in any case. *Swift v. Flanagan*, 12 How. Pr. (N. Y.) 438.

15. *Plough v. Reeves*, 33 Ind. 181; *Verden v. Coleman*, 23 Ind. 49; *Van Devanter v. Nixon*, 5 Ind. App. 304, 31 N. E. 203. But see *Reeves v. Plough*, 46 Ind. 350.

[a] Leave of the court must be had on motion or petition. *Alsop v. Cowan*, 66 Miss. 451, 6 So. 208; *Swift v. Flanagan*, 12 How. Pr. (N. Y.) 438.

[b] No formal complaint, as in ordinary suits, is necessary. A written notice of motion, showing the names of the parties, the date, and amount of the judgment, is sufficient. *Simpson v. Wilson*, 16 Ind. 428.

[c] No pleadings are required or contemplated by the statute, and the action of the court in striking out pleadings filed cannot be the basis of an assignment of error in the supreme court. If the judgment-defendant has any equities, or cross-action, he must resort to his remedy by suit. *Plough v. Reeves*, 33 Ind. 181; *Van Devanter v. Nixon*, 5 Ind. App. 304, 31 N. E. 203. But see *Reeves v. Plough*, 46 Ind. 350.

[d] Petition should be verified. *Matter of Howell*, 2 Redf. Surr. (N. Y.) 299.

16. *Van Devanter v. Nixon*, 5 Ind. App. 304, 31 N. E. 203.

17. *Verden v. Coleman*, 23 Ind. 49.

18. See generally the statutes, and Ind.—*Reeves v. Plough*, 46 Ind. 350. Mass.—*Newcomb v. Newcomb*, 12 Gray 28. N. Y.—Code Civ. Proc., §1381; *Wadley v. Davis*, 30 Hun 570. Wis. St., 1898, §2968.

19. *Matter of Bentley*, 16 Abb. Pr. (N. Y.) 89.

[a] But it is not necessary that all of the judgment debtor's property be described. *Wadley v. Davis*, 30 Hun (N. Y.) 570, wherein the court said: "The affidavit used furnished a description of certain real estate of the debtor, and we think it is no defense to the application to show that the debtor had other lands upon which the judgment was a lien. There is nothing in the sections regulating the proceedings, requiring a description of all the debtor's property to be given before an order is made, that a judgment be enforced . . . with like effect as if the judgment debtor was still living. (Secs. 1379, 1380, 1381; *Matter of Clark*, 2 Abb. N. C., 208.)"

[b] **Petition Should Show Judgment a Lien.**—Where a statute provides that execution may be had, after one year from the death of any defendant in a judgment for money, by leave of the court rendering the judgment, against any property upon which such judgment was a lien at the time of the death of the defendant, the petition or application should show that the judgment was a lien at the time of the death of the defendant. *Alsop v. Cowan*, 66 Miss. 451, 6 So. 208, wherein the court said: "To entitle the plaintiff to execution under §1751 of the code he must have had a lien at the time of the death of the defendant, but in this case the petition fails to show that the judgment was a lien in the only way by which it could become such, *i. e.*, by enrolment, and it shows affirmatively that the lien of the execution was destroyed by the quashal of the levy. Therefore, the petition, by which the parties chose to test their rights, is insufficient to show a right to execution."

recovered wholly for necessities sold,<sup>20</sup> and that no similar execution remains outstanding against the judgment debtor.<sup>21</sup> Where the application is made by one not a party plaintiff in the judgment sought to be enforced, it is not necessary that the facts showing ownership of the judgment in the applicant be stated.<sup>22</sup>

The parties to the application are discussed elsewhere.<sup>23</sup>

(b.) *Notice of Application.*<sup>24</sup> — When the statute does not require notice of an application for the issuance of an execution, an order for execution is not invalid for want of previous notice of the application,<sup>25</sup> but the court may require such notice.<sup>26</sup>

Statutes sometimes provide for notice of an application for an order granting leave to issue an execution,<sup>27</sup> in which case, an order made

20. *Newman v. Mortimer*, 98 App. Div. 64, 90 N. Y. Supp. 524.

21. *Newman v. Mortimer*, 98 App. Div. 64, 90 N. Y. Supp. 524.

[a] An affidavit stating that "there is now no execution on this judgment now outstanding or not returned" is not sufficient. "This averment may be true, but it does not follow that other executions on other judgments are not outstanding and unsatisfied." *Neuman v. Mortimer*, 98 App. Div. 64, 90 N. Y. Supp. 524.

22. *Martin v. Orr*, 96 Ind. 491, sufficient to state merely that the applicant does own the judgment.

23. **For whom execution issues**, see generally *supra*, II, B, 1, d.

24. **After death of sole defendant**, see *supra*, II, B, 1, h, (IV), (E).

25. *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330; *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *Bryan v. Stidger*, 17 Cal. 270; *Water Supply Co. v. Sarnow*, 6 Cal. App. 586, 92 Pac. 667; *Water Supply Co. v. Sarnow*, 1 Cal. App. 479, 82 Pac. 689. See also *Miss. Alsop v. Cowan*, 66 Miss. 451, 6 So. 208. **Va.**—*Com. v. Hewitt*, 2 Hen. & M. 181. **Eng.**—*Mercer v. Lawrence*, 26 Wkly. Rep. 506.

[a] **Due Process of Law.**—Notice of a motion for leave to issue execution is not necessary to constitute the due process of law which is guaranteed by the United States constitution. "The due process of law there guaranteed is obtained by the service of summons on the defendants or their subsequent appearance in the action before judgment. Perhaps in some cases circumstances may appear which would make it an abuse of discretion to make such an order without notice, or which would make it imperative to vacate the order

on motion or reverse it on appeal." *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038.

26. *McAuliffe v. Coughlin*, 105 Cal. 268, 38 Pac. 730, holding that upon plaintiff's "motion for an order that execution issue it was proper and regular practice for the court, of its own motion, to order the defendant to show cause why plaintiff's motion should not be granted; thus giving the defendant an opportunity to be heard in answer to that motion. The order to show cause was simply a notice of the motion, and a citation of the defendant to appear at a stated time and place and show cause why plaintiff's motion should not be granted." See also *Pollard v. Pollard*, 2 Mon. (Ky.) 16.

[a] **Execution Upon Judgment for Alimony.**—In *Newcomb v. Newcomb*, 12 Gray (Mass.) 28, it was held that the court would not issue an execution for alimony without notice to the respondent. *Compare*, *Bell v. Walsh*, 130 Mass. 163, wherein the court said: "Under the modern statutes, although it is not usual to issue an execution for alimony without previous notice and hearing, yet it is within the discretion of the court, upon a consideration of all the circumstances of the case, to order such an execution to issue without notice." Enforcement of decree for alimony by execution, see generally 7 STANDARD PROC. 835.

[b] **Under a rule of court providing that upon any application in an action or proceeding, notice of the motion therein shall be given, notice of an application for leave to issue execution has been held necessary.** *Joss v. Fairgrieve*, 7 Ont. W. N. 184.

27. See generally the statutes, and **Ind.**—*Gibson v. Green*, 22 Ind. 422



without notice of any kind to the adverse party, is invalid.<sup>28</sup>

(c.) *Hearing and Determination.*—The granting of a motion for execution upon a judgment after the lapse of the statutory period of time within which execution issues as of course is a matter within the discretion of the court.<sup>29</sup> The only question presented is whether the judgment or any part thereof remains unsatisfied and due.<sup>30</sup> Only circumstances arising after entry of judgment may be considered.<sup>31</sup> The court cannot go behind the judgment or inquire into its validity.<sup>32</sup> The fact that an execution, issued upon a judgment within the proper

(constructive service of notice of motion permissible); *Ketcham v. Madison, I. & P. R. Co.*, 20 Ind. 260; *Elliott v. Moore*, 5 Blackf. 270 (terre-tenants, named in a petition to have execution against the real estate of a decedent, should have notice of the petition). *Ia.*—*McConkie v. Landt*, 126 Iowa 317, 101 N. W. 1121. *N. Y.*—Code Civ. Proc., §1378; *Van Rensselaer v. Wright*, 121 N. Y. 626, 25 N. E. 3; *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236; *Shultes v. Sickles*, 70 Hun 479, 24 N. Y. Supp. 145, 53 N. Y. St. 700, *affirmed*, 147 N. Y. 704 (statute only requires notice to be served on the defendant in the action); *Sacia v. Nestle*, 13 How. Pr. 572, notice required whenever an application for leave to issue execution was made under former §284 of the code.

[a] An application for execution against the wages, etc., of a defendant must be upon notice. *Neuman v. Mortimer*, 98 App. Div. 64, 90 N. Y. Supp. 524; *Brodie v. Maher*, 78 Misc. 92, 138 N. Y. Supp. 872.

28. *McConkie v. Landt*, 126 Iowa 317, 101 N. W. 1121.

29. *Wheeler v. Eldred*, 137 Cal. 37, 69 Pac. 619; *Van Rensselaer v. Wright*, 121 N. Y. 626, 25 N. E. 3.

[a] If the court were bound to allow the enforcement of a judgment after the lapse of five years, the judgment would become a perpetual encumbrance by mere neglect of the owner thereof to execute it. *Wheeler v. Eldred*, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20.

[b] Leave to issue the writ nunc pro tunc will not be granted after unreasonable time. *Hansee v. Fiero*, 25 Abb. N. C. (N. Y.) 46.

[c] Where lapse of time since issuing an execution renders it necessary to apply to the court for leave it cannot properly be granted where such delay has intervened that no action will

lie on the judgment. *Jerome v. Williams*, 13 Mich. 521.

[d] A statute allowing execution upon leave of court after five years applies only to the sixth year, and does not authorize a perpetual reviver. *Peters v. Vawter*, 10 Mont. 201, 25 Pac. 438.

30. *Plough v. Reeves*, 33 Ind. 181; *Van Devanter v. Nixon*, 5 Ind. App. 304. 31 N. E. 203; *Betts v. Garr*, 26 N. Y. 383; *Lee v. Watkins*, 13 How. Pr. (N. Y.) 178. But see *Knox v. Randall*, 24 Minn. 479.

[a] If the judgment is unpaid, and there is no valid defense, the motion should be granted. *Small v. Wheaton*, 2 Abb. Pr. (N. Y.) 316, 4 E. D. Smith (N. Y.) 427.

[b] The court may determine whether or not an apparent satisfaction of a judgment is void. *McAuliffe v. Coughlin*, 105 Cal. 263, 38 Pac. 730.

[c] The ex parte affidavit of the plaintiff is not the proper proof of the nonpayment of the judgment; he should be examined orally, under oath. *Simpson v. Wilson*, 16 Ind. 428.

[d] The court cannot inquire into the effect the execution may have upon purchasers of real estate, sold by the defendant before the invalidity of his discharge as an insolvent debtor was declared. *Small v. Wheaton*, 2 Abb. Pr. (N. Y.) 316, 4 E. D. Smith (N. Y.) 427.

31. *Weldon v. Rogers*, 159 Cal. 700, 115 Pac. 464; *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951.

[a] The court cannot consider the facts appearing at the trial of the case or any of the circumstances leading up to the judgment. *Weldon v. Rogers*, 159 Cal. 700, 115 Pac. 464.

32. *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951, *following* *Lee v. Watkins*, 3 Abb. Pr. (N. Y.) 243, 13 How. Pr. (N. Y.) 178.

[a] The judgment debtor cannot be

period, was never returned,<sup>33</sup> or that the plaintiff has also sought other relief,<sup>34</sup> will not prevent the granting of leave to issue.

Order. — If the court grants leave an order is made accordingly.<sup>35</sup> which, under some statutes, should specify the amount for which the execution is to issue,<sup>36</sup> or the particular property, possession of which is to be delivered.<sup>37</sup>

Appeal. — An order granting<sup>38</sup> or denying<sup>39</sup> leave, is appealable.

(III.) Issuance of More Than One Writ at Same Time. — It may be stated generally that more than one execution should not be issued at one and the same time,<sup>40</sup> except where authorized by statute.<sup>41</sup> A second execution cannot properly issue to the same county with the first until the first is returned.<sup>42</sup> Several forms of execution may be issued,

heard to show that no summons was ever served upon him in the action. While the judgment remains on record, the court should go no further. *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951.

33. *Northern Pac. R. Co. v. Bender*, 13 Mont. 432, 34 Pac. 848.

34. See *supra*, II, B, 1, i, (I).

35. The order is entered and docketed as a judgment, and a judgment-roll made up in the same manner as a judgment. *Ladd v. Higley*, 5 Ore. 296.

As to judgment-roll, see the title "Judgment Records."

[a] Presumptively Correct.—An order directing the issuance of an execution, where the adjudication is of a court of general jurisdiction, is presumptively correct. *Knox v. Randall*, 24 Minn. 479, 495.

[b] A general and standing order of court that the clerk may issue execution to recover his fees is a sufficient order for the issuance of a writ under a statute making it necessary to obtain the court's permission before issuing a writ for the collection of fees. *Elliott v. Ellery*, 11 Ohio 306.

36. *Ladd v. Higley*, 5 Ore. 296.

[a] The order may direct the issuance of an execution for an amount to be determined by the clerk upon computation. *Aspen Mining & Smelting Co. v. Wood*, 84 Fed. 48, 28 C. C. A. 276.

37. *Ladd v. Higley*, 5 Ore. 296.

[a] Upon an appeal from an order to show cause why an execution should not issue upon a satisfied judgment the appellate court cannot review a final order directing the execution, made subsequent to the appearance of the defendant, no appeal having been

taken therefrom. *McAuliffe v. Coughlin*, 105 Cal. 268, 38 Pac. 730.

38. *Entrop v. Williams*, 11 Minn. 381.

39. *Betts v. Carr*, 26 N. Y. 383.

40. See the following: *Ia.*—*Merritt v. Grover*, 61 Iowa 99, 15 N. W. 860. *Ia.*—*Newell v. Morton*, 3 Rob. 102; *Hudson v. Dangerfield & Al.*, 2 La. 63, 20 Am. Dec. 297. *Md.*—*Waters v. Caton*, 1 Harr. & McH. 407. *Miss.*—*McGehe v. Handley*, 5 How. 625. *N. J.* *State v. Stout*, 11 N. J. L. 362. *N. Y.* *Ledyard v. Buckle*, 5 Hill 571. *N. C.* *Adams v. Smallwood*, 53 N. C. 258. *Ore.*—*Wright v. Young*, 6 Ore. 87. *Pa.* *Springer v. Brown*, 9 Pa. 305.

41. Issuance of writs at same time to different counties, see *supra*, II, B, 1, g, (III).

42. See the following: *U. S.*—*Dobbin v. Allegheny*, 7 Fed. Cas. No. 3,941. *Ia.*—*Merritt v. Grover*, 61 Iowa 99, 15 N. W. 860; *Downard v. Crenshaw*, 49 Iowa 296. *Miss.*—*Parker v. Dean*, 45 Miss. 408. *N. Y.*—*Ledyard v. Buckle*, 5 Hill 571; *Dorland v. Dorland*, 5 Cow. 417; *Matter of Royal Bank*, 140 App. Div. 480, 125 N. Y. Supp. 322; *Bloomingtondale v. Richardson*, 140 App. Div. 350, 125 N. Y. Supp. 320. *Ohio.*—*Arnold v. Fuller's Heirs*, 1 Ohio 458. *Can.* *Dunbar v. Ross*, 32 Nova Scotia 222.

[a] The fact that the first execution was ordered returned, but was not, does not make a second execution, issued before the first one was returned, legal. *Merritt v. Grover*, 61 Iowa 99, 15 N. W. 860.

[b] Where issued, the execution is voidable and not void. *Doe v. Dutton*, 2 Ind. 309.

Issuance of alias and pluries writs, see generally *infra*, II, B, 9.

however, at the same time,<sup>43</sup> though but one can be executed at a time.<sup>44</sup>

(IV.) **On Transcript or Abstracts of Judgments of Inferior Courts.**<sup>45</sup>  
(A.) **IN GENERAL.**—Executions issue in some jurisdictions, upon transcripts of judgments of inferior courts, only after an affidavit by the plaintiff, his assignee, or the agent or attorney of either,<sup>46</sup> has been filed in the superior court, stating the amount due upon the judgment,<sup>47</sup> and fixing the identity of the judgment as the same one

43. See the following: **Del.**—Vandever *v.* Cannon, 2 Houst. 172. **Me.** Miller *v.* Miller, 25 Me. 110. **N. C.** McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728. **Pa.**—Grant *v.* Potts, 2 Miles 164; Davies *v.* Scott, 2 Miles 52; Young *v.* Taylor, 2 Binn. 218, 230; Shaw *v.* Kenath, 10 Phila. 444, 32 Leg. Int. 412; Hoopes *v.* Robinson, 2 Chest. Co. Rep. 312. **S. C.**—State *v.* Guignard, 1 McCord 176.

[a] The party for whom judgment is given may have a writ of fieri facias, or elegit, or levari facias, or capias ad satisfaciendum, at his option; or he may have them all in succession until his judgment is satisfied; or suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time provided they all be of the same species. Two different species of execution cannot be executed at once on the same judgment, nor a second writ of the same, or of a species different from its forerunner, till that has, by return, been proved insufficient. Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941.

[b] **Objection that different species of execution cannot issue at same time must come from defendant.** His creditors cannot raise it. Hoopes *v.* Robinson, 2 Chest. Co. Rep. (Pa.) 312.

44. **Del.**—Vandever *v.* Cannon, 2 Houst. 172. **Me.**—Miller *v.* Miller, 25 Me. 110. **N. C.**—McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728. **Pa.** Grant *v.* Potts, 2 Miles 164; Hollowell *v.* McClay, 3 Phila. 261; Young *v.* Taylor, 2 Binn. 218, 230. *Compare*, Shaw *v.* Kenath, 10 Phila. 444, 32 Leg. Int. 412. **S. C.**—State *v.* Guignard, 1 McCord 176. **Eng.**—Stamper *v.* Hodson, 8 Mod. 302, 88 Eng. Reprint 215.

45. **As foundation of writ of execution**, see *supra*, II, B, 1, b, (IX).

46. Howell's Mich. St., 1913, §12, 294; Frohlich *v.* Mitchell, 132 Mich. 432, 93 N. W. 1087. And see Burns' Ann. Ind. St., 1914, §644.

47. Burns' Ann. Ind. St., 1914, §644; Mavity *v.* Eastbridge, 67 Ind. 211; Howell's Mich. St., 1913, §12, 294; Denver *v.* Connolly, 92 Mich. 549, 52 N. W. 1003; Bigelow *v.* Booth, 39 Mich. 622. See Shepard *v.* Schruett, 163 Mich. 485, 128 N. W. 772; Smith *v.* Circuit Judge, 46 Mich. 338, 9 N. W. 440; Udell *v.* Kahn, 31 Mich. 195.

[a] **Affidavit Jurisdictional.**—(1) The filing of the affidavit with the clerk of the circuit court is a condition precedent to the issuance of a valid execution. Berkery *v.* Wayne Circuit Judge, 82 Mich. 160, 46 N. W. 436; Smith *v.* Circuit Court, 46 Mich. 338, 9 N. W. 440; Bigelow *v.* Booth, 39 Mich. 622; Monaghan *v.* McKimmie, 32 Mich. 40. (2) But see Mavity *v.* Eastbridge, 67 Ind. 211, holding that an execution issued without the filing of the affidavit required by statute is merely voidable at the instance of the defendant for whose benefit the provision was intended, and if he did not take advantage of such failure, a sale based upon such execution would be valid.

[b] **Nunc Pro Tunc Filing of Affidavits.**—If the affidavits are insufficient to confer jurisdiction, jurisdiction cannot be conferred by substituting sufficient affidavits nunc pro tunc. Berkery *v.* Wayne Circuit Judge, 82 Mich. 160, 46 N. W. 436.

[c] **Stating the amount of the judgments**, and that they were not paid, is substantially stating the amount due, and is sufficient. Dehority *v.* Wright, 101 Ind. 382.

[d] **The amount for which the judgment was originally rendered need not be stated in the affidavit.** Denver *v.* Connolly, 92 Mich. 549, 52 N. W. 1003.

[e] **Form of Affidavit.**—See Frohlich *v.* Mitchell, 132 Mich. 432, 93 N. W. 1087.

**As to affidavit for purpose of obtaining transcript**, see *infra*, II, B, 1, b, (IX), (B), (1).



upon which the transcript from the inferior court is given.<sup>48</sup>

The issuance and nulla bona return of an execution in the inferior court are sometimes required as a condition precedent to the filing of a transcript and the issuance of an execution thereon from the superior court,<sup>49</sup> and a certificate to this effect must accompany the affidavit;<sup>50</sup> but under some statutes such requirement is dispensed with.<sup>51</sup>

48. *Denver v. Connolly*, 92 Mich. 519, 52 N. W. 1003.

49. Ark.—*Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550; *Jordan v. Bradshaw*, 17 Ark. 106, 65 Am. Dec. 419; *Massey v. Gardenhire*, 12 Ark. 638. Ill.—*Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823. N. J.—*Nimmo v. Howard*, 42 N. J. Eq. 487, 10 Atl. 712; *Tasto v. Kloppling*, 43 N. J. L. 448.

See generally the statutes of the several states.

[a] Such a statutory provision is intended for the benefit of the judgment debtor to prevent execution on his realty until his personalty has been exhausted, and must be urged by him in a direct proceeding to quash the process; it cannot affect the rights of third persons in a collateral proceeding. *Jordan v. Bradshaw*, 17 Ark. 106, 65 Am. Dec. 419. And see *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550.

[b] Under a statute which requires that an execution shall be first issued below where the defendant resides in the county at the time of issuing the execution, it is of no consequence, when the defendant does not at such time reside in the county, that he resided there at the time of obtaining the judgment, or that no execution had formerly issued from the justice. *Mathewson v. Kilburn*, 183 Mo. 110, 81 S. W. 1096; *Tracy v. Whitsett* 51 Mo. App. 149.

[c] That the execution is directed to a township other than that in which the execution-defendant resides does not render the subsequent writ void. *Ables v. Webb*, 186 Mo. 233, 85 S. W. 383.

50. *Burns' Ann. Ind. St.*, 1914, §644; *Brown v. Wuskoff*, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243.

51. Mich.—*Shepard v. Schrutt*, 163 Mich. 485, 128 N. W. 772; *Udell v.*

*Kahn*, 31 Mich. 195. Mo.—By express provision of statute. *Rev. St.*, 1909, §7528; *Sachse v. Clingsmith*, 97 Mo. 406, 11 S. W. 69; *McDonnell v. Nash-Smith Tea & Coffee Co.*, 150 Mo. App. 24, 129 S. W. 479. Pa.—By express provision of statute. 2 *Purdon's Dig.*, p. 1517; *Mougenot v. Vernon*, 23 Pa. Super. 165, holding that a certificate of the return nulla bona in the justice court is unnecessary in a county to which the judgment has been transferred from the superior court of the county wherein the justice's judgment was issued.

[a] In cases aided by the levy of an attachment upon realty, the issuance of an execution and its return nulla bona is not a prerequisite to the filing of the transcript in the circuit court. *Hawkins v. Wills*, 49 Fed. 506, 1 C. C. A. 339.

[b] In Missouri, (1) prior to 1907, issuance of an execution from the justice's court and a return of nulla bona thereon were necessary before execution could be issued upon the transcript (*Langford v. Few*, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 606; *Loring v. Maysville Creamery Co.*, 70 Mo. App. 54), where the judgment was against a resident; it was otherwise when the judgment was against a non-resident. See *Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369; *Mathewson v. Kilburn*, 183 Mo. 110, 81 S. W. 1096; *Sachse v. Clingsmith*, 97 Mo. 406, 11 S. W. 69; *Johnson v. Latta*, 84 Mo. 139; *Perkins v. Quigley*, 62 Mo. 498; *Tracy v. Whitsett*, 51 Mo. App. 149. (2) The construction of the early statutes allowed the filing of the transcript in the circuit court before the issuance and nulla bona return of execution in the justice's court; but no execution could issue on the transcript until after such issuance and return in the lower court. *Wineland v. Coonce*, 5 Mo. 296, 32 Am. Dec. 320. (3) It was also held that though irregular to issue an execution from the circuit

No leave of court is necessary to the issuance of an execution on a transcript filed as required.<sup>52</sup>

(B.) SCIRE FACIAS TO PROCURE.—In some jurisdictions a proceeding by scire facias was at one time a prerequisite to the issuance of an execution from the superior court upon a justice's transcript filed therein.<sup>53</sup> Such proceeding was heard in the court in which the transcript was filed.<sup>54</sup>

j. *Compelling Issuance of Writ.*—(I.) By Clerk.—The issuance of a writ of execution is a purely ministerial duty of the clerk,<sup>55</sup> which becomes an imperative one when he is requested to issue the writ by a person entitled to it.<sup>56</sup> On his refusal to issue execution on a valid, subsisting judgment, he may be compelled to do so by mandamus,<sup>57</sup> or

clerk's office on a justice's transcript which showed that the execution was returned before the day, yet a sale under such an execution was not void and subject to collateral attack. *Gorman v. Stanton*, 5 Mo. App. 585. See also *Dillon v. Rash*, 27 Mo. 243.

52. *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380; *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39.

As to necessity for leave of court generally, see *supra*, II, B, 1, i, (II), (C).

53. *Miller v. Shearer*, 6 Ind. 50; *Nowland v. Jackson*, 1 Ind. 162; *Scott v. Williams*, 7 Blackf. (Ind.) 370.

[a] As to the form of the writ of scire facias, see the following Indiana cases: *Miller v. Shearer*, 6 Ind. 50; *Nowland v. Jackson*, 1 Ind. 162; *Groves v. McCabe*, 8 Blackf. 88; *Shiel v. Ferriter*, 7 Blackf. 574; *Nevils v. Campbell*, 7 Blackf. 325; *Bennett v. Jones*, 7 Blackf. 110; *Orput v. Hardy*, 6 Blackf. 456; *Roller v. Custer*, 6 Blackf. 433; *Campbell v. Baldwin*, 6 Blackf. 364.

54. *Miller v. Shearer*, 6 Ind. 50.

[a] Where the proceeding is for the purpose of reviving the justice's judgment, it must be heard by the court in which the transcript is filed. *Glaze v. Lewis*, 12 Ore. 347, 7 Pac. 354; *Rice v. Kitzelman*, 1 Chest. Co. Rep. (Pa.) 173.

[b] Scire facias in the justice's court will not revive the judgment entered in the common pleas on the transcript or authorize the issuing of an execution thereon from the common pleas. *Rice v. Kitzelman*, 1 Chest. Co. Rep. (Pa.) 173.

55. See *supra*, II, B, 1, a.

56. See *supra*, II, B, 1, c, (III).

57. *Cal.—Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194. *Kan.—Powell v. Brad-*

*ley*, 86 Kan. 198, 119 Pac. 543; *Whitmore v. Stewart*, 61 Kan. 254, 59 Pac. 261; *Mendenhall v. Burnette*, 58 Kan. 355, 49 Pac. 93. *Mass.—Thompson v. Sleeper*, 168 Mass. 373, 47 N. E. 106. *Mo.—State v. Vogel*, 14 Mo. App. 187; *State v. Berning*, 8 Mo. App. 600; *State v. Vogel*, 6 Mo. App. 526. *N. Y. People ex rel. Debenetti v. Gale*, 22 Barb. 502, 13 How. Pr. 260; *People v. Clerk*, 3 Abb. Pr. 57. *Ohio.—State ex rel. Pacific Guano Co. v. Eager*, 2 Ohio Cir. Dec. 335, 3 Ohio Cir. Ct. 581. *P. I. Hidalgo v. Crossfield*, 17 Phil. Isl. 466. *Tex.—Moore v. Muse*, 47 Tex. 210; *Jones v. McMahan*, 30 Tex. 719. *Wis.—Attorney-General v. Lum*, 2 Wis. 507, writ of assistance.

[a] Where no appeal has been taken, the clerk will be compelled to issue execution, even though a supersedeas bond has been filed and approved. *Powell v. Bradley*, 86 Kan. 198, 119 Pac. 543. For effect of filing a supersedeas bond where no notice of appeal served, see *infra*, II, B, 1, f, (IV), (B).

[b] Where a motion to set aside a judgment and grant a new trial was left undecided at the adjournment of court, and the clerk for that reason refused to issue a writ of execution, the court granted an alternative writ of mandamus, requiring the clerk to issue execution or show cause for his refusal. *People v. Cloud*, 3 Ill. 362.

[c] Where Judgment Set Aside. Mandamus to compel the clerk to issue an execution will be refused where there is a minute entry showing that the judgment was set aside. *State v. Thompson*, 118 Tenn. 571, 102 S. W. 349.

[d] Where a clerk has accepted an amount less than that due from appel-

upon motion in the case in which such writ or process properly issues.<sup>58</sup> But the writ peremptorily requiring execution to be issued will not be granted, if the issuance requires anything more than a mere ministerial act.<sup>59</sup> And the judgment creditor must have performed all conditions precedent giving him the right to demand issuance of the execution.<sup>60</sup> So too, it must appear that the clerk has clearly and unmistakably refused to perform a merely ministerial duty.<sup>61</sup> If the request for execution is made within the period of statutory limitation, mandamus will not be refused because of laches.<sup>62</sup>

**Existence of Another Remedy.**—If the statute affords a remedy which is plain, speedy and adequate, mandamus will not lie until such remedy has proven fruitless.<sup>63</sup> But it has been held that mandamus will not be refused on the ground that the petitioner has a remedy at law if that remedy is only a suit on the clerk's official bond.<sup>64</sup>

lants in full satisfaction of the costs of appeal, and upon appeal the judgment is reversed, mandamus will not lie against the clerk to compel him to issue execution against the respondents for any greater amount than the appellants paid. *Greer v. Whitley*, 135 Ga. 333, 69 S. E. 479.

58. *Moore v. Muse*, 47 Tex. 210. And see *Eppstein & Co. v. Holmes & Crain*, 64 Tex. 560.

59. *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11; *Thompson v. Sleeper*, 168 Mass. 373, 47 N. E. 106.

[a] When the right of the judgment creditor to execution has been modified by something which has occurred after judgment, and facts must be found which are not of record in order to determine how far this right has been modified, mandamus will not issue against the clerk until these facts have been found by the court and the clerk ordered to issue execution in accordance therewith. *Thompson v. Sleeper*, 168 Mass. 373, 47 N. E. 106.

[b] Where an order was made with a condition annexed, the clerk cannot be expected to pass judicially upon the question whether the condition has been performed or not, and a writ of mandamus will not be directed to the clerk to issue execution upon such order. *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11.

60. *Pease v. Morris*, 138 Mass. 72, failure to file bond in default case.

61. *Compton v. Airial*, 9 La. Ann. 496; *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.

[a] In *Compton v. Airial*, 9 La. Ann. 496, it was held that mandamus will not lie to compel a clerk to issue an execution for arrears of alimony, where it does not appear that an application and a proper showing have first been made to the judge who rendered the decree of alimony.

[b] **Ambiguous Judgment.**—A clerk will not be compelled by mandamus to issue execution upon a judgment open to two constructions, under one of which the plaintiff is not entitled to execution. *Hall v. Stewart*, 23 Kan. 396.

62. *State v. Renick*, 157 Mo. 292, 57 S. W. 713.

63. Thus, where a statute confers authority upon a court to direct a clerk in the performance of his official duties, an application to, and a refusal by, such court to so direct its clerk, is a prerequisite to the granting of a mandamus against the clerk. *Pickell v. Owen*, 66 Iowa 485, 24 N. W. 8; *State ex rel. Ogden v. Frank*, 52 Neb. 553, 72 N. W. 857; *State ex rel. Sloan v. Moores*, 29 Neb. 122, 45 N. W. 278.

64. **Cal.**—*Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194 (money judgment sought to be enforced); *People ex rel. Carpenter v. Loucks*, 28 Cal. 68, where judgment awarded possession of land. **Mo.**—*State v. Renick*, 157 Mo. 292, 57 S. W. 713, money judgment. **Ohio.** *State ex rel. Pacific Guano Co. v. Eager*, 2 Ohio Cir. Dec. 335, 3 Ohio Cir. Ct. 581. **Tex.**—*Jones v. McMahan*, 30 Tex. 719, where amount of bond less than judgment.

But see *Fulton v. Hanna*, 40 Cal. 278,



(II.) By Judge.—Mandamus will lie against a judge to compel him to direct the issuance of a writ of execution, if such direction requires merely the performance of a ministerial duty on his part.<sup>65</sup> But he cannot be compelled to issue the execution, if he has a clerk whose duty it is to issue it.<sup>66</sup> Where the court acts judicially in refusing to order execution to be issued, mandamus will not lie to compel him to order it,<sup>67</sup> nor to review the act of the court.<sup>68</sup>

(III.) Parties to Proceeding.—In proceedings to procure mandamus to compel the issuance of an execution, all persons interested should be made parties.<sup>69</sup>

and *Goodwin v. Glazer*, 10 Cal. 333, wherein the court held that where the judgment was merely a money judgment mandamus would not lie, but the proper remedy was an action on the clerk's bond.

[a] **Remedy by Action on Bond Not Adequate.**—The court in *State ex rel. Pacific Guano Co. v. Eager*, 2 Ohio Cir. Dec. 335, says: "It may be true that the clerk and his bondsmen are liable to respond to the relator in damages in an action at law for his wrongful refusal. If, however, this should be done and judgment recovered, the clerk or his successor might again defeat the object of the suit by refusing to issue a writ of execution, and this might be repeated indefinitely. If, however, this danger is more fanciful than real, yet we think the remedy by action not adequate to enforce the relator's right. By the judgment of the court it had established, not only its right to a sum of money, but its right to the process of the court for its immediate collection; and the full and adequate protection of this right requires a more summary remedy than that afforded by a new action; the writ of mandamus gives that remedy, and the relator is entitled to its benefits."

65. Cal.—*Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11. Mich.—*Gaskill v. Jackson Circuit Judge*, 159 Mich. 472, 123 N. W. 1131, 16 Detroit Leg. N. 957. Wash.—*State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796.

[a] Thus, where the supreme court in affirming a judgment, directed that execution issue thereon and remanded the cause to the superior court for further proceedings in compliance with the decision, it was the duty of the trial court to order execution issued and on its refusal to so order, mandamus

will lie to compel him to do so. *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796.

[b] **Appeal Not Adequate Remedy.** Where it is the plain duty of a court to order execution, a writ of mandamus is the proper remedy to compel him to do so, for the remedy by appeal although plain is neither speedy nor adequate. "The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment. And, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete. So that unless the judgment of reversal was accompanied by a mandatory direction to order the issuance of execution, the petitioner would find himself at the end of his appeal precisely where he is now—with a right to demand the issuance of the writ, but with no power to compel it." *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11. See also *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796.

66. *People ex rel. Debenetti v. Gale*, 13 How. Pr. (N. Y.) 5; *Hidalgo v. Crossfield*, 17 Phil. Isl. 466.

**Compelling clerk to issue execution,** see *supra*, II, B, 1, j, (I).

67. *United States v. Trigg*, 11 Pet. (U. S.) 173, 9 L. ed. 676.

68. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.

[a] **The proper procedure** in such case is to enter the order denying the application and appeal therefrom. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.

69. *State v. Thompson*, 118 Tenn.

k. *Joint and Several or Separate Judgments and Executions.*<sup>70</sup> Where the judgment distinctly states the amount each one of two plaintiffs is entitled to, executions may issue in favor of each for the share belonging to him.<sup>71</sup> But a person in whose favor a judgment is rendered cannot divide it and order several executions issued upon it for the amounts into which he divides it.<sup>72</sup> An assignee of a part of a judgment will not be allowed to issue execution upon so much of the judgment debt as is assigned to him.<sup>73</sup>

Though the judgment be against several defendants in solidio, execution may issue against any one of them,<sup>74</sup> unless the statute otherwise provides.<sup>75</sup> Where judgment is rendered against part only of several defendants, execution can issue only against those found liable.<sup>76</sup> But where the proceeding is against several, and judgments against one or more are entered at one time, and against others at another time, one

571, 102 S. W. 349. But see *Jones v. McMahan*, 30 Tex. 719, holding that the judgment debtor need not be cited as the clerk was qualified to state his reasons for not issuing the writ.

[a] **Clerk a Necessary Party.** *Moore v. Muse*, 47 Tex. 210.

70. As to joint and several or separate judgments, see the title "Judgments."

71. *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

[a] Where several legatees or distributees obtain a decree against executors or administrators for a monied legacy, the decree is several and each is entitled to a separate execution for his share. *Ellison v. Andrews*, 34 N. C. 188.

[b] Executions may issue severally to complainant in the original bill and the complainant in a cross-bill for the amounts adjudged severally. *Stuart v. Heiskell's Trustee*, 86 Va. 191, 9 S. E. 984.

72. *Mass.*—*Davis v. Ferguson*, 148 Mass. 603, 20 N. E. 311, damages and costs. *N. Y.*—*People v. Onondaga C. P.*, 3 Wend. 331. *Pa.*—*Hopkins v. Stockdale*, 117 Pa. 365, 11 Atl. 368. *Eng.*—*Forster v. Baker*, 2 K. B. [1910] 636, 19 Ann. Cas. 462.

73. *Forster v. Baker*, 2 K. B. [1910] 636, 19 Ann. Cas. 462.

[a] "The original judgment creditor cannot divide his judgment and issue several executions upon it for the amounts into which he chooses to divide it, and he cannot assign to another a power which he does not himself possess." *Forster v. Baker*, 2 K. B. [1910] 636, 19 Ann. Cas. 462.

74. *Ga.*—*Jackson v. Roberts*, 83 Ga. 358, 9 S. E. 671. *La.*—*Michel v. Benner*, 24 La. Ann. 287, without issuing it against the others. *N. J.*—*Ruckman v. Decker*, 28 N. J. Eq. 5. *N. Y.* *Crossitt v. Wiles*, 13 N. Y. Civ. Proc. 827. *Can.*—*M'Donagh v. Jephson*, 16 Ont. App. 107, 115.

[a] In *Crossitt v. Wiles*, 13 N. Y. Civ. Proc. 327, the court said: "The Code is silent on this subject. None of its provisions, indeed, require that an execution must be issued against all the defendants, and it nowhere requires that the sheriff must, in the body of the execution, be commanded to enforce the judgment against all the defendants. It is only where it is desired to collect the judgment out of the joint property of all the defendants, or where some provision in the judgment itself requires it, that the sheriff must be directed to levy upon the joint property of all. Notwithstanding the fact that the judgment is against two or more defendants, the plaintiff has the legal right to collect it out of the separate property of either."

[b] **Judgment Reversed as to One Defendant.**—Where a judgment against two defendants is upon appeal reversed as to one of them, the plaintiff is entitled to execution against the other. *Nichols v. Dunphy*, 58 Cal. 605.

**Judgment Opened or Vacated as to One Defendant.**—See *supra*, II, B, 1, b, (VI).

75. *Miss. Code*, 1906, §3960.

76. *Ky.*—*Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. *Pa.* *Breidenthal v. McKenna*, 14 Pa. 160; *Kimmel v. Kimmel*, 5 Serg. & R. 294.

execution may be issued against all,<sup>77</sup> unless their liability is different.<sup>78</sup> Where a judgment or decree adjudges distinct and separate amounts against each of several defendants, the executions thereon should issue against each defendant separately for the sum adjudged against him.<sup>79</sup>

A joint execution upon separate and distinct judgments is unauthorized and void.<sup>80</sup>

1. *Necessity for Delivery.*—In some jurisdictions, an execution is not issued until it is actually or constructively delivered to the sheriff or other proper officer with the intention of having it levied.<sup>81</sup> In

**W. Va.**—*Taney v. Woodmansee*, 23 W. Va. 709.

[a] "An execution against A and B upon a judgment against A alone is void as to both defendants." *Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451.

77. *Walker v. Com.*, 18 Gratt. (59 Va.) 13, 98 Am. Dec. 631.

78. As where defaulted defendants are not liable for costs of trial. See *Mass. Rev. L.*, 1902, ch. 177, §7.

79. *Hyder v. Butler*, 103 Tenn. 289, 52 S. W. 876.

80. **Ark.**—*Bigham v. Dover*, 86 Ark. 323, 110 S. W. 217, not voidable merely, but void. **Ind.**—*Doe v. Rue*, 4 Blackf. 263; *Sharpe v. Baker* (Ind. App.), 99 N. E. 44. **Ky.**—*Merchie v. Gaines*, 5 B. Mon. 126. **La.**—*Dugat v. Babin*, 8 Mart. (N. S.) 391.

[a] Where several actions are instituted against persons jointly and severally liable, separate executions must issue on the judgments obtained. *Bank of Columbia v. Ross*, 4 Harr. & McH. (Md.) 456, although but one satisfaction can be obtained.

[b] **Not Amendable.**—Such an execution is defective, not in form merely, but also in substance, and is therefore not susceptible of amendment. *Bigham v. Dover*, 86 Ark. 323, 110 S. W. 217. Amendment of executions generally, see *infra*, II, B, 2, m.

81. **U. S.**—*Howes v. Cameron*, 23 Fed. 324; *Berry v. Smith*, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359. **Ill.**—*Pease v. Ritchie*, 132 Ill. 638, 645, 24 N. E. 433, 8 L. R. A. 566; *Gilmore v. Davis*, 84 Ill. 487; *Western Union Cold Storage Co. v. Rose*, 60 Ill. App. 452. **Mich.**—*Peterson v. Wayne Circuit Judge*, 108 Mich. 608, 66 N. W. 487; *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111. **Mo.**—*Burton v. Deleplain*, 25 Mo. App. 376. **Neb.**—*Godman v. Boggs*,

12 Neb. 13, 10 N. W. 403. **N. Y.**—*Burrell v. Hollands*, 78 Hun 583, 29 N. Y. Supp. 515, 61 N. Y. St. 373; *Walters & Farley v. Sykes & Harman*, 22 Wend. 566. **N. C.**—*McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769; *State v. McLeod*, 50 N. C. 318. **Ohio.**—*Kelley v. Vincent*, 8 Ohio St. 415. **Pa.**—*Purd. Dig.*, vol. 2, p. 1549; *Person's Appeal*, 78 Pa. 145. **S. D.**—*Schroeder v. Pehling*, 20 S. D. 642, 108 N. W. 252; *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815.

[a] **Other Statements of the Rule.** An execution cannot be considered as being issued until it is placed where it might have been executed, and some efficient act done under it. It must be issued to the sheriff, or other proper officer, who is the only one who can do such efficient act. *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111.

[b] "It is settled by the decisions of this court, that a writ, or execution is not issued until the clerk hands it to the sheriff, or to the party, or his agent." *State v. McLeod*, 50 N. C. 318.

[c] **The mere preparing of the writ** by the clerk and entering a memorandum of "execution" on his docket, is not a sufficient or proper execution, the writ never being sent out of the clerk's office nor delivered to the sheriff. *McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769. And see *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

[d] **Leaving an execution at the sheriff's office**, or the house where he usually transacted his business, is equivalent to a delivery thereof to him. *Midfin v. Will*, 2 Yeates (Pa.) 177.

[e] **Delivery to Deputy.**—The sheriff and his deputies are in law, one officer, so that a writ delivered for execu-



other states, however, the rule as to this matter is otherwise.<sup>82</sup>

m. *Recording*.—In some jurisdictions every writ of execution issued against lands shall, before it is delivered to the sheriff or other officers for execution, be recorded by the clerk of the court out of which the writ issued.<sup>83</sup>

2. **Form and Sufficiency of Writ.**<sup>84</sup>—a. *In General.*<sup>85</sup>—Statutes sometimes provide forms for writs of execution;<sup>86</sup> and where such is the case the writ should follow the language of the statute,<sup>87</sup> although it is sufficient if the statutory form is substantially preserved and followed.<sup>88</sup> Where no form is prescribed for any particular case, the court may vary the statutory form prescribed so as to comply with the requirements of the case in hand.<sup>89</sup>

The writ may be written on one or more sheets of paper,<sup>90</sup> and where

tion to the deputy is in law, delivered to the sheriff. *Albrecht v. Long*, 25 Minn. 163.

[f] **Depositing the writ in a pigeon-hole in the clerk's office** is not a sufficient issuance (*Burton v. Deleplain*, 25 Mo. App. 376), even though such pigeonhole is set apart for the exclusive use of the sheriff. *Person's Appeal*, 78 Pa. 145.

[g] **A delivery to the sheriff with instructions to do nothing** is no delivery. *Cook v. Wood*, 16 N. J. L. 254.

**Who may levy execution**, see *infra*, II, B, 5.

82. *Davis v. Roller*, 106 Va. 46, 55 S. E. 4, holding that an execution is issued within the meaning of the Virginia code, when it is made out and signed by the clerk ready for the officer, marked "to lie," although it has not been placed in the hands of the officer to be levied. The court in this case said: "The defendants in the judgment insist that this execution does not comply with our statute . . . the precise contention of defendants being that no execution can be said to have issued upon a judgment unless it be not only made out by the clerk but placed in the hands of an officer to be levied; and counsel cites authorities from other jurisdictions which seem to support this position. In this state, however, the law seems to be otherwise."

83. N. J. Comp. St., 1910, p. 2243; *Elmer v. Burgin*, 2 N. J. L. 186.

[a] A mere entry of the title and date of entry in the book of execution will not be sufficient; the provisions of the statute are not merely directory. *Voorhees v. Chaffers*, 24 N. J. L. 507.

[b] The failure to so record an

execution cannot be cured by any subsequent proceedings. *Vanderveere v. Gaston*, 24 N. J. L. 818.

84. **Form and sufficiency of alias and pluries writs**, see *infra*, II, B, 9; of executions against person, see *infra*, II, C; of executions issued upon judgments of justice's courts, see the title "Justices of the Peace."

85. **For particular forms**, see 9 STANDARD PROC. 724, et seq., and cross-references there made.

86. See generally the statutes, and the following: **Ala.**—Civ. Code, 1907, §4077. **Ark.**—Digest St., 1904, §3204. **Conn.**—Gen. St., 1902, §898. **Ky.**—St., 1915, §1651. **Mo.**—Rev. St., 1909, §2173. **N. H.**—Pub. St., 1901, ch. 231, §11. **R. I.**—Gen. Laws, 1909, ch. 303, §12; *Taylor v. Ames*, 5 R. I. 361.

87. *Bales v. Scott*, 26 Ind. 202; *Sowle v. Champion*, 16 Ind. 165; *Dubroca v. Faurot*, 3 La. Ann. 272 (execution written in French and English). See also *Lowndes v. Pinckney*, 2 Strob. Eq. (S. C.) 44.

88. **Ala.**—Code, 1907, §4077; *Me-Mahan & Evans v. Colclough*, 2 Ala. 68. **Ark.**—Kirby's Dig., 1904, §3204. **Ky.**—*Graham v. Price*, 3 A. K. Marsh. 522, 13 Am. Dec. 199. **Mo.**—*Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *Overton v. White*, 126 Mo. App. 363, 103 S. W. 512. **N. H.**—Pub. St., 1901, ch. 231, §11. **R. I.**—Gen. Laws, 1909, ch. 303, §12. **Wash.**—*Pederson v. Lease*, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922.

89. **R. I.** Gen. Laws, 1909, ch. 303, §18. See also *Stringer v. Coombs*, 62 Me. 160, 16 Am. Rep. 414.

90. *Glover v. Bass*, 162 Ala. 267, 50 So. 125.

more than one sheet is used, they may be fastened together in any convenient manner.<sup>91</sup>

**Presumption of Regularity.**<sup>92</sup> — Since all public officers are presumed to do their duty, an execution should be regarded as being issued in the form required by statutory provisions until the contrary appears.<sup>93</sup> Other presumptions in aid thereof will also be indulged.<sup>94</sup>

**Surplusage.** — Unnecessary matters contained in the writ will not render it invalid, but will be disregarded as surplusage.<sup>95</sup>

**Statement as to Affidavits Filed.** — It would seem to be unnecessary that the writ should recite the fact or the substance of affidavits which may have been filed as a foundation for any procedure in regard to the writ.<sup>96</sup>

91. *Glover v. Bass*, 162 Ala. 267, 50 So. 125.

[a] "The writ gets its validity from the authority issuing it, and from what is written on it, and not by virtue of the mode or means by which the sheets are fastened together." *Glover v. Bass*, 162 Ala. 267, 50 So. 125.

92. **As to presumptions of regularity**, see 9 ENCY. OF EV. 895, et seq., 944, et seq.

93. **Ga.**—*Gross v. Mims*, 63 Ga. 563. **Kan.**—*Bowerstock v. Adams*, 55 Kan. 681, 41 Pac. 971. **Mo.**—*McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344; *Sachse v. Clingsmith*, 97 Mo. 406, 11 S. W. 69; *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891. **Tex.**—*Turner v. Crane*, 19 Tex. Civ. App. 369, 47 S. W. 822.

94. It is presumed that every execution issued by a proper officer, which recites a judgment as its basis, has in fact a judgment to stand upon. *Gross v. Mims*, 63 Ga. 563.

[a] In the absence of the appearance and judgment dockets it will be presumed that the costs were properly taxed on them, and that the amount stated in the execution is correct. *Merwin v. Hawker*, 31 Kan. 222, 1 Pac. 640.

[b] Where a clerk issued an execution directed to another county it is presumed that the proper affidavit authorizing the issuance of such execution was filed, and an allegation in an answer to a bill in equity denying that an execution had been issued in the county where judgment had been rendered, is insufficient to overthrow the presumption that the clerk properly performed his duty. *Gorman v. Glenn*, 25 Ky. L. Rep. 1755, 78 S. W. 873.

95. **Ala.**—*McElhaney v. Flynn*, 23 Ala. 819. **Ark.**—*Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105. **Ga.**—*Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482; *Walls v. Smith*, 19 Ga. 8. **Ill.**—*Friedlander v. Fenton*, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207. **Kan.**—*Merwin v. Hawker*, 31 Kan. 222, 1 Pac. 640. **N. Y.**—*Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Holmes v. Rogers*, 2 N. Y. Supp. 501. **N. C.**—*Simpson v. Simpson*, 64 N. C. 427. **Ohio.**—*Matthews v. Thompson*, 3 Ohio 272.

[a] **Illustrations.**—An execution in the name of "Henry W. Collier, use of officers of court," is not void, but furnishes a protection to the officer levying it, if issued by a court of competent jurisdiction; the words "use of officers of court" may be rejected as surplusage. *McElhaney v. Flynn*, 23 Ala. 819.

[b] An affidavit being made "for the purpose of foreclosing the lien on a saw-mill, and all the lumber, the product of said mill," and the execution directing the sheriff to levy on the engine and fixtures as well as the saw-mill and lumber, if the engine and fixtures were no part of the mill, their insertion in the execution was surplusage, and the execution would still be good as against the mill and its products. *Bennett v. Gray*, 82 Ga. 592, 9 S. E. 469.

96. Though a statute authorizes the clerk to issue the writ against the personal representative of the deceased debtor upon the receipt of an affidavit informing him of such death and appointment, it was held not necessary that the clerk should recite in the writ the fact that he had received his information through the required affi-

b. *Title and Court*.—The statutes generally provide that the writ shall run in the name of the state or the people thereof.<sup>97</sup> But the failure of an execution to run in the name of the state is generally held to be a defect of form only, which does not make it void.<sup>98</sup>

The writ should show out of what court it issued.<sup>99</sup>

c. *Description of Judgment Generally*.—The writ of execution should contain a recital as to or description of the judgment upon which it is founded;<sup>1</sup> and show that it is issued and enforced as an

davit. *Scott v. Lyons, Solomon & Co.*, 59 Tex. 593.

[a] In *Lebreton v. Lemaire* (Tex. Civ. App.), 43 S. W. 31, it was said that there was no necessity for the fact that an affidavit had been filed to obtain an execution instantan to appear in or upon the execution.

97. See generally the statutes, and the following: **U. S.**—*Aetna Ins. Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. **Cal.**—Code Civ. Proc., §682; *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. **Ariz.**—Civ. Code, 1913, §1357. **Idaho.**—Rev. Codes, 1908, §4471. **Ill.**—*Sidwell v. Schumacher*, 99 Ill. 426; *Reddick v. Cloud's Admx.*, 7 Ill. 670. **Ind.**—*Burns' Ann. St.*, 1914, §724. **Minn.**—Rev. Laws, 1905, §4290; *Thompson v. Bickford*, 19 Minn. 17. **Miss.** Code, 1906, §3912. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325; *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 235, 64 Pac. 504. **Nev.**—Rev. Laws, 1912, §5281. **N. H.**—Pub. St., 1901, ch. 231, §11. **N. D.**—Rev. Codes, 1905, §7104. **R. I.** Gen. Laws, 1909, ch. 303, §1. **S. D.** Code Civ. Proc., 1910, §334. **Tex.**—*Vernon's Sayles' Civ. St.*, 1914, §3729. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513.

[a] It will be sufficient if the body of the writ indicates that it runs in the name of the state. *Bean v. Loftus*, 48 Wis. 371, 4 N. W. 334.

98. **Cal.**—*Hibberd v. Smith*, 50 Cal. 511. **Ill.**—See *Sidwell v. Schumacher*, 99 Ill. 426, 433. **La.**—*Broughton v. King*, 2 La. Ann. 569. **Minn.**—*Thompson v. Bickford*, 19 Minn. 17. **N. Y.** *Park v. Church*, 5 How. Pr. 381. **S. D.** *State v. Cassidy*, 4 S. D. 58, 34 N. W. 928. **Wash.**—*Pederson v. Lease*, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922. **Wis.**—*Bean v. Loftus*, 48 Wis. 371, 4 N. W. 334.

[a] In *Pederson v. Lease*, 48 Wash.

253, 93 Pac. 439, 125 Am. St. Rep. 922, the execution complained of reads in the commencement thereof: "State of Washington, Clallam County, ss.: To the sheriff of Clallam County, Greeting," and then proceeded in the usual form followed in executions. The court said: "It may be that this form is not strictly in compliance with the statute and constitution, but we are not prepared to hold that it was fatally defective; and inasmuch as no objections were made to the confirmation of the sale, we cannot hold the sale void by reason of this alleged defect."

Curing defect by amendment, see *infra*, II, B, 2, m, (II), (A).

99. *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545.

From what tribunal writ issues, see *supra*, II, B, 1, e.

1. See the following: **Ariz.**—Civ. Code, 1913, §1357, execution should refer intelligibly to judgment. **Ga.** *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54. **Idaho.**—Rev. Code, 1908, §4471. **Ill.**—*Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545. **Ind.** *Ann. St.*, 1914, §724. **Ia.**—Code, 1897, §3960. **Ky.**—*Graham v. Price*, 3 A. K. Marsh. 522, 13 Am. Dec. 199; *Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. **Md.**—*Deakins v. Rex*, 60 Md. 593. **Minn.**—Rev. Laws, 1905, §4290. **Mo.**—*Rankin v. Porter Real Estate Co.*, 199 Mo. 345, 97 S. W. 877. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.** Code Civ. Proc., §1366; *Davies v. Skidmore*, 5 Hill 501; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. C.**—Rev. 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ore.**—*Lord's Laws*, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.** *Vernon's Sayles' Civ. St.*, §3729; *Bat-*



execution upon that judgment.<sup>2</sup> The execution should state the title of the action,<sup>3</sup> and the name of the court,<sup>4</sup> and the county<sup>5</sup> wherein the judgment was rendered or docketed. Likewise, it should recite the

title *v. Guedry*, 58 Tex. 111. **Va.**—Code, 1904, §3558. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

**Necessity for judgment as basis of writ of execution**, see *supra*, II, B, 1, b, (I); also *infra*, II, C.

[a] Where a *fieri facias* is sued out after a *scire facias* on a judgment, the *fieri facias* must be grounded on, and contain a proper recital of, the judgment on the *scire facias*, even though the *scire facias* was sued out unnecessarily. *Hall v. Claggett*, 63 Md. 57.

[b] **The reason why the description of the judgment is inserted in the writ is, that the officer may know what he is to enforce, and that the writ may, by inspection, be connected with the authority for its issuance.** *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736, 8 Ann. Cas. 165.

[c] **Sufficiency of Description.**—(1) "That part of an execution which describes the judgment must have the precision of the judgment itself." *Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. (2) *Compare*, *Graham v. Price*, 3 A. K. Marsh. 522, 13 Am. Dec. 199, wherein the court said: "It is not essential to the validity of an execution that the utmost possible strictness should be observed in reciting the judgment. It is sufficient that the execution conforms substantially to the judgment."

[d] The description of a judgment in rem as a judgment in personam is fatal. *Deakins v. Rex*, 60 Md. 593.

**Upon what execution founded**, see *supra*, II, B, 1, b.

2. **U. S.**—*Tilton v. Barrell*, 9 Sawy. 84, 17 Fed. 59. **Ark.**—*Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462. **Ga.**—*Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151. **Ill.**—*Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545. **Ky.**—*Graham v. Price*, 3 A. K. Marsh. 522, 13 Am. Dec. 199; *Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. **S. C.**—*Garvin v. Garvin*, 21 S. C. 83. **Tenn.**—*Courtland*

*Wagon Co. v. Shields*, 56 S. W. 275; *Harlan v. Harlan*, 14 Lea 107, 114. **Tex.**—*Hart v. McDade*, 61 Tex. 208; *Harris v. Dunn* (Tex. Civ. App.), 45 S. W. 731; *Wear v. Gillon* (Tex. Civ. App.), 40 S. W. 817. **W. Va.**—*Taney v. Woodmansee*, 23 W. Va. 709.

[a] In *Bank of United States v. White, Wright* (Ohio) 51, it was held that it may be proven by competent evidence that the writ was issued upon the judgment in question, but that the clerk's certificate would not be competent to prove the fact.

3. **Lord's Ore. Laws**, 1910, §215.

4. **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Codes, 1908, §4471. **Ill.**—*Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823. **Ind.**—*Burns' Ann. St.*, 1914, §724. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 63 L. R. A. 325, 101 Am. St. Rep. 544. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—Code Civ. Proc., §1366; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. D.**—Rev. Codes, 1905, §7104. **Ore.**—*Lord's Laws*, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—*Vernon's Sayles' Civ. St.*, §3729. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

5. **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682; *Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954. **Idaho.**—Rev. Code, 1908, §4471. **Ia.**—Code, 1897, §3960. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **Nev.**—Rev. Laws, 1912, §5281. **N. C.**—Rev., 1905, §627. **N. Y.**—Code Civ. Proc., §1366 (if rendered in the supreme court, must name the county in which judgment-roll is filed); *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. D.**—Rev. Codes, 1905, §7104. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334.

date when the judgment was rendered,<sup>6</sup> and under some authorities, the date when the judgment was docketed.<sup>7</sup> Although there may be a variance between the execution and the judgment in these respects, if, upon an inspection of the execution enough appears upon its face to connect it with the judgment, the variance will not vitiate the writ.<sup>8</sup> Thus, the failure to recite or mistake in reciting the name of

Wash.—Rem. & Bal. Code, §513. Wis. St., 1898, §2969; *Sabin v. Austin*, 19 Wis. 421.

6. Ala.—*Carter v. Smith*, 142 Ala. 414, 38 So. 184, 110 Am. St. Rep. 36. Conn.—*Cutler v. Wadsworth*, 7 Conn. 6. Ga.—*Ward v. Miller*, 143 Ga. 164, 84 S. E. 480. Ill.—*Friedlander v. Fenton*, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207; *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Mooney v. Moriarty*, 36 Ill. App. 175. Ind.—Ann. St., 1914, §724. Ia.—Code, 1897, §3960. Kan. *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. Mo.—*Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392. N. Y.—Code Civ. Proc., §1366; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. R. I.—Gen. Laws, 1909, ch. 303, §9. S. D.—Code Civ. Proc., 1910, §334. Tex.—*Vernon's Sayles' Civ. St.*, §3729; *Barnes v. Nix* (Tex. Civ. App.), 56 S. W. 202. Wis. St., 1898, §2696.

[a] Where an execution is issued on a judgment amended *nunc pro tunc*, it should recite the date of the original judgment as the date of the rendition of the judgment on which it was issued. *Carter v. Smith*, 142 Ala. 414, 38 So. 184.

[b] The execution, bearing date of October 21, 1873, and reciting that the judgment was recovered at the term of the superior court, held, "on the first Monday of September last, to-wit, on the fourteenth day of October," clearly shows upon its face, notwithstanding the imperfect attempt to repeat the year, that the judgment was recovered on October 14, 1873. *Stevens v. Roberts*, 121 Mass. 555.

7. Minn.—Rev. Laws, 1905, §4290. N. C.—*Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725, requirement that date of docketing of judgment should be stated is directory. S. C.—Code Civ. Proc., 1902, §308.

As to necessity for docketing, II, B, 1, b, (I), (C).

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8. Ala.—*De Loach v. Robbins*, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; *McMahan & Evans v. Coleclough*, 2 Ala. 68. Cal.—*Franklin v. Merida*, 50 Cal. 289. Ga.—*Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151. Ill.—*Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Corbin v. Pearce*, 81 Ill. 461. Ia.—*Sprott v. Reid*, 3 G. Gr. 489, 56 Am. Dec. 549. Kan.—*Dugan v. Harman*, 80 Kan. 302, 102 Pac. 465, 133 Am. St. Rep. 209. Ky.—*Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. Me.—*Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736, 8 Ann. Cas. 165; *Corthell v. Egery*, 74 Me. 41. Mo. *Davis v. Kline*, 76 Mo. 310. N. Y. *Healy v. Preston*, 14 How. Pr. 20. Ohio. *Waggoner v. Lessee of Dubois*, 19 Ohio 67. Tenn.—*Harlan v. Harlan*, 14 Lea 107, 114. Tex.—*Battle v. Guedry*, 58 Tex. 111; *Alexander v. Miller*, 18 Tex. 393, 70 Am. Dec. 314. Vt.—*Avery v. Lewis*, 10 Vt. 332, 33 Am. Dec. 203; *Brainard v. Stilphin*, 6 Vt. 9, 27 Am. Dec. 532.

[a] When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed; but when it is material it cannot be overlooked. *Hastings v. Johnson*, 1 Nev. 613.

[b] It is not a substantial defect in a writ that it describes a judgment by confession as having been obtained in an action. *Healy v. Preston*, 14 How. Pr. (N. Y.) 20.

[c] Where a matter of fact is the foundation of the action, and matter of record is only the inducement thereto, a variance in the execution in the description of the record is not material, unless so great as to amount to a strong probability that the record cannot be the writing described. *Stewart v. Severance*, 43 Mo. 322.

[d] A variance between an execution and judgment may be so marked as to raise the inference that the judgment mentioned in the writ is not the judgment upon which the writ was is-

the court rendering the judgment,<sup>9</sup> or in the title of the cause,<sup>10</sup> or a mistake in the recital of the date of the judgment,<sup>11</sup> or a mistake in or failure to recite the date of the docketing of the judgment,<sup>12</sup> will not render the writ void; the defect or omission will be disregarded or amended.<sup>13</sup> If the execution is so defective as not to identify the suit in which it issues, it will be considered void, however.<sup>14</sup>

d. *Designation of Parties and Capacity.*—(I.) In General.—The execution must contain the names of the parties plaintiff to the

sued, but such inference may be rebutted by proof. *Corbin v. Pearce*, 81 Ill. 461.

[e] Where the judgment contains a condition that the damages recovered were to be released upon the payment of the debt, with interest and costs, the execution should contain such condition, but its omission does not render the writ void, but merely voidable. *Hall v. Clagett*, 63 Md. 57.

9. Cal.—*Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954. La.—*Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 So. 666. Tenn.—*Trotter v. Nelson*, 1 Swan 7. Vt.—*Ross v. Shurtleff*, 55 Vt. 177.

[a] Where the clerk in issuing the execution described the judgment as rendered by the county court, when in fact it was a judgment of the supreme court, it was merely a clerical error. The writ was formal in all other respects and it was stated that the judgment was recovered at a time when only the supreme court could have been in session, a fact of which judicial notice will be taken. The writ furnishes the data for its own rectification and is valid. *Ross v. Shurtleff*, 55 Vt. 177.

10. *McAskill v. Power*, 30 Nova Scotia 189.

11. Ala.—*De Loach v. Robbins*, 102 Ala. 288, 14 So. 777. Cal.—*Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954; *Franklin v. Merida*, 50 Cal. 289. Ga.—*Ward v. Miller*, 143 Ga. 164, 84 S. E. 480; *Manry v. Shepperd*, 57 Ga. 68. Ill.—*Friedlander v. Fenton*, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207; *Mooney v. Moriarty*, 36 Ill. App. 175. Mass.—*Stevens v. Roberts*, 121 Mass. 555. Minn.—*Millis v. Lombard*, 32 Minn. 259, 20 N. W. 187. Mo.—*Davis v. Kline*, 76 Mo. 310. N. Y.—*Dixon v. Dixon*, 38 Misc. 652, 78 N. Y. Supp. 255. Ore.—*Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508. Tenn.—*Courtland Wagon Co. v. Shields*, 56 S. W.

275. Tex.—*Alexander v. Miller*, 18 Tex. 893, 70 Am. Dec. 314. Vt.—*Bank of Whitehall v. Pettes*, 13 Vt. 395, 37 Am. Dec. 600; *Rider v. Alexander & Kathan*, 1 Chip. 267. Wis.—*Sabin v. Austin*, 19 Wis. 421.

[a] If an execution correctly refers to the judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. *Franklin v. Merida*, 50 Cal. 289.

[b] Mistake of one day in reciting date of judgment not fatal. *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *Swift v. Agnes*, 33 Wis. 228.

[c] The *fi. fa.* need not name the term at which the judgment on which it rests was rendered. It is sufficient if it declares that it was lately rendered in court and is for a stated amount of principal, and a stated amount of interest up to a certain date, together with the interest from that date. If the execution follows the judgment, that is enough. *Drawdy v. Littlefield*, 75 Ga. 215.

12. *Mollison v. Eaton*, 16 Minn. 426; *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

13. As to amendment of writ of execution, see *infra*, II, B, 2, m, (II), (A) and (B).

14. *Trotter v. Nelson*, 1 Swan (Tenn.) 7. And see *Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970; *McKay v. Paris Exchange Bank*, 75 Tex. 181, 12 S. W. 529, and cases in preceding notes.

[a] Where the execution issued upon a judgment for the breach of a bond, to be discharged upon the payment of damages, and recited that the judgment was for damages only, it was held to be a fatal variance. *Den ex dem. Walker v. Marshall*, 29 N. C. 1, 45 Am. Dec. 502.



action;<sup>15</sup> and must name the person or persons against whom it issues,<sup>16</sup> as well as name those against whom the judgment is rendered.<sup>17</sup>

If the judgment or decree is against several defendants jointly, the execution must appear on its face to be against all the defendants;<sup>18</sup>

15. See generally the statutes, and the following: **Ind.**—Burns' Ann. St., 1914, §724. **Ia.**—Code, 1897, §3960. **Minn.**—Rev. Laws, 1905, §4290. **N. Y.** Code Civ. Proc., §1366. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.** Code Civ. Proc., 1910, §334. **Tex.** Vernon's Sayles' Civ. St., §3729; Harkey v. Day (Tex. Civ. App.), 129 S. W. 1195. But see Collins v. Hines, 100 Tex. 304, 99 S. W. 400. **Utah.**—Comp. Laws, 1907, §3233. **Va.**—Code, 1904, §3558. **Wash.**—Rem. & Bal. Code, §513. **W. Va.**—Taney v. Woodmansee, 23 W. Va. 709. **Wis.**—St., 1898, §2969.

[a] The writ is sufficient if it issue in the name a party bore at the commencement of the action although she may thereafter have married and such fact have been suggested of record. DeWitt v. Moore, 19 Ky. L. Rep. 1953, 44 S. W. 964.

For whom execution issues, see *supra*, II, B, 1, d.

16. **Fla.**—Higgins v. Driggs, 21 Fla. 103. **Ill.**—Brown v. Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; West v. Krebaum, 88 Ill. 263; Douglas v. Whiting, 28 Ill. 362; Shirley v. Phillips, 17 Ill. 471. **Ia.**—Code, 1897, §3960. **Mo.**—Crittenden v. Leitensdorfer, 35 Mo. 239. **N. Y.**—Olmsted v. Vredenburg, 10 How. Pr. 215; Farnham v. Hildreth, 32 Barb. 277; Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. Supp. 1045. **N. C.**—Roberson v. Woollard, 28 N. C. 90. **Tex.**—Capps & Cantey v. Leachman, 90 Tex. 499, 39 S. W. 917, 59 Am. St. Rep. 830. **W. Va.**—Taney v. Woodmansee, 23 W. Va. 709.

[a] A mere failure to state the names of all of the parties in whose favor the judgment has been rendered does not necessarily nullify the writ, and there may be a sufficient description of the judgment although there be lack of fullness in the matters mentioned by the statute. But, besides a description of the judgment, it is essential that the writ show against whom it is to operate. Without the command to take the property of a named person the officer has no author-

ity to take that of any one. Without this command there is no writ; and without the name of the person whose property is to be taken there is no command. Collins v. Hines, 100 Tex. 304, 99 S. W. 400; Capps v. Leachman, 90 Tex. 499, 39 S. W. 917.

[b] If all the parties, against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor. **N. Y.** Code Civ. Proc., §1368; Simon v. Underwood, 61 Misc. 369, 115 N. Y. Supp. 65; Fish v. Hahn, 56 Misc. 449, 107 N. Y. Supp. 274.

[c] An execution upon a judgment against "the trustees of the Church Family in their official capacity" need not give the names of the trustees as the judgment is satisfied by a levy upon the property of the church, of which the legal title is held by the trustees. Davis v. Bradford, 58 N. H. 476.

Against whom execution may issue, see *supra*, II, B, 1, e.

17. See generally the statutes, and the following: **Ind.**—Burn's Ann. St., 1914, §724. **Minn.**—Rev. Laws, 1905, §4290. **N. Y.**—Code Civ. Proc., §1366. **N. C.**—Rev. 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—Vernon's Sayles' Civ. St., §3729. **Utah.**—Comp. Laws, 1907, §3233. **Va.**—Code, 1904, §3558. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

18. **Ill.**—Merrifield v. Western Cottage Piano, etc. Co., 238 Ill. 526, 87 N. E. 379; Brinton v. Gerry, 7 Ill. App. 238. **Ind.**—Dandistel v. Kronenberger, 39 Ind. 405. **Ky.**—St., §1652, sub. 2; Johnston v. Lynch, 3 Bibb 334; Tanner v. Grant, 10 Bush 362; Letton's Admr. v. Rafferty, 154 Ky. 278, 157 S. W. 35. **Md.**—The Cumberland Coal & Iron Co. v. Jeffries, 27 Md. 526. **Miss.** Conn v. Pender, 1 Smed. & M. 386. **Mo.** Zelle v. Bobb, 14 Mo. App. 267. **N. H.** Morse v. Dewey, 3 N. H. 535. **N. J.** Linn v. Hamilton, 34 N. J. L. 305; State v. Stout, 11 N. J. L. 362. **N. Y.** Code Civ. Proc., §1932; Flanagan v. Tinen, 53 Barb. 587, 37 How. Pr. 130;

and this is true, notwithstanding that from death, bankruptcy or some other cause no levy can be made on the property of some defendants.<sup>19</sup> If an appeal is entered by part of the defendants and the judgment affirmed as to all, the most convenient and less expensive course is to include all in one execution, expressing therein distinctly the several liability of each, if different, as where damages and costs have been allowed against the appellants.<sup>20</sup>

**Capacity of Parties.** — If the judgment is recovered against a person in a representative capacity, the execution must show that it issues against him in that capacity alone.<sup>21</sup> This is not sufficiently shown

*Flanders v. Batten*, 50 Hun 542, 3 N. Y. Supp. 728, 20 N. Y. St. 671. **Ohio.** Dunn & Co. Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Wkly. L. Bul. 127; *Billingheimer v. Riekey*, 2 Cin. Super. Ct. 492. **Pa.**—*Sheetz v. Wynkoop*, 74 Pa. 198; *Mortland v. Himes*, 8 Pa. 265; *Shaffer v. Watkins*, 7 Watts & S. 219; *Hensinger v. Geist*, 1 Woodw. 306; *Gibbs v. Atkinson*, 1 Clark 476, 3 Pa. L. J. 139. **Tenn.**—*Lee v. Crossna*, 6 Humph. 281; *Saunders v. Gallaher*, 2 Humph. 445; *Boyken v. State*, 3 Yerg. 426. **Va.**—Code, 1904, §3582. **W. Va.** Code, 1913, §5106.

[a] The rule, that where a judgment is joint, the process to enforce its payment must also be joint, is technical, and has more of form than substance in it; and the court out of which the process issues will take care that it is not used so as to work an injustice. *Sheetz v. Wynkoop*, 74 Pa. 198; *Mortland v. Himes*, 8 Pa. 265.

[b] "An execution (1) against A & B for a sum which it recites that the plaintiff has recovered against 'him' is void upon its face, as it is uncertain against whom the judgment was rendered." *Farmers' Nat. Bank v. National Bank*, 4 Ky. L. Rep. 451. (2) But an execution commanding the sheriff to levy upon the property of A, B and C, to satisfy a judgment which D had recovered against the said A and others, is not objectionable for not stating the recovery to have been against the said A, B and C, the expressions being substantially the same. *McCoy v. Elder*, 2 Blackf. (Ind.) 183.

[c] **Use of Conjunctive.**—An execution against several defendants to reach individual property does not have to say, nor does it ever say, A "or" B, but it always says A "and" B; and so it would do, putting the word *and* before the last defendant, and

nothing before any of the others, were there a score of defendants. *Parler v. Johnson*, 81 Ga. 254, 7 S. E. 317.

**Necessity for execution conforming to judgment as to parties**, see *infra*, II, B, 2, d, (II).

19. III.—*Merrifield v. Western Cottage Piano & O. Co.*, 238 Ill. 526, 87 N. E. 379. **Ky.**—*Johnston v. Lynch*, 3 Bibb 334. **N. J.**—*Linn v. Hamilton*, 34 N. J. L. 305. **Pa.**—*Sheetz v. Wynkoop*, 74 Pa. 198. **Tenn.**—*Dickinson v. Bowers*, 7 Baxt. 307.

[a] But see *Kendrick v. Rice*, 16 Tex. 254, following *Turner v. Smith*, 9 Tex. 626, where it is held that the name of a deceased defendant was properly omitted from the writ for the reason that the execution could not be enforced against his estate.

[b] **The rule held applicable** (1) where the enforcement of the execution was restrained as against one of the defendants. *Merrifield v. Western Cottage Piano, etc. Co.*, 144 Ill. App. 289. (2) So, where judgment was against the principals and surety jointly, the execution must, on its face, be against the same parties, notwithstanding the fact that the surety may have been discharged from liability by facts occurring subsequent to the judgment. *Brinton v. Gerry*, 7 Ill. App. 238.

[c] The fact that one of the judgment debtors has been declared a bankrupt and discharged subsequent to the entry of judgment will not render an execution which had run against all, invalid. *Linn v. Hamilton*, 34 N. J. L. 305.

20. *Kendrick v. Rice*, 16 Tex. 254.

21. **Conn.**—*Palmer v. Palmer*, 2 Conn. 462. **N. Y.**—*Olmsted v. Vredenburg*, 10 How. Pr. 215; *Reid v. Stegman*, 15 Abb. N. C. 422. **Tex.**—*Texas Sav. & Loan Assn. v. Banker*, 26 Tex. Civ. App. 107, 61 S. W. 724.

by a word or words following the name of the person in such form that they are merely *descriptio personae*.<sup>22</sup>

(II.) **Conformity to Judgment.** — In accordance with the rule requiring the execution to conform to the judgment,<sup>23</sup> it must conform thereto in respect to the parties named therein,<sup>24</sup> as well as to their capacity.<sup>25</sup> One not a party to the judgment<sup>26</sup> must not be named

See also *infra*, II, B, 2, d, (II).  
Compare, 8 STANDARD PROC. 770, and  
*infra*, II, B, 3, m,

22. **Ala.**—*Averett v. Thompson*, 15 Ala. 678. **Ga.**—*Stephens v. City of Atlanta*, 119 Ga. 666, 46 S. E. 872; *Armour Pack Co. v. Lovell*, 118 Ga. 164, 44 S. E. 990; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Wynn v. Irvine's Georgia Music House*, 109 Ga. 287, 34 S. E. 582; *Saffold v. Banks*, 69 Ga. 289. See *Tharpe v. McCall*, 54 Ga. 501. **N. H.**—*Keniston v. Little*, 30 N. H. 318, 64 Am. Dec. 297. **B. I.**—*Gilbane v. Hawkins*, 29 R. I. 502, 72 Atl. 723. **Tex.**—*Hart v. McDade*, 61 Tex. 208; *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

Compare, 8 STANDARD PROC. 738, 757.

[a] If a judgment is against the personal property of a deceased in the hands of the defendants, as his executors, a writ of execution is insufficient if it merely describes the defendants in their representative capacity as it would not prevent levy being made upon the individual property of the defendants. *Olmsted v. Vredenburg*, 10 How. Pr. (N. Y.) 215.

23. See *infra*, II, B, 2, d, (II).

24. **Conn.**—*Palmer v. Palmer*, 2 Conn. 462. **Ga.**—Code, 1910, §6022; *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151; *Moughon v. Brown*, 68 Ga. 207; *Bradford v. The Water Lot Co.*, 58 Ga. 280; *Williams v. Atwood*, 57 Ga. 190, 52 Ga. 585. **Ia.**—*Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116. **Ky.**—*Com. v. Fisher*, 2 J. J. Marsh. 137; *Bridges v. Caldwell's Exrs.*, 2 A. K. Marsh. 195. **Me.**—*Mysroll v. Violette*, 55 Me. 108. **Mo.**—*Crittenden v. Leitensdorfer*, 35 Mo. 239. **N. C.**—*Roberson v. Wollard*, 28 N. C. 90. **Ohio.**—*Dunn & Co. v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 Wkly. L. Bul. 127. **Pa.**—*Shaffer v. Watkins*, 7 Watts & S. 219; *Gibbs v. Atkinson*, 1 Clark 476, 3 Pa. L. J. 139. **Tenn.**—*Jennings v. Pray*, 8 Yerg. 85. **Tex.**—*Cleveland v. Simpson*, 77 Tex. 96, 13 S. W. 851; *Hart v. McDade*, 61 Tex. 208.

[a] A judgment in favor of one person is certainly no authority for a process to issue in the name of another person; and such an execution, being on its face entirely disconnected with the judgment offered to support it, cannot be shown to have been in fact issued on such judgment, although it was so intended by the officer who issued it, and an execution which is complete on its face cannot be sworn to refer to a judgment other than one which would authorize such an execution to issue. *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684.

[b] Rule of idem sonans held applicable where judgment ran against "Peter Pederson" and the writ issued against "Peter Peterson." *Pederson v. Lease*, 48 Wash. 253, 93 Pac. 439.

25. **Ga.**—*Powell v. Perry*, 63 Ga. 417. **N. Y.**—*Reid v. Stegman*, 15 Abb. N. C. 422; *Superintendents of the Poor v. Smith*, 11 Wend. 181. **N. C.**—*Newsom v. Newsom*, 26 N. C. 381. **Pa.**—*Lepsch v. Barrett*, 236 Pa. 579, 85 Atl. 21. **Tex.**—*Hart v. McDade*, 61 Tex. 208; *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

[a] There is no variance between a judgment rendered against a person in his individual capacity and an execution having a word indicating a representative capacity following the name, where such word is merely surplusage and *descriptio personae*. *Tharpe v. McCall*, 54 Ga. 501. See *supra*, II, B, 2, d, (I).

As to effect of issuing execution in favor of or against individual partners where judgment is in favor of partnership, see the title "Partnership."

26. **Ga.**—*Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151. **Ill.**—*Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Elliot v. Sneed*, 2 Ill. 517. **Mo.**—*Crittenden v. Leitensdorfer*, 35 Mo. 239. **N. C.**—*Roberson v. Woollard*, 28 N. C. 90. **Va.**—*Snavely v. Harkrader*, 30 Gratt. (71 Va.) 487.



either as an execution plaintiff, or defendant.<sup>27</sup> The addition of the initial of a middle name in the execution will not avoid the process as a material departure from the judgment, however.<sup>28</sup> An execution issued against the members of a corporation is variant from a judgment recovered against the corporation.<sup>29</sup>

An execution reciting a judgment in favor of one person, but failing to state that it was recovered for the use of another is merely voidable.<sup>30</sup> Conversely, an execution reciting that the judgment was rendered in favor of one person, for the use of another, is merely irregular where the judgment was in favor of the beneficiary named in the execution.<sup>31</sup>

(III.) **Effect of Omission of Name or Capacity.**—It is generally held that the omission of the name of the plaintiff,<sup>32</sup> or defendant in execution,<sup>33</sup> renders the writ of execution void, if the judgment is not otherwise identified and shown to be the same one upon which the writ issues.

Where the name of one of several defendants is omitted, it has been held that the execution is merely irregular,<sup>34</sup> subject to being set aside, if properly attacked in a direct proceeding.<sup>35</sup>

The failure to state the capacity of the parties, being an amendable defect, will not render the writ void.<sup>36</sup>

(IV.) **Effect of Mistake or Defect in Designation.**—Even though there is a mistake or defect in reciting the names of the parties plaintiff,<sup>37</sup>

See also *supra*, II, B, 1, d.

27. See *supra*, II, B, 1, e.

[a] The writ of execution must name the same persons as those against whom the judgment is rendered. *Roberson v. Woollard*, 28 N. C. 90.

28. *McMahan & Evans v. Colclough*, 2 Ala. 68; *Jackson v. Weisiger*, 1 Bibb (Ky.) 324.

29. *Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116; *Reid v. Stegman*, 99 N. Y. 646, 1 N. E. 672.

30. *Stevenson v. McLean*, 5 Humph. (Tenn.) 332, 42 Am. Dec. 434.

[a] Under a statute providing that "the plaintiff in such execution shall be the person actually entitled, without regard to his relative position in the cause," an execution is good which issues on the names of the beneficiaries. *Whittle v. Tarver*, 75 Ga. 818. But see *Shackleford v. Hooper*, 65 Ga. 366.

31. *Barnes v. Hayes*, 1 Swan (Tenn.) 304; *Jennings v. Pray*, 8 Yerg. (Tenn.) 85.

32. *Barrett v. Brownlee*, 190 Ala. 613, 67 So. 467; *Cooper & Co. v. Jacobs*, 82 Ala. 411, 2 So. 832.

33. *Douglas v. Whiting*, 28 Ill. 362; *Roberson v. Woollard*, 28 N. C. 90.

[a] An execution directing that the amount of the judgment be collected out of the "separate property of the judgment debtor, John Goldberg, first name fictitious, real name unknown to the plaintiff," is void, as it allows the levy to be made upon the property of any Goldberg. *Goldberg v. Markowitz*, 94 App. Div. 237, 87 N. Y. Supp. 1045.

34. **U. S.**—*In re First Nat. Bank*, 49 Fed. 120. **N. H.**—*Morse v. Dewey*, 3 N. H. 535, omission of names of two out of three debtors. **Ohio**.—*Dunn & Co. v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 Wkly. L. Bul. (Ohio) 127. **Pa.**—*Shaffer v. Watkins*, 7 Watts & S. 219; *Gibbs v. Atkinson*, 1 Clark 476, 3 Pa. L. J. 139. **Tenn.**—*Wilson & Wheeler v. Nance & Collins*, 11 Humph. 189; *Lee v. Crossna*, 6 Humph. 281. **Tex.**—*White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747.

35. See *infra*, IV.

36. *Powell v. Perry*, 63 Ga. 417.

As to amendment of writ so as to show capacity of parties, see *infra*, II, B, 2, m, (II), (C).

37. **Ala.**—*Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441. **Ga.**—*Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73

or defendant,<sup>38</sup> the force and effect of the writ will not be destroyed in a case where the judgment is otherwise so plainly described and identified as to make it apparent who the parties are, and that the writ in question issued upon such judgment.<sup>39</sup> The same is true where the names defectively stated or omitted can be corrected or supplied by reference to the record.<sup>40</sup> But where the judgment cannot be identified, a mistake in the name of the parties will render the writ void;<sup>41</sup> and this is true even though the mistake is merely in the Chris-

Am. St. Rep. 151. **Ind.**—*Hume v. Conduitt*, 76 Ind. 598. **Ia.**—*Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 213. 54 Am. St. Rep. 573. **Neb.** *Miller v. Willis*, 15 Neb. 13, 16 N. W. 840. **N. C.**—*Rutherford v. Raburn*, 32 N. C. 144. **Ore.**—*Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508. **Tex.**—*Haskins v. Wallet*, 63 Tex. 213.

[a] The writ will not be rendered void by reason of the insufficient description of the parties when they may be identified by consulting the complaint. *Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441.

[b] Where the writ correctly recited in whose favor the judgment had been rendered, but in the clause directing to whom the proceeds should be paid, failed to recite all the parties plaintiff, omission was immaterial. *Smith v. Sweat*, 60 Ga. 539.

[c] Where a judgment reads that the receiver of the plaintiffs shall recover of the defendants, an execution stating the recovery as in favor of the plaintiffs is sufficient, if the identity of the judgment is otherwise established. *Harlan v. Harlan*, 14 Lea (Tenn.) 107.

38. **Mo.**—*Ellis v. Jones*, 51 Mo. 180; *Gorman v. Stanton*, 5 Mo. App. 585. **N. C.**—*Rutherford v. Raburn*, 32 N. C. 144. **W. Va.**—*Stout v. Baltimore & O. R. Co.*, 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940.

[a] Where the defendant is correctly described in one part of the writ, the fact that he is incorrectly described in another part of the writ, is immaterial, the identity of the person being apparent. *Gorman v. Stanton*, 5 Mo. App. 585.

39. The mere transposition of the words "plaintiff" and "defendant," being merely surplusage, will not affect the validity of the writ. *McIntyre v. Sanford*, 9 Daly (N. Y.) 21.

[a] Although the execution did not state in whose favor the judgment was

rendered but recited that judgment was rendered "between A as plaintiff, and G as defendant," and ordered that the property of "said judgment debtor" be sold to satisfy the judgment, the fact that it was subscribed by the plaintiff's attorneys sufficiently indicated that the defendant was the judgment debtor referred to, and if that was not enough, reference could be had to the judgment and the roll. *Morrison v. Austin*, 14 Wis. 601.

40. *Miller v. Willis*, 15 Neb. 13, 16 N. W. 840.

[a] **Indorsement on Writ.**—Failure of the execution to recite the name of the plaintiff in the body of the execution does not render it void, but merely irregular, where the name was indorsed on the back of the writ. *McGuire v. Galligan*, 53 Mich. 453, 19 N. W. 142; *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184; *Collins v. Hines* (Tex. Civ. App.), 100 S. W. 359. See *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151. But see *Barrett v. Brownlee*, 190 Ala. 613, 67 So. 467, wherein the record follows under the rule of stare decisis, although it criticizes the principle announced in *Cooper & Co. v. Jacobs*, 82 Ala. 411, 2 So. 832, holding such an execution void.

41. *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151; *Underwood v. Harvey*, 106 Ga. 268, 32 S. E. 124; *Bradford v. Water Lot Co.*, 58 Ga. 280; *Manry v. Shepperd*, 57 Ga. 68 (judgment against W. M. described in writ as a judgment against W. M. Jr. renders writ void where both persons reside in the county).

[a] "A judgment in favor of one person is certainly no authority for a process to issue in the name of another person; and such an execution, being on its face entirely disconnected with the judgment offered to support it, cannot be shown to have been in fact issued on such judgment,

tian name.<sup>42</sup> But an execution against two persons, in which the name of one is erroneously stated, is not void as against the one who is correctly described.<sup>43</sup>

**Effect of Misdescription of Capacity.**—An execution issued for or against a person in a different capacity than that in which the judgment is rendered, is void.<sup>44</sup>

**e. Designation of Amount of Judgment.**—(I.) **In General.**—If execution is issued upon a money judgment, it must state the amount thereof,<sup>45</sup> as well as the amount actually due thereon when the writ is issued.<sup>46</sup> An execution which varies from the judgment as to the

although it was so intended by the officer who issued it. An execution which is complete on its face cannot be shown to refer to a judgment other than one which would authorize such an execution to issue." *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151.

[b] Where a judgment is against the Water Lot Company of the City of Columbus, an execution against the Water Lot Company is substantially variant therefrom. "The name of a corporation is of its very essence; by that name it is empowered to sue, and by it it is liable to be sued; . . . it can only be known in all legal proceedings by that name." *Bradford v. Water Lot Co.*, 58 Ga. 280.

42. *Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874; *Battle v. Guedry*, 58 Tex. 111; *Harkey v. Day* (Tex. Civ. App.), 129 S. W. 1195 (under a statute providing that the writ shall correctly describe the judgment, stating . . . the names of the parties).

43. *Blake v. Blanchard*, 48 Me. 297.

44. *Pemberton v. Searce*, Hard. (Ky.) 3. See *supra*, II, B, 2, d, (I).

[a] The difference between the two capacities which appears in the judgment, and in the execution, is virtually a difference of parties; and will produce the same legal effect as if the execution had issued in the name of a different person. *Palmer v. Palmer*, 2 Conn. 462.

45. **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682. **Ga.**—Conley v. Buck, 102 Ga. 752, 29 S. E. 710; *Williams v. Atwood*, 57 Ga. 190, 52 Ga. 585. **Idaho.**—Rev. Code, 1908, §4471. **Ind.**—Burns' Ann. St., 1914, §724. **Ia.**—Code, 1897, §3960. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74

Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **N. Y.**—Code Civ. Proc., §1368; *Todd v. Botchford*, 86 N. Y. 517, 1 Civ. Pr. 402; *Watson v. Fuller*, 6 Johns. 283; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—*Vernon's Sayles' Civ. St.*, §3729; *Sykes v. Speer* (Tex. Civ. App.), 112 S. W. 422. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

[a] Where an execution is intended as an execution for costs and refers to the judgment with sufficient precision so that no person can be mistaken about the judgment it is issued upon, the fact that the execution fails to give the amount of the debts recovered in the judgment, does not render it void. *Hunter v. Miller*, 36 Mo. 143.

46. **Ariz.**—Civ. Code, 1913, §1357. **Ark.**—Hightower v. Handlin & Veneys, 27 Ark. 20. **Idaho.**—Rev. Code, 1908, §4471. **Ill.**—*Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823. **Ind.**—Burns' Ann. St., 1914, §724. **Ia.**—Code, 1897, §3960. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **N. Y.**—Code Civ. Proc., §1368; *Todd v. Botchford*, 86 N. Y. 517, 1 Civ. Pr. 402; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. And see also *Nat. Park Bank v. Salomon*, 53 Hun 629, 5 N. Y. Supp. 632, 1 Silv. 494, 23 N. Y. St. 566. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes,



amount thereof, though irregular, is not thereby rendered void if the identity of the judgment upon which the writ issues is not destroyed.<sup>47</sup> But where the recital in the writ of the amount of the judgment is so defective that the writ cannot be connected with the judgment,<sup>48</sup>

1905, §7104. **Ohio**.—*Monaghan v. Monaghan*, 25 Ohio St. 325; *Humbert's Lessee v. M. E. Church*, Wright 213; *Bank of United States v. White*, Wright 51. **Ore**.—*Lord's Laws*, 1910, §215. **S. C.**—*Code Civ. Proc.*, 1902, §308. **S. D.**—*Code Civ. Proc.*, 1910, §334. **Tex**.—*Vernon's Sayles' Civ. St.*, §3729. **Utah**.—*Comp. Laws*, 1907, §3233. **Wash.** *Rem. & Bal. Code*, §513. **Wis**.—*St.*, 1898, §2969.

[a] Where a judgment was confessed for a total amount, but the statement upon which it was based showed that only a portion of this indebtedness was due, an execution issued for the total amount of the judgment is irregular. *Nat. Park Bank v. Salomon*, 53 Hun 629, 1 Silv. 494, 5 N. Y. Supp. 632, 23 N. Y. 566.

[b] Where the principal of a judgment for \$27.80 was reduced by a payment of \$25, leaving only \$2.80, a sale of property under execution for \$27.80 instead of for \$2.80 is void as to one who had notice of such payment. *Downs v. Dennis*, 83 Ark. 71, 102 S. W. 699.

[c] Where defendant is entitled to an offset against the judgment, execution for the face of such judgment is improper. *Nash v. Kreling*, 136 Cal. 627, 69 Pac. 418.

47. **Ala.**—*De Loach v. Robbins*, 102 Ala. 288, 14 So. 777; *Clements v. Pearce*, 63 Ala. 284. **Ark**.—*Hail v. Doyle*, 35 Ark. 445. **Cal**.—*Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330; *Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954; *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. **Ga**.—*Manrny v. Shepperd*, 57 Ga. 68. **Ill**.—*Newman v. Willits*, 60 Ill. 519; *Becker v. Quigg*, 54 Ill. 390; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47. **Ia**.—*Williams v. Brown*, 28 Iowa 247; *Cunningham v. Felker*, 26 Iowa 117; *Cooley v. Brayton*, 16 Iowa 10. **Kan**.—*St. Louis & S. F. Ry. Co. v. Rierson*, 38 Kan. 359, 16 Pac. 443; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793; *Dickens v. Crane*, 33 Kan. 344, 6 Pac. 630. **Ky**.—*Letton's Admr. v. Rafferty*, 154 Ky. 278, 157 S. W. 35; *Pemberton v. Seacoe*,

*Hard*. 3. **Md**.—*Miles v. Knott's Lessee*, 12 Gill & J. 442. **Mass**.—*Berry v. Gates*, 175 Mass. 373, 56 N. E. 581. **Miss**.—*Dailey v. State*, 56 Miss. 475. **Mo**.—*Davis v. Kline*, 76 Mo. 310; *Montgomery v. Farley*, 5 Mo. 233. **Mont**.—*Roush v. Fort*, 2 Mont. 482. **N. H**.—*Avery v. Bowman*, 40 N. H. 453, 77 Am. Dec. 728. **N. J**.—*Bruere v. Briton*, 20 N. J. L. 268. **N. M**.—*Bachelder v. Chaves*, 5 N. M. 562, 25 Pac. 783. **N. Y**.—*Wright v. Nostrand*, 94 N. Y. 31; *Peck v. Tiffany*, 2 N. Y. 451; *Peet v. Cowenhoven*, 14 Abb. Pr. 56; *Jackson v. Pratt*, 10 Johns. 381. **N. C**.—*Hinton v. Roach*, 95 N. C. 106. **Ore**.—*Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508. **Pa**.—*Coleman v. Mansfield*, 1 Miles 56. **Tenn**.—*Trotter v. Nelson*, 1 Swan 7. **Tex**.—*Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730; *Sykes v. Speer* (*Tex. Civ. App.*), 112 S. W. 422. **Wash**.—*Pederson v. Lease*, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111.

[a] Excessive amount held to be a fraud on rights of subsequent creditors (*Weiskircher v. Volk*, 29 Pa. Super. 611), and the burden of proof is on the plaintiff to show that it is not fraudulent (*Weiskircher v. Volk*, 29 Pa. Super. 611).

[b] **Judgment by Default**.—The fact that the judgment was entered upon the default of the defendant does not change the rule that an execution issued for a greater amount than the judgment calls for is merely irregular and not void. Merely because he had failed to answer the complaint did not release him from the duty incumbent upon him to see that the judgment did not allow a greater amount than the court was authorized to award under the allegations of the complaint or that the execution did not call for a greater sum of money than the judgment called for. *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462.

[c] **Amendment**, see *infra*, II, B, 2, m, (II), (D).

48. *Coltraine v. McCain*, 14 N. C. 308, 24 Am. Dec. 256 (wherein lawful and unlawful demands were put in the

or when issued for a different amount with some fraudulent intent,<sup>49</sup> it is void.

If the execution issues for too large an amount, the proper practice is by a motion to set aside the writ as to the excess.<sup>50</sup>

(II.) Costs and Interest. — The execution should designate the amount of costs to be collected upon the execution,<sup>51</sup> and should specify a date from which interest upon the judgment is to be computed.<sup>52</sup>

The writ should conform to the judgment in stating the costs and interest due.<sup>53</sup> The writ will not be rendered invalid by a failure to state the amount of costs,<sup>54</sup> or to itemize the costs included.<sup>55</sup> Nor will a mere clerical error in the writ as to the amount of the costs accrued in an action render the writ invalid.<sup>56</sup> A variance between

writ to be collected, and the amounts were not distinguished so as to show the defendant how much he must rightfully pay); *Maxwell v. King*, 3 Yerg. (Tenn.) 460 (amount left entirely blank).

49. *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

50. *Kan.*—*St. Louis & S. F. Ry. Co. v. Rierison*, 38 Kan. 359, 16 Pac. 443; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. *Ky.*—*Letton's Admr. v. Rafferty*, 154 Ky. 278, 157 S. W. 35. *Md.*—*Gorsuch v. Thomas*, 57 Md. 334. *Tenn.* *Barnes v. Robinson*, 4 Yerg. 186. *Wash.* *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111.

51. See generally the statutes, and the following: *Ala.*—Civil Code, 1907, §4080; *Francis v. Sheats*, 153 Ala. 468, 45 So. 241, 127 Am. St. Rep. 61 (section not applicable to executions issuing out of the chancery courts); *Marks v. Wood*, 133 Ala. 533, 31 So. 978; *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730. *Kan.*—*Gleason v. Itten*, 52 Kan. 218, 34 Pac. 892. *Miss.*—Code, 1906, §974. *N. C.*—*Sheppard v. Bland*, 87 N. C. 163.

[a] The purpose of the statute is, to inform the party against whom the execution issues of the amount of the costs with which he is charged, and the particulars composing it. The statute should be fairly construed, and when the bill of costs is not calculated to mislead, the writ is not offensive to the statute. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730.

[b] A plaintiff must be deemed to have waived his costs by taking out an execution for damages only, "not only because he could have but one execution for damages and costs, but because, unless he is deemed to have

waived his costs, there was no judgment on which an execution could have issued." *Davis v. Ferguson*, 148 Mass. 603, 20 N. E. 311.

52. See generally the statutes, and Code Civ. Proc. (N. Y.), §1368; *Todd v. Botchford*, 86 N. Y. 517, 1 Civ. Pr. 402; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274.

[a] Where the execution contains no such direction, it is properly satisfied when the amount of the judgment is collected according to its mandate. *Todd v. Botchford*, 86 N. Y. 517, 1 Civ. Pr. 402.

[b] But an execution is not rendered void where it omits to demand interest upon a judgment which allows interest from the day of its rendition. *Brace v. Shaw*, 16 B. Mon. (Ky.) 43.

53. *Ariz.*—Civ. Code, 1913, §1357. *Md.*—*Gwinn v. Whitaker*, 1 Harr. & J. 754. *Tex.*—*Vernon's Sayles' Civ. St.*, §3729, rate of interest, if other than six per cent.

Necessity generally of writ conforming to judgment, see *infra*, II, B, 2, h.

[a] An execution issuing against the defendant for costs is fatally variant from a judgment reciting that the plaintiff assumed the costs. *Smith v. Lockett*, 73 Ga. 104.

54. *Merwin v. Hawker*, 31 Kan. 222, 1 Pac. 640; *Dougherty v. Gangloff*, 239 Mo. 649, 144 S. W. 434.

55. *Griffin v. Dauphin*, 133 Ala. 543, 31 So. 849.

56. *Adrianne, Platt & Co. v. Heiskell*, 8 App. Cas. (D. C.) 240. See also *Simmons v. Shapre*, 148 Ala. 217, 42 So. 441, where "orders of court, thirty cents" was obviously intended for "order of court."

[a] Mistake in Costs Does Not Con-

the execution and judgment as to the amount or rate of interest to be collected, where deemed a mere clerical error, renders the writ only voidable;<sup>57</sup> but where there is a strict application of the general rule that the writ must conform to the judgment in all respects, such a variance is held to render the writ void.<sup>58</sup> Where the execution as issued varies in the amount or rate of interest or costs from the statute allowing interest or costs, it is held to be void.<sup>59</sup>

f. *Direction to Officer Executing.*—(I.) *To Whom Directed.*—The writ should be directed to the sheriff<sup>60</sup> of the county where it is to be

**stittue Variance.**—Costs, not being an essential or necessary part of the judgment, a mistake in their calculation is not to be regarded as a variance between the writ of execution and the judgment, but a clerical error to be corrected upon motion or suggestion to that effect. A motion for the retaxation of costs would not operate to disturb any right acquired under a writ of execution. *Adrianne, Platt & Co. v. Heiskell*, 8 App. Cas. (D. C.) 240.

57. **Ark.**—*Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462. **Ga.**—*Mitchell v. Toole*, 63 Ga. 93. **Ky.**—*Brace v. Shaw*, 16 B. Mon. 43; *Kleissendorff v. Fore*, 3 B. Mon. 471; *Marshall v. Green*, 8 Ky. L. Rep. 346, 1 S. W. 602. **Me.**—*Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736, 8 Ann. Cas. 165. **Tex.**—*Hughes v. Driver*, 50 Tex. 175.

58. *Fowlkes v. Poppenheimer & Co.*, 4 Lea (Tenn.) 422.

59. *Mason v. Eakle*, 1 Ill. 83; *Haskell v. Littlefield*, 155 Mass. 320, 29 N. E. 626.

[a] Under a statute providing that only the original claim or demand shall draw interest after judgment, an execution is void which directs the collection of interest on the interest accrued on the principal at the time of the rendition of the judgment. *Hastings v. Johnson*, 1 Nev. 613.

60. See generally the statutes, and the following: **Ala.**—Code, 1907, §4077. **Ariz.**—Civ. Code, 1913, §1357; *Satterwhite v. Melezer*, 3 Ariz. 162, 24 Pac. 184. **Cal.**—Code Civ. Proc., §§682, 687; *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402. **Conn.**—Gen. St., 1902, §899. **Del.**—*Lofland v. Jefferson*, 4 Harr. 303. **Fla.**—Gen. St., 1906, §1614. **Ga.**—Code, 1911, §6018; *Young v. Germania Sav. Bank*, 132 Ga. 490, 64 S. E. 552; *State v. Jeter*, 60 Ga. 489. **Idaho.**—Rev. Code, 1908, §4471. **Ind.**—*Burns' Ann. St.*, 1914, §724. **Ky.**—*Carroll's Code*, 1906, §667; *Parsons v. Dills*, 159 Ky. 471, 167

S. W. 415; *Gowdy v. Sanders*, 88 Ky. 346, 11 S. W. 82, 10 Ky. L. Rep. 912. **Md.**—*Johnson v. Foran*, 58 Md. 148. **Minn.**—Rev. Laws, 1905, §4290. **Miss.**—*Griffin v. Hickman*, 92 Miss. 266, 46 So. 73. **Mo.**—Rev. St., 1909, §2177. **Mont.**—Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **Neb.**—Rev. St., 1913, §8042. **N. H.**—Pub. St., 1901, ch. 231, §11. **N. J.**—Comp. St., 1910, p. 2243, §1. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—Code Civ. Proc., §1362. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Okla.**—Rev. Laws, 1910, §5149. **Ore.**—Lord's Laws, 1910, §215. **R. I.**—Gen. Laws, 1909, §303, ch. 12. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—*Vernon's Sayles' Civ. St.*, §3729. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *Mayer v. Morgan*, 26 Wash. 71, 66 Pac. 128. **Wis.**—St., 1898, §2969.

[a] Only to the sheriff in office, or his "immediate" predecessor. *Lofland v. Jefferson*, 4 Harr. (Del.) 303.

[b] The writ of execution is never addressed to, nor does it carry with it, any command to the defendant. *Thorpe v. Ellithorpe*, 21 Pa. Co. Ct. 216.

[c] An officer cannot execute process unless it is directed to him for service, or to the class of officers to which he belongs. *Porter v. Stapp*, 6 Colo. 32; *Parsons v. Dills*, 159 Ky. 471, 167 S. W. 415; *Gowdy v. Sanders*, 88 Ky. 346, 11 S. W. 82; *Boaz v. Nail*, 2 Mete. (Ky.) 245. See *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185, wherein, under a special statute, it is held that a sheriff may execute a writ directed to a constable.

[d] Must not be directed to sheriff of one county and delivered to another. *Bybee v. Ashby*, 7 Ill. 151.

[e] The officer who seized goods under a writ of attachment, and holds



executed, or other proper officer.<sup>61</sup> If the sheriff is a party to the cause or interested therein, or if the office is vacant, some statutes provide that the writ shall be directed to the coroner,<sup>62</sup> or to a person designated by the court.<sup>63</sup> If the sheriff and coroner are both interested, then the writ is directed to the jailer.<sup>64</sup>

A failure to properly direct the writ as a general rule only renders it irregular, that is voidable and not void.<sup>65</sup> But where there is not simply a mistake or error in the direction, but a total non-compliance with the statute, the writ is void and not merely voidable.<sup>66</sup> Where the writ is directed to the coroner or other officer than the sheriff, the

the same, is the proper officer to whom the execution on the judgment in the attachment suit should issue. *Pecotte v. Oliver*, 2 Idaho 230, 10 Pac. 302.

As to the county to which the writ should issue, see *supra*, II, B, 1, g.

61. *Ariz. Civ. Code*, 1913, §1357; *Satterwhite v. Melzer*, 3 *Ariz.* 162, 24 *Pac.* 184.

[a] The words "other officer" refers to those officers who are required to perform the duties of the sheriff in case of his disqualification by reason of interest. *Satterwhite v. Melzer*, 3 *Ariz.* 162, 24 *Pac.* 184.

[b] Where the sheriff and the constable have concurrent power to serve an execution, the writ must be specifically directed to the constable if it be desired that he serve it, otherwise it will be presumed that the sheriff was intended to serve the writ. *Brier v. Woodbury*, 1 *Pick. (Mass.)* 362.

62. See generally the statutes, and the following: *Ala.*—*Civ. Code*, 1907, §4088; *Gresham v. Leverett*, 10 *Ala.* 384. *Ga.*—*Code*, 1910, §6019; *Gillis & Co. v. Smith*, 67 *Ga.* 446; *State v. Jeter*, 60 *Ga.* 489. *Ill.*—*Cook v. Chicago*, 57 *Ill.* 268. *Ky.*—*Carroll's Code*, 1906, §667; *Parsons v. Dills*, 159 *Ky.* 471, 167 *S. W.* 415; *Gowdy v. Sanders*, 88 *Ky.* 346, 11 *S. W.* 82. *Minn.*—*Rev. Laws*, 1905, §4290. *Mo.*—*Carr v. Youse*, 39 *Mo.* 346, 90 *Am. Dec.* 470. *N. Y.* *Code Civ. Proc.*, §§1362, 173. *N. C.* *Rev.*, 1905, §627; *Bowen v. Jones*, 35 *N. C.* 25, 55 *Am. Dec.* 426. *N. D.* *Rev. Codes*, 1905, §7104. *S. C.*—*Code Civ. Proc.*, 1902, §308; *Cauble v. Hoke*, 1 *Spears* 168. *S. D.*—*Code Civ. Proc.*, 1910, §334. *Tenn.*—*Brown v. Barker*, 10 *Humph.* 346. *Wash.*—*Rem. & Bal. Code*, §513; *Vietzen v. Otis*, 46 *Wash.* 402, 90 *Pac.* 264; *Mayer v. Morgan*, 26 *Wash.* 71, 66 *Pac.* 128. *Wis.*—*St.*, 1898, §2969.

[a] An execution against a sheriff should be directed to the coroner of the county of the sheriff's residence and to all and singular the sheriffs of the state, except the sheriff of the county of such residence, and the same may be levied by the coroner, other sheriff or constable of the county, at the option of the plaintiff. *Blance v. Mize*, 72 *Ga.* 96; *Gillis v. Smith*, 67 *Ga.* 446.

[b] Execution directed to sheriff who is a party, is void. *N. C.*—*Bowen v. Jones*, 35 *N. C.* 25. *S. C.*—*Cauble v. Hoke*, 1 *Spears* 168. *Eng.*—*Weston v. Coulson*, 1 *W. Black.* 505, 96 *Eng. Reprint* 292.

[c] Substantial Compliance.—A writ directed to the "sheriffs and coroners" has been held a sufficient compliance with the statute providing that the writ be directed to the coroner when the sheriff is a party to the action. *Gillis v. Smith*, 67 *Ga.* 446.

63. *Ga.*—*State v. Jeter*, 60 *Ga.* 489, 499, where no coroner, and sheriff is party, or interested. *N. Y.*—*Code Civ. Proc.*, §1362. *Wis.*—*St.*, 1898, §2977.

64. *Carroll's Ky. Code*, 1906, §667; *Parsons v. Dills*, 159 *Ky.* 471, 167 *S. W.* 415; *Boaz v. Nail*, 2 *Metc. (Ky.)* 245.

65. *Ala.*—*Johnson v. Whitfield*, 124 *Ala.* 508, 27 *So.* 406, 82 *Am. St. Rep.* 196. *Idaho.*—*Pecotte v. Oliver*, 2 *Idaho* 251, 10 *Pac.* 302. *Okl.*—*Christy v. Springs*, 11 *Okl.* 710, 69 *Pac.* 864. *S. C.* *Carr v. Scott*, *Riley* 193.

[a] A direction to the deputy-sheriff is simply an irregularity, subject to amendment and does not render the writ void. *First Nat. Bank v. Franklin*, 20 *Kan.* 264.

[b] Strangers will not be heard to object that the writ was not properly directed. *Crane v. Warner*, 14 *Vt.* 40.

66. *State v. Jeter*, 60 *Ga.* 489, 499; *Stewart v. Severance*, 43 *Mo.* 322.

reason for doing so should be recited.<sup>67</sup> The omission to do so, however, does not render the writ void.<sup>68</sup>

(II.) **Specific Direction.**<sup>69</sup>—(A.) **IN GENERAL.**—The writ of execution must contain directions to the sheriff, informing him as to the manner in which he is to satisfy the judgment upon which it is issued.<sup>70</sup> Thus, if the writ is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment with interest out of the property of the debtor subject to execution,<sup>71</sup> in the order prescribed by the statute, which is generally, first out of the personal property,<sup>72</sup> and if sufficient personalty cannot be found, then out of his real property.<sup>73</sup> A failure to prescribe the order in which the

67. *Thompson v. Bremage*, 14 Ark. 59; *McPherson v. The State Bank*, 4 Ark. 558; *Carr v. Youse*, 39 Mo. 346, 90 Am. Dec. 470; *Moss v. Thompson*, 17 Mo. 405. But see *Cook v. Chicago*, 57 Ill. 268; *Bastard v. Treutch*, 3 Ad. & El. 451, 111 Eng. Reprint 485.

68. *Thompson v. Bremage*, 14 Ark. 59.

69. As to directions given to sheriff in execution against the person, see *infra*, II, C.

As to order of levy, see *infra*, II, B, 4.

70. *Place v. Riley*, 98 N. Y. 1, 7 Civ. Pr. 403; *Wright v. Young*, 6 Ore. 87.

71. See generally the statutes, and the following: **Ia.**—Code, 1897, §3960; *Cooley v. Brayton*, 16 Iowa 10. **Ind.** *Burns' Ann. St.*, 1914, §724. **Mich.** *Howell's Ann. St.*, 1913, §13,031. **Tex.** *Vernon's Sayles' Civ. St.*, §3729.

[a] Without a direction as to what property the officer may levy upon, there is no execution. *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556.

72. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1357; *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Minn.**—Rev. Laws, 1905, §4290. **Mo.** *Houck v. Cross*, 67 Mo. 151. **Mont.** Rev. Codes, 1907, §6814. **Neb.**—Rev. St., 1913, §8057. **Nev.**—Rev. Laws, 1912, §5281. **N. J.**—Comp. St., 1910, p. 2243, §1. **N. Y.**—Code Civ. Proc., §1369; *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; *Hathaway v. Howell*, 54 N. Y. 97; *Guterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081; *Garczynski v. Russell*, 75 Hun 497, 27 N. Y. Supp. 465. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ohio.**—Page &

*Adams' Ann. Gen. Code*, §11,664. **Okla.** Rev. Laws, 1910, §5154. **Ore.**—Lord's Laws, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513; *Mayer v. Morgan*, 26 Wash. 71, 66 Pac. 128. **Wis.**—St., 1898, §2969; *Swift v. Agnes*, 33 Wis. 228. **Wyo.** Comp. St., 1910, §4690.

[a] If the writ directs the sheriff to satisfy the judgment out "of the goods and chattels" of the defendant, it will not authorize a levy and sale of the defendant's real estate. *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556.

73. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1357; *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Minn.**—Rev. Laws, 1905, §4290. **Mo.** *Houck v. Cross*, 67 Mo. 151. **Mont.** Rev. Codes, 1907, §6814. **Neb.**—Rev. St., 1913, §8057. **Nev.**—Rev. Laws, 1912, §5281. **N. J.**—Comp. St., 1910, p. 2243, §1. **N. Y.**—Code Civ. Proc., §1369; *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; *Hathaway v. Howell*, 54 N. Y. 97; *Garczynski v. Russell*, 75 Hun 497, 27 N. Y. Supp. 465; *Guterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ohio.**—Page & *Adams' Ann. Gen. Code*, §11,664. **Okla.** Rev. Laws, 1910, §5154. **Ore.**—Lord's Laws, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513; *Mayer v. Morgan*, 26 Wash. 71, 75, 66 Pac. 128. **Wis.**—St., 1898, §2969; *Swift v. Agnes*, 33 Wis. 228. **Wyo.** Comp. St., 1910, §4690.

[a] **Execution Follows Statutory Di-**

property shall be applied may not render the execution wholly void,<sup>74</sup> but it is held that a positive misdirection in this respect totally invalidates the process.<sup>75</sup> It is sometimes provided that if the judgment is a lien upon real property, then the writ must direct satisfaction out of any real property belonging to the debtor on the day when the judgment was docketed or thereafter;<sup>76</sup> or if the execution is issued to another county, that it shall direct satisfaction out of any real property belonging to the debtor on the day the transcript of the judgment docket was filed or thereafter.<sup>77</sup> If the writ be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, or tenants of real property, or trustees, it should direct that the judgment with interest be satisfied out of such property.<sup>78</sup>

Where the debt, for which judgment is confessed, is not all due, the sheriff must be directed to collect only the sum stated in an indorsement thereon to be due at the time the writ is issued.<sup>79</sup>

An execution issuing upon a judgment in an attachment suit, need not direct the sheriff to levy upon the proceeds of the goods attached, for

**rections.**—Where an execution supplements a judgment which provided that execution issue against the goods and chattels of the defendant, by directing, as the statute provides it shall, that in event the goods and chattels are insufficient, the officer shall levy on the lands and tenements, it is not variant from the judgment. *Houck v. Cross*, 67 Mo. 151.

[b] Where the judgment has ceased to be a lien on the land the execution must conform to §1252, Code Civ. Proc. *Garczynski v. Russell*, 75 Hun 497, 27 N. Y. Supp. 465, 57 N. Y. St. 673.

74. Where a writ commands the sheriff "to levy upon the real estate, goods and chattels of" the defendants, instead of directing a resort to the personal property, and then a levy upon the realty, though informal it is not thereby invalidated. *Wright v. Young*, 6 Ore. 87.

75. An execution is void which commands the sheriff to collect the judgment out of the attached personal property of the judgment debtor, and if that is insufficient, out of his attached real property; where the case is one in which, under the statute, the execution must go first against the attached personal property, second against the other personal property of the judgment debtor, and lastly against the attached real property. *Place v. Riley*, 98 N. Y. 1, 7 Civ. Pr. 403.

76. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913,

§1357. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Mont.**—Rev. Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—*Woolworth v. Taylor*, 62 How. Pr. 90. **Utah.**—Comp. Laws, 1907, §3233.

77. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Mont.**—Rev. Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—*Burch v. Burch*, 51 Misc. 232, 100 N. Y. Supp. 814. **Utah.**—Comp. Laws, 1907, §3233.

78. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Ind.**—Ann. St., 1914, §724. **Ia.**—Code, 1897, §3961. **Minn.**—Rev. Laws, 1905, §4290. **Mo.**—Rev. St., 1909, §2172; *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556. **Mont.**—Rev. Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. J.**—Comp. St., 1910, p. 2243, §1. **N. Y.**—Code Civ. Proc., §1371; *Matter of Lazelle*, 16 Misc. 515, 40 N. Y. Supp. 343. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ore.**—Lord's Laws, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1908, §334. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

79. **N. Y.**—Code Civ. Proc., §1277; *Jaffray v. Saussman*, 52 Hun 561, 5 N. Y. Supp. 629, 17 Civ. Pr. 1, 23 N. Y. St. 823.



he is bound to levy on such proceeds;<sup>80</sup> but where the attached property is in his possession, the writ should command him to sell the property attached and apply the proceeds in satisfaction of the judgment.<sup>81</sup>

(B.) DELIVERY OF SPECIFIC PROPERTY OR ITS VALUE. — If the judgment is for the delivery of the possession of real or personal property, the execution should require that the sheriff deliver the possession of the same to the party entitled thereto,<sup>82</sup> in which event it is necessary that the property be particularly described;<sup>83</sup> and if delivery of the property cannot be had, to levy upon other property to the extent of the value of the specific property specified therein.<sup>84</sup> The writ may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits recovered in the same judgment, out of the property of the party against whom it was rendered.<sup>85</sup>

(C.) SALE OF PARTICULAR PROPERTY. — (1.) *Generally.* — If the judgment directs the sale of specific real or personal property, the execution must command the officer to make sale of such property.<sup>86</sup>

80. *Start v. Sherwin*, 1 Pick. (Mass.) 521; *Lucier v. Pierce*, 60 N. H. 13.

81. *Merwin v. Hawker*, 31 Kan. 222, 1 Pac. 640. See also *Place v. Riley*, 98 N. Y. 1, 7 Civ. Pr. 403.

82. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1358. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Ind.** Ann. St., 1914, §724; *Bales v. Scott*, 26 Ind. 202. **Ia.**—Code, 1897, §3962. **Kan.**—Gen. St., 1909, §6099. **Ky.** *Carroll's St.*, 1915, §1665. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—Code Civ. Proc., §1373; *Title Guarantee & T. Co. v. American Power & Const. Co.*, 95 App. Div. 192, 88 N. Y. Supp. 502. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ohio.**—Page & Adams' Gen. Ann. Code, §11,654. **Okl.**—Rev. Laws, 1910, §5214. **Ore.**—Lord's Laws, 1910, §215; *Marks v. Willis*, 36 Ore. 1, 58 Pac. 526, 78 Am. St. Rep. 752. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—Vernon's Sayles' Civ. St., §3729. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

83. See *supra*, II, B, 2, f, (II), (E).

84. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1358. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Ind.** Ann. St., 1914, §724; *Bales v. Scott*, 26 Ind. 202. **Ia.**—Code, 1897, §3962. **Kan.**—Gen. St., 1909, §6099. **Minn.** Rev. Laws, 1905, §4290. **Mont.**—Rev.

Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. C.**—Rev., 1905, §627. **Ore.**—Lord's Laws, 1910, §215; *Marks v. Willis*, 36 Ore. 1, 58 Pac. 526, 78 Am. St. Rep. 752. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—Vernon's Sayles' Civ. St., §3729, if personal property. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.** St., 1898, §2969.

85. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1358. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Ind.** Ann. St., 1914, §724; *Bales v. Scott*, 26 Ind. 202. **Ia.**—Code, 1897, §3962. **Kan.**—Gen. St., 1909, §6099. **Ky.**—*Carroll's St.*, 1915, §1665. **Minn.**—Rev. Laws, 1905, §4290. **Mont.**—Rev. Codes, 1907, §6814. **Nev.**—Rev. Laws, 1912, §5281. **N. Y.**—Code Civ. Proc., §1373; *Van Rensselaer v. Wright*, 56 Hun 39, 8 N. Y. Supp. 885, 29 N. Y. St. 468. **N. C.**—Rev., 1905, §627. **N. D.**—Rev. Codes, 1905, §7104. **Ohio.**—Page & Adams Ann. Gen. Code, §11,654. **Okl.** Rev. Laws, 1910, §5214. **Ore.**—Lord's Laws, 1910, §215. **S. C.**—Code Civ. Proc., 1902, §308. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—Vernon's Sayles' Civ. St., §3729. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.**—St., 1898, §2969.

86. See generally the statutes, and the following: **Ariz.**—Civ. Code, 1913, §1358. **Ore.**—Lord's Laws, 1910, §215. **S. D.**—Code Civ. Proc., 1910, §330.

(2.) *Joint or Separate Property.* — Where the action was on a joint indebtedness and some of the defendants were not served and did not appear, the execution should direct satisfaction out of the joint property of all the defendants and the individual property of those who were served or who appeared.<sup>87</sup>

An execution upon a judgment against a married woman must direct that it be levied and collected from her separate property,<sup>88</sup> unless it may lawfully be satisfied out of other property.<sup>89</sup> If it does not, it is erroneous in form, though such error does not vitiate the writ.<sup>90</sup>

(D.) WHERE JUDGMENT FOR COSTS. — If the execution is for costs, it should require the sheriff to satisfy it out of any property of the execution defendant liable to execution.<sup>91</sup>

(E.) WHERE JUDGMENT PAYABLE IN SPECIFIED CURRENCY. — If the judgment is made payable in a specified kind of money or currency, the writ must direct the sheriff to satisfy the same in the kind of money or currency specified.<sup>92</sup>

(F.) AS TO RETURN OF WRIT. — The writ should on its face fix the return day thereof.<sup>93</sup> A failure to fix the day or place of return, or an

**Tex.**—Vernon's Sayles' Civ. St., §3729. **Wis.**—St., 1898, §2969.

87. See generally the statutes, and the following: **Mont.**—Rev. Codes, 1907, §6815. **N. Y.**—Code Civ. Proc., §1935. **Utah.**—Comp. Laws, 1907, §3234.

88. **N. Y.**—*Monerief v. Ward*, 25 How. Pr. 94, 16 Abb. Pr. 354; *Thompson v. Sargent*, 15 Abb. Pr. 452. **N. C.**—Rev., 1905, §617. **N. D.**—Rev. Codes, 1905, §7102. **Pa.**—*Pepper & Lewis' Dig.*, p. 4864, §13. **R. I.**—Gen. Laws, 1909, ch. 303, §10. **S. C.**—Code, 1902, §306; *Clinkscales v. Hall*, 15 S. C. 602. **S. D.**—Code Civ. Proc., 1910, §331. **W. Va.**—Code, 1913, §3683.

As to issuance of execution generally against a married woman, see 11 **STANDARD PROC.** 807, et seq.

89. See 11 **STANDARD PROC.** 805, 807, et seq.

90. *Monerief v. Ward*, 25 How. Pr. (N. Y.) 94, 16 Abb. Pr. (N. Y.) 354; *Thompson v. Sargent*, 15 Abb. Pr. (N. Y.) 452 (statutes so providing held to be directory); *Clinkscales v. Hall*, 15 S. C. 602.

91. *Reddick v. Cloud's Admr.*, 7 Ill. 670; *Vernon's Sayles' Tex. Civ. St.*, §3729.

As to enforcement of order or judgment for costs in general, see 5 **STANDARD PROC.** 974, et seq.

92. See generally the statutes, and the following: **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Me.**—*Stringer v. Coombs*, 62 Me. 160,

16 Am. Rep. 414. **Mass.**—*Independent Ins. Co. v. Thomas*, 104 Mass. 192. **Nev.**—Rev. Laws, 1912, §5281. **Ohio.**—*Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66. **Utah.**—Comp. Laws, 1907, §2233.

[a] An execution is merely irregular which requires the money to be collected in gold, when the judgment called for dollars only. *Hughes v. Driver*, 50 Tex. 175.

93. See generally the statutes, and the following: **Ark.**—*Kirby's Dig.*, 1904, §3204. **Ky.**—*Goode's Admr. v. Miller*, 78 Ky. 235. **Miss.**—*Brown v. Thomas*, 26 Miss. 335. **Mo.**—*Estes v. Long*, 71 Mo. 605; *Milburn v. State*, 11 Mo. 188, 47 Am. Dec. 148. **N. Y.**—Code Civ. Proc., §1366; *Williams v. Hogeboom*, 8 Paige 469; *Carpenter v. Simmons*, 28 How. Pr. 12; *Park v. Church*, 5 How. Pr. 381; *Fake v. Edgerton*, 3 Abb. Pr. 229; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274. **R. I.**—Gen. Laws, 1909, ch. 303, §12. **Wis.**—*How v. Kane*, 2 Chand. 222, 2 Pin. 531.

See generally the title "Returns." [a] The return day of the execution is required to be stated in it, for the certainty and regularity of the proceeding, but mainly for the security of the rights of the party entitled to the fruits of it. It is not absolutely necessary to its efficacy, in empowering the officer to make the money, that the time for its return should be specified, at least so far as strangers are

error in so doing, will not invalidate the writ, however;<sup>94</sup> the defect may be waived.<sup>95</sup>

g. *Description and Value of Property.*<sup>96</sup>—Where the judgment directs that execution be issued against certain land, the execution must specify the property on which it is to be levied.<sup>97</sup> And if the

concerned. No one is interested in the time of the return but the plaintiff. *Brown v. Thomas*, 26 Miss. 335.

[b] Direction to "make due return" held sufficient. *Stephens v. Denison*, 1 Ore. 19.

94. *Ala.*—*Mitchell v. Corbin*, 91 Ala. 599, 80 So. 810; *Waldrop v. Friedman & Loveman*, 90 Ala. 157, 7 So. 510, 24 Am. St. Rep. 775; *Brevard's Exrs. v. Jones*, 50 Ala. 221. *Ga.*—*Henderson v. Zachry*, 80 Ga. 98, 4 S. E. 883. *Ky.* *Goode's Admr. v. Miller*, 78 Ky. 235. *Miss.*—*Brown v. Thomas*, 26 Miss. 335. *N. Y.*—*Wright v. Nostrand*, 94 N. Y. 31; *Cutler v. Rathbone*, 1 Hill 204; *Rider v. Mason*, 4 Sandf. Ch. 351; *Carpenter v. Simmons*, 28 How. Pr. 12; *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037. *N. C.*—*Lanier v. Stone*, 8 N. C. 329. *Tex.*—*Collin County Nat. Bank v. Satterwhite* (Tex. Civ. App.), 184 S. W. 338.

[a] An execution dated December 7, 1873, and made returnable "on the 4th Monday in January next (A. D. 1863)" was held not to be invalid, the court holding that "next" controls the figures "1863" and sufficiently corrected the date. *Howell v. Sherwood*, 242 Mo. 513, 147 S. W. 810.

[b] Where (1) the direction in the writ varies from the statute fixing the time within which the return is to be made, the return must be made as the statute directs, regardless of the language of the writ. *Mitchell v. Corbin*, 91 Ala. 599, 80 So. 810; *Waldrop v. Friedman & Loveman*, 90 Ala. 157, 7 So. 510, 24 Am. St. Rep. 775. (2) But an erroneous direction as to the return of an execution is of no consequence, because the law, and not the direction contained in the writ, is controlling. *In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037. (3) But in *Bond v. Wilder*, 16 Vt. 393, it was held that an execution made returnable in sixty days, when it should have been made returnable in one hundred and twenty days, was void, and would afford no justification to an officer seizing and selling property under it.

95. *Berry v. Riley*, 2 Barb. (N. Y.) 307.

[a] Waiver by agreement that writ be returnable forthwith. *Jordan v. Posey*, 1 How. Pr. (N. Y.) 123.

[b] At common law it was necessary that executions should bear teste in term time, and be made returnable to the next succeeding term; but for a failure in either respect, the process although erroneous, was not void, but amendable. . . . In this country executions are not required either to bear teste or be made returnable in term time, but as a substitute for that rule of the common law, they are to bear teste by the clerks of the courts respectively, and to be made returnable to the rule days of the said courts, so that there be at least thirty and not more than ninety days between the teste and return of the writ. But as the time required between the teste and return is not of the essence of the writ, but rather directory to the clerk in issuing it, an error in that respect should not have a greater operation than the making of an execution at common law bear teste out of term time would have, and consequently at most is but matter of error by which the party might avoid the process, but of which the sheriff in a proceeding against him cannot avail himself." *Wilson v. Huston*, 4 Bibb (Ky.) 332.

96. *Directions as to Property To Be Taken.*—See *supra*, II, B. 2, f, (II).

97. *Ga.*—*Winslow v. O'Pry*, 56 Ga. 138. *Kan.*—*Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. *Mo.*—*Lord v. Johnson*, 102 Mo. 680, 15 S. W. 73. *Pa.*—*McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613.

See also the title "Mortgages."

[a] *Reference to Judgment for Description.*—An execution against specific property described in the writ as "goods, lands, etc., of the said defendants recovered in this suit," is a sufficient reference to the judgment entered to make the description of the property therein a part of the execution, and thereby constituted a sufficient de-



judgment decrees that an interest in property should not be sold until the termination of a lesser interest, the execution must make that exception.<sup>98</sup> An execution upon a judgment for the delivery of the possession of real or personal property must particularly describe the property intended,<sup>99</sup> and give the value thereof.<sup>1</sup> Some statutes require an execution on a judgment for the purchase price of land, to describe the land.<sup>2</sup>

If the writ fails to describe the property to be levied upon, or to so refer to it that it may be identified, it will be void;<sup>3</sup> but a slight error in the description will not render the writ void.<sup>4</sup>

*h. Conformity to Judgment.*—It is a general rule that an execution should conform to the judgment upon which it is predicated in every essential particular.<sup>5</sup> It should conform to the judgment in

scription to pass the title on the execution sale. *Simmons v. Arnim* (Tex. Civ. App.), 172 S. W. 184.

98. *Reese v. Burts*, 39 Ga. 565.

99. *Ariz.*—Civ. Code, 1913, §1358. *Cal.*—Code Civ. Proc., §682. *Idaho.*—Rev. Code, 1908, §4471. *Ind.*—Burns' Ann. St., 1914, §724. *Ia.*—Code, 1897, §3962. *Kan.*—Gen. St., 1909, §6099. *Ky.*—Carroll's St., 1915, §1665. *Minn.*—Rev. Laws, 1905, §4290. *Mont.*—Rev. Codes, 1907, §6814. *Nev.*—Rev. Laws, 1912, §5281. *N. Y.*—Code Civ. Proc., §1373; Title Guarantee & Trust Co. v. American Power & Const. Co., 88 N. Y. Supp. 502. *N. C.*—Rev., 1905, §627. *N. D.*—Rev. Codes, 1905, §7104. *Ohio.*—Page & Adams' Ann. Gen. Code, §11, 654. *Okla.*—Rev. Laws, 1910, §5214. *Ore.*—Lord's Laws, 1910, §215. *S. C.*—Code Civ. Proc., 1902, §308. *S. D.*—Code Civ. Proc., 1910, §334. *Tex.*—Vernon's Sayles' Civ. St., §3729. *Utah.*—Comp. Laws, 1907, §3233. *Va.*—Code, Supp. 1910, §3584. *Wash.*—Rem. & Bal. Code, §513. *W. Va.*—Code, 1913, §5109.

See also 7 STANDARD PROC. 1050.

1. *Ariz.*—Civ. Code, 1913, §1358. *Cal.*—Code Civ. Proc., §682. *Idaho.*—Rev. Code, 1908, §4471. *Ind.*—Burns' Ann. St., 1914, §724. *Ia.*—Code, 1897, §3962. *Nev.*—Rev. Laws, 1912, §5281. *N. C.*—Rev., 1905, §627. *N. D.*—Rev. Codes, 1905, §7104. *Ore.*—Lord's Laws, 1910, §215. *S. C.*—Code Civ. Proc., 1902, §308. *S. D.*—Code Civ. Proc., 1910, §334. *Tex.*—Vernon's Sayles' Civ. St., §3729. *Utah.*—Comp. Laws, 1907, §3233. *Wash.*—Rem. & Bal. Code, §513.

2. *N. C. Rev.*, 1905, §627.

3. *McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613.

4. *Huddleson v. Reynolds*, 8 Gill (Md.) 332, 50 Am. Dec. 702; *McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613.

**Error May Be Cured by Amendment.**  
See *infra*, II, B, 2, m, (II), (E).

5. *U. S.*—Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721; *Early v. Rogers*, 16 How. 599, 14 L. ed. 1074. *Ala.*—De Loach v. Robins, 102 Ala. 288, 14 So. 777. *Ark.*—Bingham v. Dover, 86 Ark. 323, 110 S. W. 217; *Hightower v. Handlin & Veneys*, 27 Ark. 20. *Cal.*—Davis v. Robinson, 10 Cal. 411. *Conn.*—Mallory v. Hartman, 86 Conn. 615, 86 Atl. 567; *Palmer v. Palmer*, 2 Conn. 462. *Ga.*—Code, 1910, §6022; *Ward v. Miller*, 143 Ga. 164, 84 S. E. 480; *Smith v. Lockett*, 73 Ga. 104; *Moughon v. Brown*, 68 Ga. 207; *Powell v. Perry*, 63 Ga. 417; *Williams v. Atwood*, 57 Ga. 190; *Winslow v. O'Pry*, 56 Ga. 138; *Reese v. Burts*, 39 Ga. 565. *Ill.*—*Kinkade v. Gibson*, 209 Ill. 246, 70 N. E. 683; *Brown v. Duncan*, 132 Ill. 413, 418, 23 N. E. 1126; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Merrifield v. Western Cottage Piano & O. Co.*, 149 Ill. App. 1, 4; *Merrifield v. Western Cottage P. & O. Co.*, 144 Ill. App. 289; *Cohen v. Menard*, 31 Ill. App. 503, 505. *Ind.*—*Grim v. Adkins*, 21 Ind. App. 106, 51 N. E. 494; *Doe*, on the Demise of *Wilkins v. Rue*, 4 Blackf. 263. *Ia.*—*Wilson v. Reuter*, 29 Iowa 176; *Sprott v. Reid*, 3 G. Gr. 489. *Kan.*—Gen. St., 1909, §6101; *Fuller v. Wells*, 42 Kan. 551, 22 Pac. 561. *La.*—*Dugat v. Babin*, 8 Mart. (N. S.) 391. *Me.*—*Prescott v. Prescott*, 62 Me. 428. *Md.*—*Hall v. Claggett*, 63 Md. 57; *Gwinn v. Whitaker*, 1 Har. & J. 754. *Mass.*—*Dewey v. Peeler*, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399; *Nims v. Spurr*,

respect to the parties thereto,<sup>6</sup> and their capacity,<sup>7</sup> as well as in respect to the designation of the amount of the judgment.<sup>8</sup>

i. *Teste and Date*.—The execution should have the proper teste or attestation clause.<sup>9</sup> In some jurisdictions the writ must be tested in the name of the judge of the court in which the judgment is obtained.<sup>10</sup> The general rule is that the omission of or errors in the teste will not invalidate the writ since it may be amended.<sup>11</sup> At com-

138 Mass. 209. **Mo.**—Rev. St., 1909, §2172; *McManus v. Price*, 246 Mo. 438, 152 S. W. 3; *Rankin v. Porter Real Estate Co.*, 199 Mo. 345, 97 S. W. 877; *Coe v. Ritter*, 86 Mo. 277; *Bain v. Chrisman*, 27 Mo. 293; *Maloney v. Real Estate B. & L. Assn.*, 57 Mo. App. 384. **Nev.**—Rev. Laws, 1912, §5281; *Solen v. Virginia & T. R. Co.*, 14 Nev. 405; *Hastings v. Johnson*, 1 Nev. 613. **N. J.**—*Linn v. Hamilton*, 34 N. J. L. 305. **N. M.**—Ann. St., 1915, §2190. **N. Y.**—*Watson v. Fuller*, 6 Johns. 283; *Nat. Park Bank v. Salomon*, 53 Hun 629, 5 N. Y. Supp. 632, 23 N. Y. St. 566, 1 Silvernail 494. **N. C.**—*Rutherford v. Raburn*, 32 N. C. 144; *Roberson v. Woollard*, 28 N. C. 90. **Okla.**—Rev. Laws, 1910, §5216. **Ore.**—*Marks v. Willis*, 36 Ore. 1, 58 Pac. 526, 78 Am. St. Rep. 752. **Pa.**—*Kneib v. Graves*, 72 Pa. 104; *Shaffer v. Watkins*, 7 Watts & S. 219; *Griffin v. Davis*, 6 Pa. Super. 481; *McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613; *Gibbs v. Atkinson*, 1 Clark 476, 3 Pa. L. J. 139; *Reigel's Appeal*, 1 Walk. 72. **R. I.**—*Lynch v. Webster*, 17 R. I. 513, 23 Atl. 27, 14 L. R. A. 696; *Taylor v. Ames*, 5 R. I. 361. **Tenn.**—*Dornan Bros. v. Benham Furniture Co.*, 102 Tenn. 303, 52 S. W. 38; *Trotter v. Nelson*, 1 Swan 7; *Jennings v. Pray*, 8 Yerg. 85; *Harlan v. Harlan*, 14 Lea 106; *Wilson v. Nance*, 11 Humph. 189. **Tex.**—*Collins v. Hines*, 100 Tex. 304, 99 S. W. 400; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626; *Criswell v. Ragsdale*, 18 Tex. 443. **Va.**—*Snavelly v. Harkrader*, 30 Gratt. (71 Va.) 487. **W. Va.**—*Taney v. Woodmansee*, 23 W. Va. 709.

[a] "Nothing can be plainer than that the execution must follow the judgment and be warranted by it. And whether the execution corresponds with the judgment and is warranted by it or not, depends upon the nature and form of the judgment, and not upon the effect to be given to it by a plea of former recovery or any other mat-

ter dehors the record." *Kneib v. Graves*, 72 Pa. 104.

[b] "Every execution should conform accurately to the judgment or decree which it is used to enforce. There is a substantial reason for this requirement. Where the judgment or decree is satisfied by execution in the hands of an officer, the defendant is entitled, for his protection, to record evidence of the discharge. This evidence is not furnished by an execution, although duly returned satisfied by an officer, which does not correspond with the judgment or decree." *Snavelly v. Harkrader*, 30 Gratt. (71 Va.) 487.

[c] An execution is void which issues against the goods, and chattels, lands and tenements of the heirs themselves, upon a judgment against the land descended. *Walker v. Marshall*, 29 N. C. 1, 45 Am. Dec. 502.

6. See *supra*, II, B, 2, d.

7. See *supra*, II, B, 2, d.

8. See *supra*, II, B, 2, e.

9. *Trotter v. Nelson*, 1 Swan (Tenn.) 7; *Porter v. Earthman*, 4 Yerg. (Tenn.) 358.

[a] A testatum clause is not necessary in a writ issuing to a county different from that in which the venue is laid. *Butterfield v. Howe*, 19 Wend. (N. Y.) 86. But see *Simonds v. Catlin*, 2 Caines (N. Y.) 61.

10. **Ga.**—Code, 1910, §6018. **Minn.**—Rev. Laws, 1909, §4290. **S. D.**—Code Civ. Proc., 1910, §334.

[a] That a fieri facias issued on a judgment bore test in the name of the regular judge of the circuit, does not make it invalid, although such judge did not preside when the judgment was rendered, being disqualified from so doing. The use of his name in this merely formal attestation does not annul the process. *Drawdy v. Littlefield*, 75 Ga. 215.

11. **Ga.**—*Drawdy v. Littlefield*, 75 Ga. 215. **Ky.**—See *Wilson v. Huston*, 4 Bibb 332. **Mass.**—*Ripley v. Warren*, 2 Pick. 592. **N. H.**—*Parsons v. Swett*,

mon law, the execution was dated as of the first day of the term.<sup>12</sup>

In most jurisdictions the rule now is that the date of the writ actually does, and by law, should express the true time of issuing the execution,<sup>13</sup> although under some statutes, they are still tested as of the first day of the term next before the date of issuance.<sup>14</sup> The omission by the clerk to date the writ or an erroneous date is not fatal to the case.<sup>15</sup>

j. *Signature*.—Under the ancient practice, where the seal of the court was in the custody of a particular officer sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution.<sup>16</sup> But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without a signature of the officer affixing it.<sup>17</sup> And the statutes generally require that the writ be subscribed or signed by the clerk,<sup>18</sup> though the omission of the clerk to do so is, in some jurisdictions, considered a mere

32 N. H. 87, 64 Am. Dec. 352; *Scribner v. Whiteher*, 6 N. H. 63, 23 Am. Dec. 708. **N. J.**—*Inskeep v. Lecony*, 1 N. J. L. 111, tested out of term. **N. Y.**—*Douglass v. Haberstro*, 88 N. Y. 611; *Butterfield v. Howe*, 19 Wend. 86; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341; *Carpenter v. Simmons*, 28 How. Pr. 12; *In re Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037. **Ohio**.—*Chapin v. Allison*, 15 Ohio 566. **Tenn.**—*Perkins & Co. v. Woodfolk*, 8 Baxt. 480.

**Amendment to teste of writ**, see *infra*, II, B, 2, m, (II).

12. *Farley v. Lea*, 20 N. C. 307, 32 Am. Dec. 680; *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Porter v. Earthman*, 4 Yerg. (Tenn.) 358; *Barnes v. Hayes*, 1 Swan (Tenn.) 304; *Berry v. Clements*, 9 Humph. (Tenn.) 312.

[a] Should bear teste in term time. *Wilson v. Huston*, 4 Bibb (Ky.) 332; *Inskeep v. Lecony*, 1 N. J. L. 111.

[b] If judgment be entered in vacation, the writ may bear teste as of the preceding term. *Superintendents v. Smith*, 11 Wend. (N. Y.) 181; *Gordon v. Valentine*, 16 Johns. (N. Y.) 145.

13. See generally the statutes, and the following: **Ala.**—Civ. Code, 1907, §4079. **Fla.**—Gen. St., 1906, §1614. **Ga.**—Code, 1910, §6018. **Ill.**—*Brown v. Parker*, 15 Ill. 307. **Miss.**—Code, 1906, §§3959, 3912. **N. J.**—*Morgan v. Taylor*, 38 N. J. L. 317.

[a] An execution should be dated as of the day when it issued from the clerk's office, and not as of the day of its delivery to the sheriff. *Mollison*

*v. Eaton*, 16 Minn. 426, 10 Am. Rep. 150.

14. **N. C.** Rev., 1905, §624; *Williams v. Weaver*, 94 N. C. 134; *Bryan v. Hubbs*, 69 N. C. 423; *Shannon's Tenn. Code*, §4731.

[a] The statute requiring a teste is merely directory as the writ no longer operates as a lien. *Williams v. Weaver*, 94 N. C. 134; *Bryan v. Hubbs*, 69 N. C. 423.

15. **Conn.**—*Roberts v. Church*, 17 Conn. 142. **Ga.**—*Usry v. Saulsbury*, 62 Ga. 179. **Miss.**—*Dailey v. State*, 56 Miss. 475. **N. J.**—*Inskeep v. Lecony*, 1 N. J. L. 111. **N. Y.**—*Williams v. Hogeboom*, 22 Wend. 648. **N. C.**—*Williams v. Weaver*, 94 N. C. 134; *Bryan v. Hubbs*, 69 N. C. 423. **Vt.**—*Whitehall Bank v. Pettes*, 13 Vt. 395. **Wis.**—*State v. Brophy*, 38 Wis. 413.

[a] The writ need not state the year of Christ in addition to the year of the commonwealth. *Craig v. Johnson*, Hard. (Ky.) 520.

16. *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389, citing *Tidd's Pr.* 999, 1027. See also *Wolf v. Cook*, 40 Fed. 432.

17. **Cal.**—*O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. **Ga.**—*Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301; *Rawles v. Jackson*, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185. **N. M.**—*Munis v. Herrera*, 1 N. M. 362.

18. See generally the statutes, and the following: **U. S.**—*Aetna Ins. Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. **Ariz.**—Civ. Code, 1913, §1357. **Cal.**



irregularity in a matter of form,<sup>19</sup> curable by amendment.<sup>20</sup> But if under the statute, the signature is requisite to the authentication of the writ, its omission will render the writ void.<sup>21</sup>

**Of Party Having Writ Issued.**<sup>22</sup> — Provision is sometimes made for the signature or indorsement of the party for whom the writ is issued, or of his attorney.<sup>23</sup>

Code Civ. Proc., §682. **Ga.**—Williams v. McArthur, 111 Ga. 28, 36 S. E. 301. **Idaho.**—Rev. Codes, 1908, §4471. **Ind.** Burns' Ann. St., 1914, §724. **Minn.** Rev. Laws, 1905, §4290. **Miss.**—Code, 1906, §3912. **Mont.**—Rev. Codes, 1907, §6814; Kipp v. Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325; State *ex rel.* Sackett v. Thomas, 25 Mont. 226, 235, 64 Pac. 503. **Nev.**—Rev. Laws, 1912, §5281. **N. C.**—Rev., 1905, §8616, 627. **N. D.** Rev. Codes, 1905, §7104. **Ohio.**—Chapin v. Allison, 15 Ohio 566. **P. I.**—Hidalgo v. Crossfield, 17 Phil. Isl. 466. **R. I.** Gen. Laws, 1909, ch. 303, §1. **S. C.** Code Civ. Proc., 1902, §308. **S. D.** Code Civ. Proc., 1910, §354. **Tex.**—Vernon's Sayles' Civ. St., §3729. **Utah.** Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513.

[a] A deputy clerk (1) may sign the execution in his own name where the statute provides that a deputy may perform any duties appertaining to the office of his principal. Chapin v. Allison, 15 Ohio 566. And see Bragg v. Lorio, 1 Woods 209, 4 Fed. Cas. No. 1,800; Biggers v. Winkles, 124 Ga. 990, 53 S. E. 397; Dever v. Akin, 40 Ga. 423. (2) But the execution should not be signed by the deputy in the name of the clerk, as if the clerk himself had made the signature. Biggers v. Winkles, 124 Ga. 990, 53 S. E. 397.

19. **U. S.**—Griswold v. Connolly, 1 Woods 193, 11 Fed. Cas. No. 5,833. **Ark.**—Jett v. Shinn, 47 Ark. 373, 1 S. W. 693; Whiting & Slark v. Beebe, 12 Ark. 421. **Kan.**—Taylor v. Buck, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346. **Ky.**—Botts v. Williams, 5 J. J. Marsh. 62. **N. Y.**—Hill v. Haynes, 54 N. Y. 153. **Pa.**—M'Cormick v. Meason, 1 Serg. & R. 92. **Can.**—Archibald v. Hubley, 18 Can. Sup. Ct. 116.

[a] **Failure To State Official Capacity After Signature.**—The failure of the clerk of the circuit court, who under the constitution is also clerk of the county court, to add the words "county clerk" after his signature in

issuing an execution from the county court does not render the execution absolutely void because of the provision of sec. 1574 of the Revised Statutes which requires that the "clerk of the county court shall sign all papers required to be signed pertaining to said county court as 'county clerk,'" when he signed the execution as "clerk" and affixed the seal of the county court thereto. Lewis v. Russell, 47 Fla. 184, 36 So. 166.

20. See *infra*, II, B, 2, m, (II), (A).

21. **Cal.**—O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. **Ga.**—Williams v. McArthur, 111 Ga. 28, 36 S. E. 301; Rawles v. Jackson, 104 Ga. 593, 30 S. E. 820. **Ill.** Hernandez v. Drake, 81 Ill. 34; Dearborn Laundry Co. v. Chicago & A. R. R. Co., 55 Ill. App. 438.

[a] In O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389, the court said: "Section 682, Code Civ. Proc., prescribes that an execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk. The 'test,' as it has been understood, is not required. Under these code provisions, every execution must be subscribed by the clerk. No other mode is provided for its authentication, and without it there can be no writ of execution. It is mere waste paper. Respondents submit a list of authorities which they contend support the view that the execution is not void, although not signed by the clerk. That may be true where the writ is otherwise authenticated as it is in New York and many other states where execution must be signed by the party in whose favor it is issued, or, as said there, by the party who issues it. If so signed, it is not void, although not authenticated by the clerk. Such a document could not be regarded as a writ in this state."

22. For whom issued, see *supra*, II, B, 1, d.

23. See generally the statutes, and

k. *Seal*.—The writ of execution should be sealed with the seal of the court.<sup>24</sup> And in some jurisdictions, a writ issued without such is void.<sup>25</sup> In other jurisdictions, however, the affixing of a seal is a merely formal matter, the omission of which renders the writ voidable only.<sup>26</sup>

the following: **Minn.**—Rev. Laws, 1905, §4290. **N. Y.**—Code Civ. Proc., §24; *Brush v. Lee*, 36 N. Y. 49; *McDonald v. O'Flynn*, 2 Daly 42. **S. C.**—Code Civ. Proc., 1902, §308. **Wis.**—St., 1898, §2969; *Collins v. Smith*, 57 Wis. 284, 15 N. W. 192; *Allen v. Clark*, 36 Wis. 101; *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

[a] The writ need not necessarily be subscribed by the attorney of record. *Thorpe v. Fowler*, 5 Cow. (N. Y.) 446; *Cook v. Dickerson*, 1 Duer (N. Y.) 679.

[b] Signature by a non-resident attorney held to be merely an irregularity. *Hommedieu v. Stowell*, 18 Abb. Pr. (N. Y.) 336.

[c] In *Collins v. Smith*, 57 Wis. 284, it was held that the plaintiff himself may sign the writ under a general authority from his attorney to sign any paper in connection with the action.

24. **U. S.**—*Aetna Ins. Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. **Ark.** *Hall v. Lackmond*, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84. **Ariz.**—Civ. Code, 1913, §1357. **Cal.**—Code Civ. Proc., §682. **Idaho.**—Rev. Code, 1908, §4471. **Ind.**—Burns' Ann. St., 1914, §724. **La.**—*King v. Baker*, 7 La. Ann. 570. And see *Drouet v. Rice*, 2 Rob. 374 (scroll sufficient); *Fink v. Lallande*, 16 La. 547. **Me.**—*Porter v. Haskell*, 11 Me. 177. **Minn.**—Rev. Laws, 1905, §4290. **Miss.**—Code, 1906, §3912. **Mont.** Rev. Codes, 1907, §6814; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325; *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 235, 64 Pac. 503. **Nev.**—Rev. Laws, 1912, §5281. **N. D.**—Rev. Codes, 1905, §7104. **P. I.**—*Hidalgo v. Crossfield*, 17 Phil. Isl. 466. **R. I.**—Gen. Laws, 1909, ch. 303, §1. **S. D.**—Code Civ. Proc., 1910, §334. **Tex.**—*Vernon's Sayles' Civ. St.*, §3729; *White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747. **Utah.**—Comp. Laws, 1907, §3233. **Wash.**—Rem. & Bal. Code, §513. **Wis.** St., 1898, §2969. **Can.**—*Archibald v. Hubley*, 18 Can. Sup. Ct. 116.

[a] In *North Carolina* (1) the writ

must be sealed when the writ runs out of the county. The omission makes the writ void and of no power in the hands of the officer. *Taylor v. Taylor*, 83 N. C. 116; *Finley v. Smith*, 15 N. C. 95; *Seawell v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722; *Shackelford v. McRea*, 10 N. C. 226. (2) But sealing is unnecessary when the writ is confined within the county of the court from which it issues. *Taylor v. Taylor*, 83 N. C. 116; *Shackelford v. McRea*, 10 N. C. 226.

25. **U. S.**—*Aetna Ins. Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. **Ill.** *Weaver v. Peasley & Co.*, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469; *Sidell v. Schumacher*, 99 Ill. 426; *Roseman v. Miller*, 84 Ill. 297; *Davis v. Ransom*, 26 Ill. 100; *Bybee v. Ashby*, 7 Ill. 151; *Peasley & Co. v. Weaver*, 64 Ill. App. 80; *Mann v. Reed*, 49 Ill. App. 406. **Kan.**—*Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341; *Frankhouser v. Dewitt*, 9 Kan. App. 636, 58 Pac. 1027. **La.** *Bonin v. Durand*, 2 La. Ann. 776. **Ohio.** *Boal v. King*, 6 Ohio 11; *Boal's Lessee v. King*, Wright 223. **Tex.**—*White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747.

[a] **When Required by Constitution.** The decision in *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341, holding void a writ issued without a seal is based upon the ground that the seal is required by a constitutional provision which could not be altered by legislation providing for amendment of process.

26. **Cal.**—*Hibberd v. Smith*, 50 Cal. 511. **Fla.**—*Mitchell v. Duncan*, 7 Fla. 13. **Ga.**—See *Dever v. Akin*, 40 Ga. 423. **Ind.**—*Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433; *Rose v. Ingram*, 98 Ind. 276; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213. **Me.**—*Bailey v. Smith*, 12 Me. 196; *Sawyer v. Baker*, 3 Greenlf. 29. **Mich.**—*Arnold v. Nye*, 23 Mich. 286. **Mont.**—*Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **Neb.**—*Taylor v. Courtney*, 15 Neb. 190,

1. *Indorsements*. — (I.) By Officer Issuing Writ. — The statutes often provide for the making of certain indorsements by the clerk before delivering the writ to the officer by whom it is to be executed.<sup>27</sup> In some jurisdictions, the amount of the debt, damages and costs must be indorsed on the writ;<sup>28</sup> in others, the date and amount of the judgment and the costs are indorsed;<sup>29</sup> in other jurisdictions, the costs<sup>30</sup>

16 N. W. 842. N. Y.—Wright v. Nosstrand, 91 N. Y. 31; Hill v. Haynes, 51 N. Y. 153; Dominoek v. Eacher, 3 Barb. 17; People v. Dunning, 1 Wend. 16. But see Bingham v. Burlingame, 33 Hun 211. Wis.—Davelaar v. Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185; Corwith v. State Bank, 18 Wis. 560, 86 Am. Dec. 793.

[a] In the case of Hunter v. Burnsville Turnpike Co., 56 Ind. 213, the court said: "There are cases which hold, that writs without a seal are not void, but voidable only, and that they may be amended, after they have been served, by attaching the seal. We incline to follow that line of decisions which holds, that process, without the proper seal, is voidable only, and therefore amendable, as being more in consonance with the general spirit of the law, which regards substance more than form. Much hardship and injury might accrue to purchasers of property on execution, or their vendees, if the sale happened to be made on an execution to which the seal, by inadvertence of the clerk, had not been affixed, if the defect could not be amended by affixing the seal." See also Rose v. Ingram, 98 Ind. 276.

**Adding seal to writ by amendment**, see *infra*, II, B, 2, m, (II), (A).

27. See generally the statutes.

28. Kirby's Dig. St. (Ark.), 1904, §3221; Mo. Rev. St., 1909, §2178.

[a] **Amount due** where the whole amount is not due. Griffith v. Jones, 3 N. J. L. 932.

29. Ga.—Code, 1910, §5992; Manry v. Shepperd, 57 Ga. 68. Neb.—Rev. St., 1913, §8057. Tenn.—Shannon's Code, §4743; Meadows v. Earles, 12 Lea 299; Warder v. Millard, 8 Lea 581.

[a] Prior (1) to the code in Tennessee, it was held that an execution was void if the items of cost were not indorsed in words at length on the execution; but where there was a judgment for debt and damages in addi-

tion to the costs, it was held that an illegal abbreviation of the items of cost would not render the execution void, or release the sheriff from his duty in enforcing the same as to the judgment for debt and damages and the legal items of cost. Meadows v. Earles, 12 Lea (Tenn.) 299; Warder v. Millard, 8 Lea (Tenn.) 581; Hopkins v. Waterhouse, 2 Yerg. 230. (2) But since the code, the provision has been held merely directory, for the strong and emphatic language of the old acts was not carried into the code, and an omission to write out at length the items, or to itemize the bill of costs, on an execution, will not invalidate it or a levy and sale thereunder. Meadows v. Earles, 12 Lea (Tenn.) 299; Warder v. Millard, 8 Lea (Tenn.) 581.

[b] **Separate Bill of Costs Attached to Writ**.—When an officer issuing an execution attaches to the writ a separate paper having thereon a bill of the costs, itemized in the manner prescribed in §5394 of the Georgia Civil Code, this paper becomes a part of the execution itself, and the action thus taken by the clerk is equivalent to properly indorsing the bill of costs thereon. Hix v. Gully, 113 Ga. 83, 38 S. E. 399.

**Necessity for reciting date of judgment in writ of execution**, see *supra*, II, B, 2, c.

**Necessity for designation of amount of judgment in writ**, see *supra*, II, B, 2, e.

30. Ohio.—Page & Adams' Ann. Gen. Code, §3027; Monaghan v. Monaghan, 25 Ohio St. 325. Tex.—Vernon's Sayles' Civ. St., §3729. Va.—Code, 1904, §3521. W. Va.—Code, 1913, §5050.

[a] Execution not having indorsed thereon the costs in words, held good, except as to the costs, being void as to them. Wingate v. Galloway, 10 N. C. 6.

**Necessity for designation of amount of costs in execution**, see *supra*, II, B, 2, e, (II).



merely, or the interest,<sup>31</sup> are indorsed upon the writ before delivery.

Under some statutes, the names of the attorneys of record must be indorsed on the writ.<sup>32</sup>

**Upon Death of Party.**—Where execution issues after the death of one or all of the plaintiffs, the clerk must indorse on the writ the fact of the death of such of them as are dead.<sup>33</sup> If all be dead, he must also indorse the names of the personal representatives or last survivor,<sup>34</sup> as well as the name and residence of the person issuing the writ.<sup>35</sup>

Where less than all of several defendants have died, execution, while operative only as against the survivors where there is no revivor, issues against all the judgment debtors,<sup>36</sup> and so it is required that the fact of the death be indorsed on the writ, to prevent levy being made upon the property of a deceased co-defendant.<sup>37</sup>

**(II.) By Party for Whom Issued.**—Statutes sometimes provide that the attorney for the plaintiff must indorse the writ, directing the sheriff to restrict the enforcement of the execution as against those defendants

31. *Erie R. Co. v. Ackerson*, 33 N. J. L. 33.

[a] "From a very early period, it has been the practice in this state to collect legal interest on a judgment, by means of an indorsement on the execution, and the right to do this must be regarded as the common law of New Jersey." *Erie R. Co. v. Ackerson*, 33 N. J. L. 33. See *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454.

**Necessity for designation of interest** in writ of execution, see *supra*, II, B, 2, e, (II).

32. Pub. St. (Vt.), 1906, §2144.

33. *Ark.*—Kirby's Dig. St., 1904, §3216. *Ia.*—Ann. Code, 1897, §4067; *Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437. *Ky.*—Carroll's Code, 1906, §402; *Mulholland v. Troutman's Admr.*, 10 Ky. L. Rep. 263; *Williams v. Staton*, 4 Ky. L. Rep. 225.

[a] **Nunc Pro Tunc Indorsement and Substitution.**—It is not regular to issue an execution on a judgment after the death of the plaintiff, in the name of his executor, without previously suggesting the death of the plaintiff, and substituting the executor upon the record. Where it was done, however, and the money levied, the record will be remitted with direction to suggest the death and substitute the name of the executor upon the record nunc pro tunc. *Darlington v. Speakman*, 9 Watts & S. (Pa.) 182. See also *supra*, II, B, 1, j, (I).

34. *Ark.*—Kirby's Dig., 1904, §3216.

*Ia.*—Ann. Code, 1897, §4067. *Ky.* Carroll's Code, 1906, §402.

35. N. Y. Code Civ. Proc., §1376; *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274.

[a] The indorsement called for by the statute was intended as notice to the judgment debtor of the authority of the person seeking to enforce the judgment after his creditor's death. *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274.

36. See *supra*, II, B, 1, h, (V).

37. *Ala.*—*Jones v. Swift*, 12 Ala. 144. *Ark.*—*Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780. *Ky.*—*Mitchell v. Smith*, 1 Litt. 243. *Miss.*—Code, 1906, §3960; *Bowen v. Bonner*, 45 Miss. 10; *Wade v. Watt, Noble & Mobley*, 41 Miss. 248. *N. Y.*—*Howell v. Eldridge*, 21 Wend. 678. *Pa.*—*Sheetz v. Wynkoop*, 74 Pa. 198.

[a] **Purpose of Statute.**—"This statute appears to have in view the protection of the rights of the deceased defendant, but to have no application to the co-defendants who are living. In case of the death of one of them before the issuance of the writ, the provision is, that his death shall be noted on it, to the end that his property shall not be taken in execution under it. But the property of the survivors is liable, without such noting, because the provision has no reference to them." *Wade v. Watt*, 41 Miss. 248.

[b] **Indorsement Unnecessary and Valueless.**—*Holt v. Lynch*, 18 W. Va. 567.

only who were summoned or who appeared in an action.<sup>33</sup> So where the entire debt for which judgment is confessed is not all due, the amount that is due when the writ issues, together with interest and costs, must be indorsed on the writ.<sup>39</sup>

(III.) **By Officer Executing Writ.**—Statutes generally provide that the officer receiving an execution shall indorse thereon the precise time of its receipt;<sup>40</sup> and if he receives more than one execution against the same person on the same day, the order of their receipt shall be indorsed thereon.<sup>41</sup> Such statutes are merely directory, however,<sup>42</sup> and if the officer neglects to make the indorsement, the time of such receipt may be proved by parol evidence.<sup>43</sup>

38. N. Y. Code Civ. Proc., §1934; *Hoffman v. Wight*, 1 App. Div. 514, 37 N. Y. Supp. 262, 72 N. Y. St. 588; *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951; *Staiger v. Theiss*, 19 Misc. 170, 43 N. Y. Supp. 292.

39. N. Y. Code Civ. Proc., §1277; *Jaffray v. Saussman*, 52 Hun 561, 5 N. Y. Supp. 629, 17 Civ. Proc. 1, 23 N. Y. St. 823.

40. See generally the statutes, and the following: **Ala.**—Civ. Code, 1907, §4097; *Andress v. Roberts*, 18 Ala. 387. **Ark.**—Dig. St., 1904, §3223. **Colo.**—Mills' Ann. St., 1912, §4177. **Idaho.**—Rev. Code, 1908, §2024. **Ill.**—Hurd's Rev. St., 1916, ch. 77, §9. **Ia.**—Code, 1897, §3965. **Kan.**—Gen. St., 1909, §6039; *Bank of Santa Fe v. Haskell County Bank*, 59 Kan. 354, 53 Pac. 132. **Ky.**—Carroll's St., 1909, §1660; *Million v. Com.*, 1 B. Mon. 310, 36 Am. Dec. 580. **Mich.**—Howell's St., §13,012; *Shepard v. Schrutt*, 163 Mich. 485, 128 N. W. 772; *Vroman v. Thompson*, 51 Mich. 452, 456, 16 N. W. 808. **Mo.**—Rev. St., 1909, §2200; *Gott v. Williams*, 29 Mo. 461. **Neb.**—Rev. St., 1913, §8058. And see *Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639, holding this section applicable only to executions issued out of a court of record, upon which lands may be levied upon and sold. **N. M.**—Crenshaw v. Delgado. 1 N. M. 376. **N. Y.**—Code Civ. Proc., §1363; *Burrell v. Hollands*, 78 Hun 583, 29 N. Y. Supp. 515, 61 N. Y. St. 373. **N. C.**—Person v. Newsom, 87 N. C. 142. **N. D.**—Rev. Codes, 1905, §7108. **Ohio.**—Page & Adams' Ann. Gen. Code, §11,665. **Okla.**—Rev. Laws, 1910, §5155. **Ore.**—Lord's Laws, 1910, §217. **Pa.**—Purd. Dig., vol. 2, p. 1549; *Hale's Appeal*, 44 Pa. 438. **S. D.**—Code Civ. Proc., 1910, §337. **Tenn.**—Shannon's Code, §4746. **Tex.**—Vernon's Sayles'

Civ. St., §3731. **Va.**—Code, 1904, §3589; *Hockman v. Hockman*, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 816. **Wash.**—Rem. & Bal. Code, §515. **W. Va.**—Code, 1913, §5112. **Wis.**—St., 1898, §2972; *Ohlson v. Pierce*, 55 Wis. 205, 12 N. W. 429; *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779. **Wyo.**—Comp. St., 1910, §4690.

[a] "The purpose of the statute requiring the officer to indorse on the writ the time at which he received it is to furnish evidence to determine at what time the lien attached, as well as the priority of conflicting writs, and the period when the officer's rights and liabilities attach." *Wilson v. Swasey* (Tex.), 20 S. W. 48. See also *Ohlson v. Pierce*, 55 Wis. 205, 12 N. W. 429.

[b] **Indorsement by deputy sheriff** is of same effect as though indorsed by the sheriff. *Million v. Com.*, 1 B. Mon. (Ky.) 310, 36 Am. Dec. 580.

41. **Ala.**—Civ. Code, 1907, §4097. **Ark.**—Dig. St., §3223. **Tex.**—Vernon's Sayles' Civ. St., §3731; *Garner v. Cutler*, 28 Tex. 175.

42. **Ala.**—*Hester v. Keith*, 1 Ala. 316. **Md.**—*Hanson v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322, 327. **Mich.**—*Shepard v. Schrutt*, 163 Mich. 485, 128 N. W. 772; *Vroman v. Thompson*, 51 Mich. 452, 456, 16 N. W. 808.

[a] **The omission by the sheriff to indorse the time of receiving an execution upon it, will not give priority to a subsequent execution, whereon the time is indorsed.** *Hale's Appeal*, 44 Pa. 438.

43. **Md.**—*Hanson v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322. **Mich.**—*Shepard v. Schrutt*, 163 Mich. 485, 128 N. W. 772. **Pa.**—*Hale's Appeal*, 44 Pa. 438.

[a] **Such evidence is not objectionable upon the ground that it conflicts**

(IV.) **Operation and Effect of.** — The facts stated in the indorsement upon a writ, where required by statute, are as much a part of the writ as if they had been inserted in the body of the execution;<sup>44</sup> and an omission or mistake in the body of the writ may be supplied or corrected from the indorsements.<sup>45</sup> It has even been held that where the amount due upon the judgment as stated in the body of the writ varies from that stated in the indorsements, that the latter amount prevails.<sup>46</sup> But where there is no statutory authority providing for the indorsement of any facts upon the writ, an indorsement is then no part of the writ.<sup>47</sup>

The indorsement upon an ordinary *fieri facias* of the description of property attached at the beginning of the action, does not change the character of the writ.<sup>48</sup> Nor will the indorsement of the words "alias" and "pluries" change an original writ to an alias or pluries execution.<sup>49</sup>

**Conclusiveness.** — A sheriff's indorsement has been held to be conclusive evidence as to the time the writ came into his hands,<sup>50</sup> but other indorsements have been held to be merely *prima facie* evidence.<sup>51</sup>

(V.) **Effect of Omission or Defect in Indorsement.** — It is generally held that an omission of or defect in the indorsement will not<sup>52</sup> render the

with the sheriff's return. *Hale's Appeal*, 44 Pa. 438.

44. **Ky.**—*Johnston v. Lynch*, 3 Bibb 334; *Meaux v. Rutgers*, 2 Ky. Dec. 288. **Mich.**—*McGuire v. Galligan*, 53 Mich. 453, 19 N. W. 142. **Tenn.**—*Warder v. Millard*, 8 Lea 581; *Williamson v. Smith*, 1 Coldw. 1, 78 Am. Dec. 478. **Tex.**—*Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

45. **Mich.**—*McGuire v. Galligan*, 53 Mich. 453, 19 N. W. 142. **N. Y.**—*White v. Coulter*, 1 Hun 357, 3 Thomp. & C. 608. **Tenn.**—*Warder v. Millard*, 8 Lea 581; *Williamson v. Smith*, 1 Coldw. 1, 78 Am. Dec. 478. **W. Va.**—*Williamson v. Ong*, 1 W. Va. 84.

46. *Com. v. McCoy*, 8 Watts (Pa.) 153, 34 Am. Dec. 445; *Griffith v. Lyle*, 7 Phila. (Pa.) 244.

47. **Ala.**—*McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35; *Cooper v. Jacobs*, 82 Ala. 411, 2 So. 832. **N. Y.**—*In re Henry Kupfer & Co.*, 165 App. Div. 570, 150 N. Y. Supp. 1037. **Tex.**—*Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

[a] An indorsement made by the clerk on the execution, that "there shall be no exemption of personal property against this execution," was wholly without authority of law and hence a mere nullity, not in any manner constituting a part of or affecting the execution itself. In such case, the

better practice is to strike out the indorsement and not to quash the writ. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

48. *Garey v. Hines*, 8 Ala. 837. 49. *Simpson v. Simpson*, 64 N. C. 427.

50. *Pearson's Appeal*, 78 Pa. 145; *Hale's Appeal*, 44 Pa. 438.

51. An indorsement by an attorney as to the time of the issuance of a writ is but *prima facie* evidence of such time. *Boyden v. Odeneal*, 12 N. C. 171.

[a] An indorsement by the clerk that the writ was recorded before issuance is but *prima facie* evidence of that fact. *Vanderveere v. Mason*, 24 N. J. L. 818.

52. **Ga.**—*Manry v. Shepperd*, 57 Ga. 68. **Mich.**—*Shepard v. Schruett*, 163 Mich. 485, 128 N. W. 772; *Vroman v. Thompson*, 51 Mich. 452, 456, 16 N. W. 808. **Mo.**—*Snodgrass v. Emery*, 66 Mo. App. 462. **N. Y.**—*Deyo v. Borley*, 63 Hun 631, 18 N. Y. Supp. 300, 43 N. Y. St. 638; *Abels v. Westervelt*, 15 Abb. Pr. 230, 24 How. Pr. 284; *Delaplaine v. Hitchcock*, 6 Hill 14. **Tex.**—*Wilson v. Swasey* (Tex.), 20 S. W. 48.

See *supra*, II, B, 2, f, (II), (G); II, B, 2, l, (III).

[a] A failure to make a required indorsement can only be questioned in



execution invalid; it may be cured by amendment in this respect.<sup>53</sup>

m. *Amendment of Writ.*—(I.) In General. — According to the strict rules of the common law, errors in the writ were not amendable.<sup>54</sup> The courts now, however, are very liberal in allowing the amendment of writs of execution so as to correct mistakes in mere matters of form or clerical misprisions.<sup>55</sup> In many jurisdictions, this power to amend and rectify errors in their writs is given the courts by statute.<sup>56</sup> But independent of statutes, the inherent powers of the courts over their process are sufficiently expansive to embrace such an authority,<sup>57</sup> especially if the record contains the data by which to make the amendment.<sup>58</sup>

The power to amend a writ of execution should be exercised only

a direct proceeding. *Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639.

[b] The failure of the clerk to indorse the date and the amount of the judgment upon the writ, does not render the writ illegal or prevent collection of the principal and interest. *Manry v. Shepperd*, 57 Ga. 68.

[c] Failure to indorse that the writ was issued by personal representative of deceased plaintiff does not render the execution void. *Deyo v. Borley*, 63 Hun 631, 18 N. Y. Supp. 300, 43 N. Y. St. 638.

[d] An unauthorized indorsement on a writ will not invalidate it or subject it to quashal, but the indorsement should be annulled. *McGowan v. Hoy*, 2 Dana (Ky.) 347.

53. See *infra*, II, B. 2, m, (II), (G).

54. *Johnston v. Lynch*, 3 Bibb (Ky.) 334.

55. *Ala.*—*McCollum v. Hubbert*, 13 Ala. 282, 48 Am. Dec. 56; *Cawthorn v. Knight*, 11 Ala. 579. *Ark.*—*Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780. *Ga.*—*Jones v. Parker*, 60 Ga. 500, execution amendable so as to conform to judgment. *Me.*—*Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736; *Thompson v. Smiley*, 50 Me. 67. *Md.*—*Hall v. Clagett*, 63 Md. 57. *N. Y.*—*Bissell v. Kip*, 5 Johns. 89. *Pa.*—*Peddle v. Hollinshead*, 9 Serg. & R. 277. *Vt.*—*Avery v. Lewis*, 10 Vt. 332, 33 Am. Dec. 203. *Wis.*—*Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185.

[a] The court in *Cawthorn v. Knight*, 11 Ala. 579, says: "Indeed it is very difficult to prescribe limits to this salutary power possessed by the courts, of permitting amendments in

their process, whether mesne, or final." See also *McCollum v. Hubbert*, 13 Ala. 282, 48 Am. Dec. 56.

As to what matters amendable, see *infra*, II, B. 2, m, (II).

56. See generally the statutes, and the following: *U. S.*—*Lane v. Beltzhoover*, Taney C. C. 110, 14 Fed. Cas. No. 8,047, under Maryland Act of 1789, ch. 20, §38. *Ala.*—Code, 1907, §3256; *Henderson v. Holman*, 69 So. 424. *Ark.*—*Jackson v. Bowling*, 10 Ark. 578. *Ga.*—Code, 1910, §5698; *Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482. *Kan.*—*Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341, under Gen. St., 1889, §4222. *Mass.*—*Nash v. Brophy*, 13 Mete. 476. *Miss.*—*Dailey v. State*, 56 Miss. 475. *Mont.*—Code Civ. Proc., §§774, 778; *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. *N. H.*—Pub. St., 1901, ch. 231, §14. *N. C.*—*Clark v. Hellen*, 23 N. C. 421, Rev. St., ch. 58, §1. *Pa.*—*Reigel's Appeal*, 1 Walk. 72. *Wis.*—St., 1898, §2830; *Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185; *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793.

[a] *Statute of Jeofails and Amendments.*—Amendments to the writ of execution do not come within the class of amendments allowed by the statute of jeofails and amendments. *Forward v. Marsh*, 18 Ala. 645; *Cawthorn v. Knight*, 11 Ala. 579; *Hayford v. Everett*, 68 Me. 505.

57. *Henderson v. Holman* (Ala.), 69 So. 424; *Sheppard v. Melloy*, 12 Ala. 561; *Hall v. Clagett*, 63 Md. 57.

58. *Ala.*—*Sheppard v. Melloy*, 12 Ala. 561. *Ky.*—*Johnston v. Lynch*, 3 Bibb 334. *Me.*—*Chase v. Gilman*, 15 Me. 64. *Md.*—*Hall v. Clagett*, 63 Md.

in furtherance of justice.<sup>59</sup> The mere fact that the amendment may affect existing rights, is not, in itself, sufficient to make the court refrain from exercising this power,<sup>60</sup> though it does have some influence on the exercise thereof.<sup>61</sup>

An amendment should be allowed only when there can be no doubt, from the records, that the execution sought to be amended did in fact issue upon the judgment to which the amendment makes it conform;<sup>62</sup> and it must appear that the party seeking the amendment was really entitled to such process as was attempted to be issued.<sup>63</sup> A writ which had no existence cannot be created by an amendment.<sup>64</sup> Therefore, an execution can only be amended when merely voidable, and not when absolutely void.<sup>65</sup>

**Alterations or Interlineations.** — A material alteration in a writ after its issuance will render it void,<sup>66</sup> at least as to the party accountable

57, must always be something in the record by which the amendment may be made.

59. *Ala.*—*Cawthorn v. Knight*, 11 *Ala.* 579. *Ga.*—*Saunders v. Smith*, 3 *Ga.* 121. *Me.*—*Caldwell v. Blake*, 69 *Me.* 458; *Hayford v. Everett*, 68 *Me.* 505. *Md.*—*Hall v. Clagett*, 63 *Md.* 57. *N. Y.*—*Porter v. Goodman*, 1 *Cow.* 413. *N. C.*—*Williams v. Sharp*, 70 *N. C.* 582; *Green v. Cole*, 35 *N. C.* 425. *Ore.*—*Flint v. Phipps*, 20 *Ore.* 340, 25 *Pac.* 725, 23 *Am. St. Rep.* 124. *Eng.*—*Brooks v. Hodson*, 7 *Man. & G.* 529, 8 *Scott N. R.* 223, 135 *Eng. Reprint* 212; *Phillips v. Tanner*, 6 *Bing.* 237, 130 *Eng. Reprint* 1271; *Hunt v. Pasman*, 4 *Maule & S.* 329, 105 *Eng. Reprint* 856.

[a] **After Sale for Inadequate Price.**—Where the property sold under an irregular writ brings an inadequate price, the law will ascribe the inadequacies to such irregularities, and will refuse to allow an amendment of the writ. *White v. Taylor*, 46 *Tex. Civ. App.* 471, 102 *S. W.* 747.

60. *Greene v. Cole*, 35 *N. C.* 425, as every amendment necessarily affects rights.

61. **Execution Defendant Injured by Allowing Amendment.**—An amendment to the writ will not be allowed in order to cure an irregularity and make a title based thereon good, where the defendants in execution had no actual and only a constructive notice that their land was sold; and where it appears that it was sold for a small, while worth a large sum; and where they had no chance to avoid the sale or redeem the land. With the amendment allowed the defendants would in-

nocently and not negligently be great losers. The amendment disallowed, none of the parties will suffer any considerable loss. The purchaser can receive his money back. The original plaintiffs can renew their execution and proceed to collect it anew. In this result, the rights of all parties are substantially preserved. *Hayford v. Everett*, 68 *Me.* 505.

[a] **Rights of Innocent Persons Involved.**—The power of permitting amendments to writs is exercised for the promotion of justice, with no parsimonious hand; yet where its allowance would be destructive of the rights of innocent third persons, the court will scan well the grounds upon which its action is sought. *Cawthorn v. Knight*, 11 *Ala.* 579. See also *Phillips v. Higdon*, 44 *N. C.* 380.

62. *McCormick v. Wheeler*, 36 *Ill.* 114, 85 *Am. Dec.* 388.

63. *Hill v. Haynes*, 54 *N. Y.* 153.

64. *Ark.*—*Bigham v. Dover*, 86 *Ark.* 323, 110 *S. W.* 217. *Cal.*—*O'Donnell v. Merguire*, 131 *Cal.* 527, 63 *Pac.* 847. *Ill.*—*McCormick v. Wheeler*, 36 *Ill.* 114, 85 *Am. Dec.* 388.

65. *Ill.*—*McCormick v. Wheeler*, 36 *Ill.* 114, 85 *Am. Dec.* 388. *Md.*—*Deakins v. Rex*, 60 *Md.* 593. *Miss.*—*Smith v. Mixon*, 73 *Miss.* 581, 19 *So.* 295. *Mont.*—*Kipp v. Burton*, 29 *Mont.* 96, 74 *Pac.* 85, 101 *Am. St. Rep.* 544, 63 *L. R. A.* 325. *N. Y.*—*Clarke v. Miller*, 18 *Barb.* 269; *Burk v. Barnard*, 4 *Johns.* 309; *Bunn v. Thomas*, 2 *Johns.* 190.

66. *White v. Jones*, 38 *Ill.* 159; *People v. Lamborn*, 2 *Ill.* 123 (alteration illegal and highly improper).

for the alteration,<sup>67</sup> though it has been held that some alterations do not wholly invalidate the writ,<sup>68</sup> and that where there has been an unauthorized erasure the writ may be restored to its original condition.<sup>69</sup> An apparent alteration will be presumed to have been innocently made before issuance of the writ.<sup>70</sup>

(II.) **Matters Amendable.**—(A.) **IN GENERAL.**—Although amendments to writs of execution are liberally allowed in some matters,<sup>71</sup> they are not allowed as to matters of substance.<sup>72</sup> Amendments are allowed for the purpose of correcting errors or misprisions of the clerk to matters of form;<sup>73</sup> thus, amendments have been held proper to correct deficiencies or irregularities in the writ, as to its caption,<sup>74</sup> or as to the

67. *Trigg v. Ross*, 35 Mo. 165.

68. *Brevard's Exrs. v. Jones*, 50 Ala. 221 (where after the return day had passed without a levy upon a writ issued from the chancery court, the register's deputy, at the sheriff's request, twice changed the return date by altering the name of the month); *Keyes v. Chapman*, 5 Conn. 169 (altering time for return).

[a] Where the statute provides that in certain cases, the execution may be levied by either a sheriff or a constable, and an execution when issued is directed to the sheriff only, the addition of a direction to the constable, made by the plaintiff's attorney, will not render the writ void. *Blanchard v. Waters*, 10 Mete. (Mass.) 185.

69. *Rollins v. Rich*, 27 Me. 557.

70. *National Bank v. Franklin*, 20 Kan. 264; *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581.

[a] Where the name of the defendant in an execution has been changed by the cancellation of one of the initials and the insertion of another, the change will be presumed, in the absence of a showing to the contrary, to have been made before the sale, by one authorized to make it. *Preston v. Wright*, 60 Iowa 351, 14 N. W. 352.

71. See *supra*, II, B, 2, m, (I).

[a] Where a writ is sued out into a county other than the county of venue, it is allowable to amend it so that it shows a nulla bona return of the writ in the county of venue. *Meyer v. Ring*, 1 H. Black. 541, 126 Eng. Reprint 310.

72. *Ark.*—*Bigham v. Dover*, 86 Ark. 323, 110 S. W. 217; *Blanks v. Rector*, 24 Ark. 496. *Ga.*—*Moughon v. Brown*, 68 Ga. 207. *Md.*—*Deakins v. Rex*, 60 Md. 593. *Mo.*—*Stewart v. Severance*,

43 Mo. 322. *Tex.*—*McKay v. Paris Exchange Bank*, 75 Tex. 181, 12 S. W. 529.

But see the discussion following, as to the particulars in which amendment may be made.

73. *U. S.*—*Black v. Wistar*, 4 Dall. 267, 1 L. ed. 828; *Murphy v. Lewis*, Hempst. 17, 17 Fed. Cas. No. 9,950a. *Ark.*—*Blanks v. Rector*, 24 Ark. 496. *Cal.*—*Brush v. Smith*, 141 Cal. 466, 75 Pac. 55. *Colo.*—*Carnahan v. Pell*, 4 Colo. 190. *Ill.*—*Merrifield v. Cottage Piano & O. Co.*, 144 Ill. App. 289. *Ind.*—*Reily v. Burton*, 71 Ind. 118; *Hutchens v. Doe*, 3 Ind. 528. *Ky.*—*Knight v. Applegate's Heirs*, 3 Mon. 335; *Johnston v. Lynch*, 3 Bibb 334; *Smith v. Carr*, Hard. 305, 308. *Me.*—*Hamant v. Creamer*, 101 Me. 222, 63 Atl. 736; *Stringer v. Coombs*, 62 Me. 160; *Smith v. Keen*, 26 Me. 411; *Chase v. Gilman*, 15 Me. 64. *Md.*—*Hall v. Clagett*, 63 Md. 57; *Deakins v. Rex*, 60 Md. 593. *Mass.*—*Dewey v. Peeler*, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399; *Blanchard v. Waters*, 10 Mete. 185. *Minn.*—*Thompson v. Bickford*, 19 Minn. 17. *Mo.*—*Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392. *N. Y.*—*De Lancey v. Piepgras*, 73 Hun 607, 26 N. Y. Supp. 806; *Jackson v. Walker*, 4 Wend. 462. *Pa.*—*Owen v. Simpson*, 3 Watts 87. *Vt.*—*Avery v. Lewis*, 10 Vt. 332, 33 Am. Dec. 203.

See also *supra*, II, B, 2, m, (I), note.

74. *Ark.*—*Kahn v. Kuhn*, 44 Ark. 404. *Cal.*—*Hibberd v. Smith*, 50 Cal. 511. *Colo.*—*Carnahan v. Pell*, 4 Colo. 190. *Minn.*—*Thompson v. Bickford*, 19 Minn. 17. *N. Y.*—*Park v. Church*, 5 How. Pr. 381.

[a] Writ running in the name of the "Territory of Dakota" after the



teste of the writ.<sup>75</sup> The omission of the seal of the court is ordinarily considered as an amendable defect;<sup>76</sup> but in those states where the omission of the seal renders the writ void,<sup>77</sup> it cannot be amended by affixing the seal.<sup>78</sup> Defects or omissions in the signature of the clerk are also curable by amendment,<sup>79</sup> though upon this proposition there

admission of South Dakota as a state held amendable. *State v. Cassiday*, 4 S. D. 58, 54 N. W. 928.

**Necessity for title of writ**, see *supra*, II, B, 2, b.

75. **U. S.**—*Shoemaker v. Knorr*, 1 Dall. 197, 1 L. ed. 97. **Ala.**—*Harrell v. Martin, Pleasants & Co.*, 6 Ala. 587. **Ark.**—*Jackson v. Bowling*, 10 Ark. 578; *Haines v. McCormick*, 5 Ark. 663. **Conn.**—*Roberts v. Church*, 17 Conn. 142. **Ga.**—*Drawdy v. Littlefield*, 75 Ga. 215; *Usry v. Saulsbury, Respass & Co.*, 62 Ga. 179. **Mass.**—*Nash v. Brophy*, 13 Metc. 476. **Miss.**—*Demoss v. Camp*, 5 How. 516, in which leave was given to amend by substituting a new writ. **N. H.**—*Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352; *Scribner v. Whitchee*, 6 N. H. 63, 23 Am. Dec. 708. **N. J.**—*Inskeep v. Lecony*, 1 N. J. L. 111. **N. Y.**—*Wright v. Nostrand*, 94 N. Y. 31; *Douglas v. Haberstro*, 88 N. Y. 611, 2 Civ. Proc. 186; *Park v. Church*, 5 How. Pr. 381; *Thorpe v. Fowler*, 5 Cow. 446; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341; *Porter v. Goodman*, 1 Cow. 413; *Center v. Billinghamurst*, 1 Cow. 33; *Williams v. Hogeboom*, 22 Wend. 648; *People v. Montgomery Common Pleas*, 18 Wend. 633. **N. C.**—*Cherry v. Woolard*, 23 N. C. 438. **Pa.**—*Berthon v. Keeley*, 4 Yeates 205; *Baker v. Smith*, 4 Yeates 185; *Peddle v. Hollinshead*, 9 Serg. & R. 277. **Tenn.**—*Perkins v. Woodfolk*, 8 Baxt. 480. **Vt.**—*Bank of Whitehall v. Pettes*, 13 Vt. 395, 37 Am. Dec. 600. **Eng.**—*Hart v. Weston*, 5 Burr. Rep. 2586, 98 Eng. Reprint 360.

[a] But in *Morgan v. Taylor*, 38 N. J. L. 317, the court refused to amend the teste of the writ, which under the statute is required to express the true time of issuing the writ, where the amendment would require the court to carry the antedating of the writ back over four terms of the court next preceding its issue, and five preceding its return in order to make it appear that the writ was issued prior to the death of the judgment creditor.

**Necessity that writ be tested**, see *supra*, II, B, 2, i.

76. **Ark.**—*Hall v. Lackmond*, 50 Ark.

113, 6 S. W. 510, 7 Am. St. Rep. 84 (amendment may be made although motion to quash the writ is pending); *Bridewell v. Mooney*, 25 Ark. 524. **Cal.**—*Hibberd v. Smith*, 50 Cal. 511. **Fla.**—*Mitchell v. Duncan*, 7 Fla. 13. **Ind.**—*Rose v. Ingram*, 98 Ind. 276; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213. **Me.**—*Bailey v. Smith*, 12 Me. 196; *Sawyer v. Baker*, 3 Me. 29. **Mass.**—*Blanchard v. Waters*, 10 Met. 185. **Mont.**—*Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **Neb.**—*Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842. **N. Y.**—*People v. Dunning*, 1 Wend. 16; *Dominiack v. Eacker*, 3 Barb. 17. **N. C.**—*Clark v. Hellen*, 23 N. C. 421; *Purcell v. McFarland's Heirs*, 23 N. C. 34, 35 Am. Dec. 734. **Wis.**—*Sabin v. Austin*, 19 Wis. 421; *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793. See *Davelaar v. Blue Bound Inv. Co.*, 110 Wis. 470, 86 N. W. 185 (seal of wrong court affixed).

**Necessity for seal**, see *supra*, II, B, 2, k.

77. See *supra*, II, B, 2, k.

78. *Weaver v. Peasley*, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469; *Gordon v. Boddwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341.

79. *Whiting & Slark v. Beebe*, 12 Ark. 421, 535.

[a] An execution for the sale of property, authenticated with the seal of the court but lacking the signature of the clerk issuing it, may be amended after its return by order of court upon the clerk to sign it, if necessary to validate proceedings under it. *Taylor v. Buck*, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346.

[b] The omission of the clerk to sign a writ issued by him, or the affixing by inadvertence the name of another person instead of his own, is a mere clerical misprision—matter of form, and not substance, and will be treated as amended whenever it is collaterally assailed. *Jett v. Shinn*, 47 Ark. 373, 1 S. W. 693.

**Necessity for signature**, see *supra*, II, B, 2, j.

are authorities to the contrary, especially where such signatures are considered as indispensable.<sup>80</sup>

(B.) RECITALS AS TO JUDGMENT.<sup>81</sup> — Errors or omissions in the writ of execution in the recitals of the date of the rendition,<sup>82</sup> or docketing,<sup>83</sup> of the judgment, or of the date of filing the transcript thereof,<sup>84</sup> may be amended.

(C.) DESIGNATION OF PARTIES OR CAPACITY.<sup>85</sup> — Errors or omissions in reciting the names,<sup>86</sup> or capacities,<sup>87</sup> of the parties to the writ, are amendable. Where a judgment is against several, a writ running

80. Cal.—O'Donnell *v.* Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. Ga.—Rawles *v.* Jackson, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185. Ill.—Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355.

81. Recitals as to judgment, see *supra*, II, B, 2, c.

82. Ill.—Mooney *v.* Moriarty, 36 Ill. App. 175. Ia.—Sprott *v.* Reid, 3 G. Gr. 489. Me.—Chase *v.* Gilman, 15 Me. 66. Md.—First Nat. Bank *v.* Weekler, 52 Md. 30. Minn.—Millis *v.* Lombard, 32 Minn. 259, 20 N. W. 187. Miss.—Dailey *v.* State, 56 Miss. 475. Mo.—Davis *v.* Kline, 76 Mo. 310; Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392. Can.—Regina *v.* Monkman, 8 Manitoba 509.

83. Cal.—Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954. N. Y.—Wright *v.* Nostrand, 94 N. Y. 31. S. D.—McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815. Wis. Swift *v.* Agnes, 33 Wis. 228; Sabin *v.* Austin, 19 Wis. 421.

Recital as to docketing of judgment, see *supra*, II, B, 2, c.

84. Burch *v.* Burch, 51 Miss. 232, 100 N. Y. Supp. 814.

85. As to designation of parties in writ, see *supra*, II, B, 2, d.

86. See the following: Ala.—DeLoach *v.* State Bank, 27 Ala. 437; McCollum *v.* Hubbert, 13 Ala. 282, 48 Am. Dec. 56; McElhaney *v.* Flynn, 23 Ala. 819; Shorter's Admr. *v.* Mims, 18 Ala. 655. Ga.—Lamb *v.* Dart, 108 Ga. 602, 34 S. E. 160; Smith *v.* Bell, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151; Gross *v.* Mims, 63 Ga. 563; Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598; Powell *v.* Perry, 63 Ga. 417; Manry *v.* Shepherd, 57 Ga. 68; Thornton *v.* Lane, 11 Ga. 459. Ky.—Shackleford *v.* Fountain's Heirs, 1 Mon. 252; Bank of Kentucky *v.* Lacy, 1 Mon. 7; Stovall *v.* Hibbs, 17 Ky. L. Rep. 906, 32 S. W.

1087. Mo.—Davis *v.* Kline, 76 Mo. 310. N. H.—Vogt *v.* Ticknor, 48 N. H. 242. Pa.—Sickler *v.* Overton, 3 Pa. 325; Cluggage *v.* Lessee of Duncan, 1 Serg. & R. 111. W. Va.—Stout *v.* Baltimore & O. R. Co., 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940. Eng. Mackie *v.* Smith, 4 Taunt. 322, 128 Eng. Reprint 354.

[a] Considered as amended when collaterally attacked. Jones *v.* Dove, 7 Ore. 467.

[b] "An execution issued by an officer having authority to issue the same, regular upon its face in all respects save that the name of the plaintiff in the judgment is omitted, may be amended by supplying the omission upon its being shown that a judgment was rendered in favor of such party for the amount specified in the execution. Such an execution is not materially variant from the judgment, but simply on account of the omission fails to connect itself with the judgment." Smith *v.* Bell, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151.

[c] Striking Out Name of Deceased Co-Plaintiff.—Where, after the death of one or more co-plaintiffs, an execution is erroneously issued in the name of all the plaintiffs, the writ may be amended by striking out the name of the deceased plaintiffs, so as to make the writ issuing in the name of the surviving plaintiff or plaintiffs. Lane *v.* Beltzhoover, Taney C. C. 110, 14 Fed. Cas. No. 8,047; Newnham *v.* Law, 5 Term. Rep. 577, 101 Eng. Reprint 323.

87. Amendments (1) allowed to show that the party is acting in a different representative capacity. Dewey *v.* Peeler, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399, (2) or acting in a representative and not an individual capacity. Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005.

against but part of the defendants may be amended by adding the names of the other defendants.<sup>88</sup> Conversely, where the writ runs against too many, it may be amended by striking out those names not properly contained therein.<sup>89</sup> But an execution cannot be amended so as to change the person against whom it is to run.<sup>90</sup>

(D.) DESIGNATION OF AMOUNT TO BE MADE BY WRIT. — Errors or omissions in designating the amount to be made by the writ of execution may be corrected by amendment.<sup>91</sup>

88. **N. H.**—Morse *v.* Dewey, 3 N. H. 535. **N. Y.**—Porter *v.* Goodman, 1 Cow. 413. **Pa.**—Sickler *v.* Overton, 3 Pa. 325; Shaffer *v.* Watkins, 7 Watts & S. 219.

89. **Goodman & Mitchell v. Walker**, 38 Ala. 142; **Andress v. Roberts**, 18 Ala. 387; **Cawthorn v. Knight**, 11 Ala. 579; **Van Deusen v. Brower**, 6 Cow. (N. Y.) 50; **Hilton v. Sinsheimer**, 5 Civ. Proc. (N. Y.) 355.

[a] Execution may be amended by striking out the name of one of the defendants, so as to make it conform to the judgment on which it was issued. **Goodman & Mitchell v. Walker**, 38 Ala. 142.

[b] Where a defendant has died, an execution erroneously issued after his death as against all the defendants may be amended so that it shall appear as being issued against the surviving defendant, and the proceedings thereon to be limited to the estate of the survivor. **Loomis v. Ross**, 12 Pa. Super. 95.

[c] Where an execution issues against the sureties of an administrator, some of whom were dead before the statute judgment was rendered, the court should not quash the execution for this cause, but amend, by striking out their names. **Thompson v. Bondurant & King**, 15 Ala. 346, 50 Am. Dec. 136.

90. In **Morris v. Balkham**, 75 Tex. 111, 12 S. W. 790, 16 Am. St. Rep. 874, the court refused to allow an amendment of an execution against the property of William Van Hagen where the judgment was against H. W. Van Hagen upon the ground that it would be unjust to allow an execution against one person to be amended so that it would become an execution against another person and give to the sale the effect of passing the title of the latter in property.

91. **Ala.**—Henderson *v.* Holman, 69 So. 424; **Sheppard v. Melloy**, 12 Ala.

561. **Cal.**—Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954; **Hunt v. Loucks**, 38 Cal. 372, 99 Am. Dec. 404; **Shirran v. Dallas**, 21 Cal. App. 405, 132 Pac. 454, 462. **Ga.**—Saunders *v.* Smith, 3 Ga. 121. **Ill.**—Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; **Lewis v. Lindley**, 28 Ill. 147; **Bybee v. Ashby**, 7 Ill. 151, 43 Am. Dec. 47. **Ind.**—McCall *v.* Trevor, 4 Blackf. 496; **Doe**, on the Demise of Wilkins *v.* Rue, 4 Blackf. 263. **Kan.**—Paine *v.* Spratley, 5 Kan. 525. **Ky.**—Knight *v.* Applegate's Heirs, 3 Mon. 335; **Pemberton v. Searce**, Hard. 3. **Me.**—Hamant *v.* Creamer, 101 Me. 222, 63 Atl. 736; **Coffin v. Freeman**, 84 Me. 535, 24 Atl. 986; **Corthell v. Egery**, 74 Me. 41; **Smith v. Keen**, 26 Me. 411; **Wright v. Wright**, 6 Me. 415. **Miss.**—Dailey *v.* State, 56 Miss. 475. **Mo.**—Davis *v.* Kline, 76 Mo. 310; **Montgomery v. Robinson**, 5 Mo. 233; **Easton v. Collier**, 1 Mo. 467. **Mont.**—Roush *v.* Fort, 2 Mont. 482. **N. J.**—Fries *v.* Woodworth, 31 N. J. L. 273; **Lane v. Potter**, 23 Atl. 420; **Cox v. Bennet**, 13 N. J. L. 165, 172; **Griffith v. Jones**, 3 N. J. L. 932. **N. M.**—Bachelder Bros. *v.* Chaves, 5 N. M. 562, 25 Pac. 783. **N. Y.**—Wright *v.* Nosstrand, 94 N. Y. 31; **Kokomo Straw Board Co. v. Inman**, 21 N. Y. Supp. 705; **Swan v. Saddlemire**, 8 Wend. 676; **Jackson v. Walker**, 4 Wend. 462; **Jackson ex dem. Anderson v. Anderson**, 4 Wend. 474; **Bissell v. Kip**, 5 Johns. 89; **Holmes v. Williams**, 3 Caines 98. **N. C.**—Hinton *v.* Roach, 95 N. C. 106. **Ohio.**—Waggoner *v.* Lessee of Dubois, 19 Ohio 67. **Eng.**—Laroche *v.* Washbrough, 2 Term Rep. 737, 100 Eng. Reprint 397. **Can.**—Helm *v.* Crossin, 17 U. C. C. P. 156.

[a] Treated as amended when collaterally attacked. **Jones v. Dove**, 7 Ore. 467.

[b] **Judgment by Confession.**—Where an execution is issued for the entire amount recovered in a judgment by confession, whereas but a part of such



(E.) DESCRIPTION OF PROPERTY.<sup>92</sup> — The description of property in a writ may be amended if it can be corrected by the praecipe or judgment.<sup>93</sup>

(F.) DIRECTIONS TO OFFICER.<sup>94</sup> — The omission to direct the writ to the proper officer is curable by amendment.<sup>95</sup> Likewise a direction to improper officers is a defect in the writ which may be amended.<sup>96</sup>

A mistake in directing the writ to the wrong county,<sup>97</sup> or an insufficient direction as to the property subject to levy,<sup>98</sup> or an error in designating the return day of the writ,<sup>99</sup> or the court to which return

debt is actually due, the writ may be amended on the motion of the judgment debtor or his subsequent execution creditors so as to direct the sheriff to collect only such amount of the debt which is actually due. *Jaffray v. Saussman*, 52 Hun (N. Y.) 561, 17 Civ. Proc. 1.

[c] An execution directing the collection of interest on the judgment at a higher rate than the judgment calls for, may be amended at any time, so as to make it conform to the judgment. *Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462.

[d] Where the writ issued for a greater amount of costs than actually due, after a retaxation of the costs the writ should be amended to conform to the amount of the costs actually due. *Adrianne Platt & Co. v. Heiskell*, 8 App. Cas. (D. C.) 240.

92. As to description of property, see *supra*, II, B, 2, f, (II), (E).

93. *Caldwell v. Blake*, 69 Me. 458; *McClelland v. Devilbiss*, 1 Pa. Co. Ct. 613. See *infra*, II, B, 2, m, (II), (F).

94. As to directions to officer, see *supra*, II, B, 2, f.

95. Me.—*Morrell v. Cook*, 31 Me. 120; *Rollins v. Rich*, 27 Me. 557. Mass.—*Blanchard v. Waters*, 10 Met. 185; *Hearsey v. Bradbury*, 9 Mass. 95. S. C. Representative of *Bordeaux v. Treasurers*, 3 McCord 142; *Toomer v. Purkey*, 1 Mill 323, 12 Am. Dec. 634. Can. *Chambers v. Dollar*, 29 U. C. Q. B. 599.

[a] A writ directed to "all and singular the sheriffs of said state," omitting to direct it also to the lawful deputies of the sheriff, is amendable, and where the levy was made by the sheriff, it seems that the writ need not even be amended. *Cheney & Matthews v. Beall*, 69 Ga. 533.

[b] Unauthorized Erasure of Direction.—If the writ, when issued by the

clerk contained the proper directions and subsequently there has been an unauthorized erasure of the direction, and a new and different direction inserted, a restoration to its former condition is proper. *Rollins v. Rich*, 27 Me. 557.

96. *National Bank v. Franklin*, 20 Kan. 264; *Christy v. Springs*, 11 Okla. 710, 69 Pac. 864.

[a] Where a writ was directed to the sheriff, but delivered to, and executed by the coroner, an amendment permitting the substitution of the word "coroner" in place of the word "sheriff" was held proper. *Simcoke v. Fredrick*, 1 Ind. 54.

[b] Where a writ was directed to the coroner, instead of the sheriff, it was held that the plaintiff was properly allowed to amend the writ, by stating, as a reason why it was so directed, that the sheriff was one of the defendants. *Moss v. Thompson*, 17 Mo. 405.

[c] Where a constable attached and held goods, and the execution was directed to the sheriff, but delivered to the constable, who served the same, it was held that the execution was not void but amendable. *Pecotte v. Oliver*, 2 Idaho 230, 10 Pac. 302.

97. *Walden v. Davison*, 15 Wend. (N. Y.) 575, 578. But see *Bybee v. Ashby*, 7 Ill. 151, holding it improper to amend, several years after sale, to correct direction to the wrong county.

98. Ga.—*Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482. N. Y.—*Burch v. Burch*, 51 Misc. 232, 100 N. Y. Supp. 814; *Woolworth v. Taylor*, 62 How. Pr. 90; *Van Deusen v. Brower*, 6 Cow. 50. Pa. *Peddle v. Hollinshead*, 9 Serg. & R. 277.

See *supra*, II, B, 2, m, (II), (E).

99. U. S.—*Shoemaker v. Knorr*, 1 Dall. 197, 1 L. ed. 97. Ala.—*Forward v. Marsh*, 18 Ala. 645. Ga.—*Saunders v. Smith*, 3 Ga. 121. Kv.—*Goode's*

is to be made,<sup>1</sup> are curable by amendment of the writ.

(G.) **INDORSEMENTS.**<sup>2</sup> — The failure to make proper indorsements required to be made upon the writ of execution is curable by amendment.<sup>3</sup>

(III.) **How Made.** — (A.) **By Whom.** — The amendment of a writ of execution requires the exercise of judicial powers, and so neither the clerk,<sup>4</sup> nor the sheriff,<sup>5</sup> generally have power to make such amendment; it can be made only in open court.<sup>6</sup> But the clerk or his successor is sometimes given the power by statute to amend any mistake made in issuing the execution, without action of court.<sup>7</sup>

(B.) **APPLICATION.** — It is sometimes the duty of the court, of its own motion, to direct the amendment of an execution;<sup>8</sup> and in collateral proceedings, an amendment is often treated as made, without a formal motion being made therefor,<sup>9</sup> and without the necessity of making a

Admr. *v.* Miller, etc., 78 Ky. 235. Miss. Harrison *v.* The Agricultural Bank, 2 Smed. & M. 307. N. Y. — Wright *v.* Nostrand, 94 N. Y. 31; Boyd *v.* Vanderkemp, 1 Barb. Ch. 273; Van Deusen *v.* Brower, 6 Cow. 50; Inman *v.* Griswold, 1 Cow. 199; Cramer *v.* Van Alstyne, 9 Johns. 386; Benedict & Burnham Mfg. Co. *v.* Thayer, 20 Hun 547. Pa. — Berthou *v.* Keeley, 4 Yeates 205. Eng. Reubel *v.* Preston, 5 East 291, 102 Eng. Reprint 1081.

1. Atkinson *v.* Newton, 2 Bos. & Pul. 336, 126 Eng. Reprint 1313 (writ made returnable to wrong court); Hunt *v.* Kendrick, 2 Black. W. 836, 96 Eng. Reprint 493. And see Simon *v.* Gurney, 5 Taunt. 605, 128 Eng. Reprint 827.

2. As to indorsements, see *supra*, II, B, 2, 1.

3. Forsythe *v.* Washtenaw Circuit Judge, 180 Mich. 633, 147 N. W. 549 (indorsement of time of receipt of writ by sheriff permitted after writ had been returned unsatisfied); Abels *v.* Westervelt, 15 Abb. Pr. (N. Y.) 230; Deyo *v.* Borley, 18 N. Y. Supp. 300.

4. Ill. — White *v.* Jones, 38 Ill. 159. Ky. — Johnson *v.* Scott, 134 Ky. 736, 121 S. W. 695. Mo. — Trigg *v.* Ross, 35 Mo. 165.

Compare, Shorter's Admr. *v.* Mims, 18 Ala. 655.

[a] The clerk is, by statute, expressly forbidden to amend or impair any process, pleading or record, without the order of the court; and, consequently, any such unauthorized change made by him in an execution would be as in the case of such change made by a stranger, mere spoliation, and would have no force to alter the

legal effect of the writ. If, however, the plaintiff in the execution made the change, by the hand of the clerk, he thereby invalidated the writ as to his beneficial interest under it; and having become himself the purchaser of the land, the sale to him under the altered writ was void. Trigg *v.* Ross, 35 Mo. 165.

5. Sublett *v.* Gardner, 144 Ky. 190, 137 S. W. 864; Johnson *v.* Scott, 134 Ky. 736, 121 S. W. 695; Vance *v.* Vanarsdale, 1 Bush (Ky.) 504; Maupin *v.* Emmons, 47 Mo. 304.

Amendment of return, see the article "Returns."

6. Sublett *v.* Gardner, 144 Ky. 190, 137 S. W. 864.

7. Ga. Code, 1910, §§5698, 5699; Smith *v.* Bell, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151; Gross *v.* Mims, 63 Ga. 563.

[a] In such case, the amendment is a mere ministerial act of the clerk. Gross *v.* Mims, 63 Ga. 563.

8. Sheppard *v.* Melloy, 12 Ala. 561.

[a] When the record which shows the variance upon which a motion to quash the writ is founded, and furnishes the only proper data for the correction of the error, it is the duty of the court of its own motion to direct the amendment of the writ and overrule the motion to quash. Sheppard *v.* Melloy, 12 Ala. 561.

9. Ala. — Friedman *v.* Waldrop, 97 Ala. 434, 12 So. 427. Mass. — Dewey *v.* Peeler, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399; Currier *v.* Bartlett, 122 Mass. 133. Pa. — Shaffer *v.* Watkins, 7 Watts & S. 219.

formal amendment, the defect being simply disregarded.<sup>10</sup> A motion to amend an execution is a proper practice, however.<sup>11</sup> The motion or application to amend a writ of execution should be made to the court from which it issued.<sup>12</sup> One court cannot amend the writ of another.<sup>13</sup>

**Notice of Application.**<sup>14</sup> — A reasonable notice of a motion to amend is generally required to be given to the parties to be affected.<sup>15</sup>

(C.) HEARING AND DETERMINATION. — Where the right to amend an execution is given by statute, it cannot be controlled by the discretion of the judge.<sup>16</sup> But ordinarily the allowance or refusal of amendments is a matter of judicial discretion,<sup>17</sup> in which case the order made is

10. **U. S.**—*Griswold v. Connolly*, 1 Woods 193, 11 Fed. Cas. No. 5,833. **Mass.**—*Look v. Luce*, 140 Mass. 461, 5 N. E. 163. **Miss.**—*Doe v. Gildart*, 4 How. 267. **Mont.**—*Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325, validating statute made writ good without amendment.

[a] In all collateral proceedings where the record discloses the error and supplies the data for its correction, an amendment of the writ will be considered as made though not formally made. *Friedman v. Waldrop*, 97 Ala. 434.

11. **Ala.**—*Sheppard v. Melloy*, 12 Ala. 561. **Ky.**—*Sublett v. Gardner*, 142 Ky. 190, 137 S. W. 864. **Mass.**—*Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033. **S. C.**—*Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170.

[a] If the authority to allow an amendment to the writ appears by extrinsic proof, and not by an inspection of the record, a motion to amend should be made. *Sheppard v. Melloy*, 12 Ala. 561.

12. **Ala.**—*Henderson v. Holman*, 69 So. 424; *Hubbert v. McCollum*, 6 Ala. 221. **Idaho.**—*Pecotte v. Oliver*, 2 Idaho 251, 10 Pac. 302. **Ky.**—*Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695. **Md.**—*Hall v. Clagett*, 63 Md. 57. **Miss.**—*Robb v. Halsey*, 11 Smed. & M. 140.

From what tribunal execution issues, see *supra*, II, B, 1, c.

13. *Bisbee v. Hall*, *Wright* (Ohio) 59.

[a] Where a *feri facias* on a justice's judgment was levied on land, and the regular proceedings had in the county court for the subjecting the land, and a sale made by virtue thereof, it was held that the county court, at a subsequent term, has no authority, on motion to set aside the *fi. fa.* on

the justice's judgment. The motion in substance being one to amend in one court the process of another. *Bennett v. Taylor*, 53 N. C. 281.

14. See generally the titles "Motions;" "Notice."

15. **Ill.**—*Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47. **Ky.**—*Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864. **Tex.**—*Morris v. Balkham*, 75 Tex. 111, 12 S. W. 790, 16 Am. St. Rep. 874.

[a] **Rights of Third Persons Affected.**—An amendment to a writ should not be allowed without notice, if it would change in substance the process from what it was when issued, and would thus affect the rights of third persons. *Simpson v. Simpson*, 64 N. C. 427.

[b] The defendant in execution need not be notified. *Giles v. Pratt*, 1 Hill (S. C.) 239, 26 Am. Dec. 170.

[c] Where the parties affected are before the court upon a motion to quash the writ, no notice of a counter-motion to amend need be given. *Inman v. Griswold*, 1 Cow. (N. Y.) 199.

16. *Johnston v. Lynch*, 3 Bibb (Ky.) 334.

17. **Ga.**—*Saunders v. Smith*, 3 Ga. 121. **Me.**—*Hayford v. Everett*, 68 Me. 505. **S. C.**—*Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170; *Hubbell v. Fogartie*, 1 Hill 167, 26 Am. Dec. 163.

[a] **In Furtherance of Justice.** The court is bound by no rule in exercising its discretionary power in such cases, except that it should be allowed only in the furtherance of justice. *Hayford v. Everett*, 68 Me. 505.

[b] **Legal Discretion.**—"The discretion of the judge in relation to amendments is not a mere capricious exercise of power and will; it is a legal discretion, and ought to be governed by, and exercised according to the rules of law. As long as the plaintiff



not ordinarily reviewable by an appellate tribunal.<sup>18</sup>

(IV.) Time for. — The general rule is that an execution may be amended at any time,<sup>19</sup> either after a levy thereof,<sup>20</sup> or after a return;<sup>21</sup> or before,<sup>22</sup> or after a sale.<sup>23</sup> An amendment will not be allowed dur-

has anything by which he can amend his subsequent proceedings, he has the right to do so; as, for instance, he can amend . . . the execution by the judgment." *Hubbell v. Fogartie*, 1 Hill (S. C.) 167, 26 Am. Dec. 163.

[c] **Setting Aside Order of Amendment.**—An amendment of a writ having been made at one term, after notice and a full hearing of the parties, and no exception taken, a motion at a subsequent term to rescind the order and erase the amendment, upon a suggestion that they were made upon false testimony, will not be heard. In such case a new trial may be granted under the statute, where the facts will sustain the application. *Russell v. Dyer*, 39 N. H. 528.

18. *Phillipse v. Higdon*, 44 N. C. 380.

[a] **Order (1) permitting or refusing amendment only reviewable where** a question of law has been decided (*Hayford v. Everett*, 68 Me. 505), (2) or where there has been a gross abuse of discretion. *Saunders v. Smith*, 3 Ga. 121.

19. *Fla.*—*Adams v. Higgins*, 23 Fla. 13, 1 So. 321. *Ind.*—*Rose v. Ingram*, 98 Ind. 276, upon a collateral attack. *Me.*—*Thompson v. Smiley*, 50 Me. 67. *Md.*—*Hall v. Clagett*, 63 Md. 57, after application made to quash writ for such defect. *N. M.*—*Bachelder Bros. v. Chaves*, 5 N. M. 562, 25 Pac. 783.

[a] If action has begun for trespass under the writ sought to be amended it has been held proper to grant the amendment upon condition that the plaintiff pay the costs of the action and motion. *Porter v. Goodman*, 1 Cow. (N. Y.) 413.

20. *Me.*—*Morrell v. Cook*, 31 Me. 120. *N. H.*—*Whittier v. Varney*, 10 N. H. 291. *Eng.*—*Hunt v. Kendrick*, 2 W. Black. 836, 96 Eng. Reprint 493.

21. *Me.*—*Sawyer v. Baker*, 3 Greenl. 29. *Mass.*—*Blanchard v. Waters*, 10 Mete. 185. *N. M.*—*Bachelder Bros. v. Chaves*, 5 N. M. 562, 25 Pac. 783. *N. Y.*—*Kokomo Straw Board Co. v. Inman*, 67 Hun 648, 21 N. Y. Supp. 705; *Phelps v. Ball*, 1 Johns. Cas. 31.

[a] **Addition of Costs.**—After an

execution which was proceeding for certain amounts as principal and costs had been returned to court fully satisfied, it could not be then amended by an insertion therein by the clerk of additional costs, as witness fees, and proceed for the same. *Dickerson v. Downs*, 108 Ga. 782, 33 S. E. 707.

22. *Ill.*—*Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Lewis v. Lindley*, 28 Ill. 147; *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47; *Mooney v. Moriarty*, 36 Ill. App. 175. *N. Y.*—*Jackson ex dem. Anderson v. Anderson*, 4 Wend. 474. *Tex.*—*McKay v. Paris Exchange Bank*, 75 Tex. 181, 12 S. W. 529, 16 Am. St. Rep. 884.

[a] In *McKay v. Paris Exchange Bank*, 75 Tex. 181, 184, 12 S. W. 529, the court said: "Where the proceedings are amendable we deem it to be the better rule to require it to be done before a sale has been made. When the defect is one of substance it will not be contended that it may properly be removed for the benefit of the purchaser after the sale by amendment. If it is one of form only, we see no reason why it may not be disregarded or supplied in any suit in which the question may become involved." See also *Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 274.

23. *Fla.*—*Adams v. Higgins*, 23 Fla. 13, 1 So. 321. *Ill.*—*Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Lewis v. Lindley*, 28 Ill. 147; *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47; *Mooney v. Moriarty*, 36 Ill. App. 175. *Minn.*—*Thompson v. Bickford*, 19 Minn. 17. *N. Y.*—*Jackson ex dem. Anderson v. Anderson*, 4 Wend. 474. *N. C.*—*Hinton v. Roach*, 95 N. C. 106; *Purcell v. McFarland's Heirs*, 23 N. C. 34, 35 Am. Dec. 734. *S. C.*—*Representatives of Bordeaux v. Treasurers*, 3 McCord 142; *Toomer v. Purkey*, 1 Mill 323, 12 Am. Dec. 634; *Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170; *Hubbell v. Fogartie*, 1 Hill 167, 26 Am. Dec. 163.

[a] Where the clerk of a superior court has omitted to affix the seal of his court to writs of fieri facias and venditioni exponas issued out of the

ing a stay of proceedings pending appeal;<sup>24</sup> and under some authorities cannot be made after the accrual of the rights of third persons,<sup>25</sup> though under other authorities the mere fact that the amendment would affect the rights of innocent persons is not in itself sufficient to prevent an amendment.<sup>26</sup>

(V.) Effect.—Amendments to the writ, made to establish conformity in the whole record, relate back to the date of issuance and take effect therefrom.<sup>27</sup>

n. *Of Execution Issued Upon Transcript of Judgment.*—An execution issued upon the transcript of a judgment docketed in a county other than that in which it was rendered, should be in the same general form as other executions.<sup>28</sup> In addition thereto, however, it should recite that the transcript of the judgment was docketed in the county in which the writ is to be executed.<sup>29</sup> It should also specify the clerk, with whom the transcript is filed,<sup>30</sup> and the time of filing the same,<sup>31</sup>

county, the court may, at a subsequent term, order the clerk to affix its seal to the said executions nunc pro tunc, in order to protect a purchaser of the land sold under them, where no third person claiming under one of the parties to the execution is to be affected thereby. *Purcell v. McFarland's Heirs*, 23 N. C. 34.

24. *Merrifield v. Western Cottage Piano Co.*, 238 Ill. 526, 87 N. E. 379.

25. *Brooks v. Hodson*, 7 Man. & G. 529, 8 Scott N. R. 223, 135 Eng. Reprint 212; *Phillips v. Tanner*, 6 Bing. 237, 130 Eng. Reprint 1271; *Hunt v. Pasman*, 4 Maule & S. 329, 105 Eng. Reprint 856.

See also *supra*, II, B, 2, m; (I), note.

26. *Cawthorn v. Knight*, 11 Ala. 579; *Green v. Cole*, 35 N. C. 425. See also *supra*, II, B, 2, m, (I), note.

27. U. S.—*Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858. Ga.—*Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482; *Saffold v. Wade*, 56 Ga. 174. Ill.—*Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462. Neb.—*Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842. N. H.—*Vogt v. Ticknor*, 48 N. H. 242; *Whittier v. Varney*, 10 N. H. 291. S. C.—*Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170.

[a] The amendment nunc pro tunc of a writ of execution makes it, as between the parties, as if the defect had never existed. *Adams v. Higgins*, 23 Fla. 13, 1 So. 321.

[b] In Georgia, formerly (1) an amendment to a writ of execution caused the fall of the levy made under the irregular writ, by express terms of the statute. *Jones v. Parker*, 60 Ga.

500; *Bradford v. Water Lot Co.*, 58 Ga. 280; *Beasley v. Bowden*, 58 Ga. 154; *Manry v. Shepperd*, 57 Ga. 68. (2) It is otherwise under the present statute. Code, 1910, §5699; *Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151.

28. See *supra*, II, B, 2, a to m inclusive.

29. *Nanz v. Oakley*, 60 Hun 431, 15 N. Y. Supp. 1, 39 N. Y. St. 327; *Kentzler v. Chicago, Milwaukee & St. P. R. Co.*, 47 Wis. 641, 3 N. W. 369; *Smith v. Buck*, 22 Wis. 57.

[a] The failure of the writ to recite that the judgment was docketed in the county in which the writ is to be executed will render it void. *Nanz v. Oakley*, 60 Hun 431, 15 N. Y. Supp. 1, 39 N. Y. St. 327; *Kentzler v. Chicago, Milwaukee & St. P. R. Co.*, 47 Wis. 641, 3 N. W. 369. But see *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815, holding it a mere amendable irregularity.

[b] In *Hoerr v. Meihofner*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674, the court held the writ not void, but irregular where it recited the docketing of the judgment in another county two days after such writ was issued and dated.

Necessity for docketing judgment where execution issues out of county of venue, see *supra*, II, B, 1, g, (II).

30. *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556; *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89; *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65.

31. *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556; *Dunham v. Reilly*, 110

and should also direct that the return be made to such clerk.<sup>32</sup>

If the judgment was rendered in a justice's court, the writ should specify the name of the justice thereof.<sup>33</sup>

**3. What Property Subject to Levy.**<sup>34</sup> — a. *What Law Governs.* The question as to what property is subject to execution is determined by the law at the time of the levy, and not by law at the time of the incurring of the obligation.<sup>35</sup> The liability of personal property under an execution issuing from the courts of the state where it is situated must be determined by the law there rather than that of the jurisdiction where the owner lives.<sup>36</sup>

b. *Personal Property.* — (I.) **General Statement.** — Generally all tangible personal property belonging to the judgment debtor, except that which is expressly exempt by statute, is subject to execution,<sup>37</sup>

N. Y. 366, 18 N. E. 89; *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65.

[a] The omission of or a mistake in the recital as to the date of the docketing of the judgment in another county, constitutes but a mere irregularity (*Burch v. Burch*, 51 Misc. 232, 100 N. Y. Supp. 814; *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815), subject to amendment. See *supra*, II, B, 2, m, (II), (B).

32. *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89; *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65.

33. *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556; N. Y. Code Civ. Proc., §1367.

[a] **Form of Recitals.** — "Whereas, on the 19th day of December, A. D. 1905, there was filed in the office of the clerk of the circuit court of Jackson county, Missouri, at Kansas City, a transcript of a judgment by F. H. Evens, plaintiff, obtained against Margaret L. Johnston, defendant, before James B. Shoemaker, Esq., a justice of the peace within and for Kaw township, Jackson county, Missouri, on the 5th day of September, A. D. 1905, for the sum of two hundred eighteen and 75/100 dollars, which was adjudged as aforesaid, and also for costs; and whereas it has been duly made to appear that an execution was issued on said judgment directed to the constable of Kaw township in said county and said constable has made return that the defendant had no goods or chattels whereof to levy the same.

"These are therefore to command you, etc." *Keeline v. Sealy*, 255 Mo. 692, 164 S. W. 556.

34. **Property subject to attachment**, see 3 STANDARD PROC. 270.

**Property subject to garnishment**, see 10 STANDARD PROC. 389.

**What property exempt from levy**, see *infra*, II, B, 4.

**Property of Corporation.** — See 5 STANDARD PROC. 672.

**Effect of Directions or Specification in Writ.** — See *supra*, II, B, 2, f, (II), (E); II, B, 2, g.

35. *Reardon v. Searey*, 2 Bibb (Ky.) 202.

36. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 18 L. ed. 599, 33 How. Pr. 18; *Sale v. Saunders*, 24 Miss. 24, 57 Am. Dec. 157.

[a] "These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides." *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003.

37. **U. S.** — *Turner v. Fendall*, 1 Cranch 117, 2 L. ed. 53. **N. Y.** — *Twinnam v. Swart*, 4 Lans. 263; *Handy v. Dobbin*, 12 Johns. 220. **N. C.** — *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102.

[a] **Dogs** are property subject to execution. *Vaughn v. Nelson*, 5 Ga. App. 105, 62 S. E. 708.

[b] **Working animals** may be seized separately from the plantation to which they are attached when the debtor himself points them out to the



though such property be in use by the owner at the time of levy.<sup>33</sup> But it has been held that the property must be in such a condition that to take it into custody would not destroy its nature or its value.<sup>39</sup>

officer for seizure. *Dorsey v. Hills*, 4 La. Ann. 106.

[c] A watch held subject to execution. *Deposit Nat. Bank v. Wickham*, 44 How. Pr. (N. Y.) 421.

[d] Registered Servants.—*Nance v. Howard*, 1 Ill. 242.

[e] A sealed parcel or locked safe may be levied on. *Tillinghast v. Johnson*, 34 R. I. 136, 82 Atl. 788.

Rolling stock of railroad company, see 5 STANDARD PROC. 675.

Personal property subject to attachment, see 3 STANDARD PROC. 273.

What property exempt from execution, see *infra*, II, B, 5.

38. *State v. Dilliard*, 25 N. C. 102, 38 Am. Dec. 708.

[a] A horse though the owner is riding it at the time. *State v. Dilliard*, 25 N. C. 102, 38 Am. Dec. 708.

[b] Tools of a mechanic while in use. *Bell v. Douglass*, 1 Yerg. (Tenn.) 397.

39. Unfinished beer in the state of intermediate fermentation cannot be levied upon. *Herman v. Phoenix Brew. Co.*, 25 Ky. L. Rep. 84, 74 S. W. 726. In this case the court says: "We have nothing to do with the argument of inconvenience in the case. The matter comes to whether the property proposed to be sold has a salable quality. Perhaps that could be best tested after an attempt to sell had been made. But such articles as molten iron, or glass in the furnace, burning charcoal in the pit, and coke in the ovens, or baker's dough, or brick in a burning kiln, hides in the vat, and beer in a state of fermentation, while undeniably having the qualities of chattels, are nevertheless in such imperfect state of transition from one thing to another that they really cannot be said to be either. Without further labor, and generally artistic or skillful labor, and the use of the realty, and the combination or mixture of other articles, they are practically worthless. The officer could not take them into possession, nor could he separate them from the bulk of which they are part, without destroying, perhaps, not only what he took, but probably much in addition, of even greater value. While

doing the creditor no good, he would be utterly destroying the debtor. There can be no sense in allowing such an act. Although, in levying upon unwieldy objects, the officer may leave them in the debtor's possession, or in the possession of another (*Hill v. Harris*, 10 B. Mon. 120, 1 Am. Rep. 542), he could not require such person, against his consent, to give them further attention, and to put upon them his labor, time, and experience. It has been long since the creditor could force his debtor to involuntarily work for him. The facts of this case fairly illustrate such a situation: Five thousand barrels of beer in the tubs are levied upon. In its then state it will require on an average of four to six weeks' time and attention to perfect it so that it will have any market value whatever. To give it the necessary attention requires a plant worth \$200,000; the labor and attention of a large and expensive force of workmen, more or less skilled in the trade of making beer; and the addition from time to time of other material than that already embraced in the beer when levied upon. When so completed, it would be worth \$5.50 per barrel. In its then state, even allowing the privilege of such use and services, it was worth not exceeding \$1.50 per barrel. Without the privilege of using the brewery, and without the labor and attention mentioned, it would be without any value. . . . Unfinished beer in the state of intermediate fermentation is not leviable under an execution, because, if the sheriff were so minded, he could not take it into his actual custody without destroying its nature and value. He cannot, as to it, satisfy the general rule as to what constitutes a good levy, viz., 'that the officer must do such acts as would subject him to an action for trespass but for the protection of the execution.' *McBurnie v. Overstreet*, 8 B. Mon. 303. While he might leave it with the defendant, yet the defendant may also refuse to be responsible for it, or to give it room or attention. It is not satisfactory to say that the officer would generally wait till the

And it has been said that the right to subject to execution is measured by the power to take and deliver possession.<sup>40</sup> A mere personal right or authority which is not assignable or otherwise separable from the person cannot be levied upon.<sup>41</sup>

(II.) Money. — Money which is the property of the defendant may be levied on while it is in his possession,<sup>42</sup> or capable of being identified as his property,<sup>43</sup> whether in specie or in bank notes,<sup>44</sup> when a trespass will not be committed in the taking.<sup>45</sup> The money need not be sold but may be used to satisfy the execution.<sup>46</sup>

Money deposited in a bank cannot be levied upon as such, since it be-

product was so completed as to be marketable. The officer can no more be compelled to wait than can the debtor be compelled to work for his creditor. Nor should the sheriff be required to turn brewer, for which he has provided him neither the equipment, nor the necessary means, nor experience, probably, nor help, nor the time, without neglecting all other public duties. So the question must be determined as of any hour before the product reaches a salable condition. Public policy, which looks to the public welfare, forbids that the law's process, intended for the aid of creditors, and not for the punishment of debtors, should be perverted in its use by the creditor to such ruinous ends to the debtor, with no benefit to any one. Such property of a debtor can be reached by the law and subjected, in a proper case, by having a receiver appointed to take charge of it and perfect it. Adequate authority and means are to be had for such action."

40. *Campbell v. Leonard*, 11 Iowa 489.

But as to how the writ is levied and the extent to which possession must be taken, see *infra*, II, B, 4.

41. *Heath v. Knapp*, 10 Watts (Pa.) 405.

42. *U. S.*—*Turner v. Fendall*, 1 Cranch 117, 2 L. ed. 53; *Reno v. Wilson*, Hempst. 91, 20 Fed. Cas. No. 11,700a. *Ala.*—*Exchange Nat. Bank v. Stewart*, 158 Ala. 218, 48 So. 487; *Barnett v. Bass*, 10 Ala. 951. *Ark.*—*State v. Lawson*, 7 Ark. 391, 46 Am. Dec. 293. *Cal.*—*In re Nerae*, 35 Cal. 392, 95 Am. Dec. 111; *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492. *Conn.*—*Brooks v. Thompson*, 1 Root 216. *Ga.*—*Rogers v. Bullen*, R. M. Charl. 196. *Ill.*—*Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40. *Ky.*—*Doyle v. Sleeper*, 1 Dana

531. *Md.*—*Harding v. Stevenson*, 6 Harr. & J. 264. *Mass.*—*Sheldon v. Root*, 16 Pick. 567, 28 Am. Dec. 266. *Mo.*—*State v. Taylor*, 56 Mo. 492; *Richards v. Heger*, 122 Mo. App. 512, 99 S. W. 802. *N. H.*—*Spencer v. Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412. *N. J.*—*Crane v. Freese*, 16 N. J. L. 305. *N. Y.*—*Noble v. Kelly*, 40 N. Y. 415; *Holmes v. Nuncaster*, 12 Johns. 395; *Handy v. Dobbin*, 12 Johns. 220. *N. C.*—*State v. Lea*, 30 N. C. 94. *Pa.*—*Herron's Appeal*, 29 Pa. 240, by statute. *S. C.*—*Summers v. Caldwell*, 2 Nott & McC. 341; *Means v. Vance*, 1 Bailey 39. *Tenn.*—*Dolby v. Mullins*, 3 Humph. 437, 39 Am. Dec. 180. *Vt.*—*Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631. *Wis.*—*Russell v. Lawton*, 14 Wis. 202, 80 Am. Dec. 769.

Money and bank notes as subject to attachment, see 3 STANDARD PROC. 277.

[a] Treasury notes of the United States. *State v. Lawson*, 7 Ark. 391, 46 Am. Dec. 293.

[b] Bag of coin in the hand. *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

[c] Contra by statute when money is in the personal possession of the debtor. *Herron's Appeal*, 29 Pa. 240.

When money exempt, see *infra*, II, B, 5.

43. *Crane v. Freese*, 16 N. J. L. 305.

44. *N. H.*—*Spencer v. Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412. *N. J.*—*Crane v. Freese*, 16 N. J. L. 305. *Pa.*—*Herron's Appeal*, 29 Pa. 240.

45. *Barnett v. Bass*, 10 Ala. 951; *Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631.

46. *U. S.*—*Reno v. Wilson*, Hempst. 91, 20 Fed. Cas. No. 11,700a. *Ala.*—*Barnett v. Bass*, 10 Ala. 951. *Conn.*—*Brooks v. Thompson*, 1 Root 216. *Mass.*

comes the property of the bank, creating a mere indebtedness in favor of the depositor.<sup>47</sup>

(III.) **Choses in Action.**—(A.) **GENERALLY.**—At common law and in the absence of statute a chose in action is not subject to execution,<sup>48</sup> but under the statutes of many states choses in action are now subject to levy on execution.<sup>49</sup>

(B.) **JUDGMENTS.**—Whether or not a judgment is subject to execution depends upon the statute of the particular state, and in the absence of statutory authority a judgment is not subject to levy.<sup>50</sup> A judgment cannot be levied on and sold as personal property capable

*Sheldon v. Root*, 16 Pick. 567, 28 Am. Dec. 266.

47. *Scott, Kerr & Co. v. Smith*, 2 Kan. 438; *Carroll v. Cone*, 40 Barb. (N. Y.) 220. See also *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

Bank deposits as subject to garnishment, see 10 STANDARD PROC. 446.

48. *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628; *Carlos v. Ansley*, 8 Ala. 900; *Wier v. Davis*, 4 Ala. 442; *Jones v. Norris*, 2 Ala. 526. **Ark.**—*Field v. Lawson*, 5 Ark. 376. **Ga.**—*McGehee v. Cherry*, 6 Ga. 550. **Ill.**—*Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40; *Greenwood v. Spiller*, 3 Ill. 502. **Ind.**—*Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Chandler v. Keaton*, 17 Ind. 215; *Chandler v. Davis*, 17 Ind. 262; *Brisco v. Askey*, 12 Ind. 666; *Williams v. Reynolds*, 7 Ind. 622; *Stewart v. English*, 6 Ind. 176; *Totten v. McManus*, 5 Ind. 407; *Shaw v. Aveline*, 5 Ind. 380; *Johnson v. Crawford*, 6 Blackf. 377; *Bay v. Saulspough*, 74 Ind. 397 (changed by statute). **Ky.**—*Thomas v. Thomas' Admr.*, 2 A. K. Marsh. 430; *McFerran v. Jones*, 2 Litt. 219. **La.**—See *Allen v. Arnouil*, 1 Rob. 399; *Carl v. Young*, 9 La. Ann. 272. **Me.**—*Smith v. Kennebec, etc. R. Co.*, 45 Me. 517. **Md.**—*Harding v. Stevenson*, 6 Harr. & J. 264; *Watkins v. Dorsett*, 1 Bland. 530. **Mich.**—*People v. Wayne County*, 5 Mich. 223. **Minn.**—*Stromberg v. Lindberg*, 25 Minn. 513. **N. Y.**—*Clark v. Warren*, 7 Lans. 180; *Worrall v. Driggs*, 1 Redf. Sur. 449; *Handy v. Dobbin*, 12 Johns. 220; *Ransom v. Miner*, 3 Sandf. 692; *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Ingalls v. Lord*, 1 Cow. 240; *Duffy v. Dawson*, 50 N. Y. St. 584, 21 N. Y. Supp. 978. **N. C.**—*Pool v. Glover*, 24 N. C. 129. **Pa.**—*Butterfield v. Lathrop*, 71 Pa. 225; *Rhoads v. Megonigal*, 2 Pa. 39; *Sterling v. Com.*, 2 Grant Cas. 162.

**Tenn.**—*Moore v. Pillow*, 3 Humph. 448. **Tex.**—*Taylor v. Gillean*, 23 Tex. 508; *Price v. Brady*, 21 Tex. 614. **Va.**—See *Claytor v. Anthony*, 6 Rand. (27 Va.) 285.

Chose in action as subject to attachment, see 3 STANDARD PROC. 292.

[a] **Remedy by Garnishment.**—*Carl v. Young*, 9 La. Ann. 272. See 10 STANDARD PROC. 366.

49. **Cal.**—*Hoxie v. Bryant*, 131 Cal. 85, 63 Pac. 153; *Davis v. Mitchell*, 34 Cal. 81. See also *Crandall v. Blen*, 13 Cal. 15. **Conn.**—See *Flagg v. Platt*, 32 Conn. 216. **Ind.**—*Bay v. Saulspough*, 74 Ind. 397. **Ia.**—*Earhart v. Gant*, 32 Iowa 481; *Savery v. Hays*, 20 Iowa 25, 89 Am. Dec. 511; *Hetherington v. Hayden*, 11 Iowa 335. **Ky.**—*McFerran v. Jones*, 2 Litt. 219. **La.**—See *Nugent v. McCaffrey*, 33 La. Ann. 271. **Tenn.**—*Smith v. United States Fire Ins. Co.*, 126 Tenn. 435, 150 S. W. 97. See *Moore v. Pillow*, 3 Humph. 448. **W. Va.**—*Huling v. Cadell*, 9 W. Va. 522, 27 Am. Rep. 562.

[a] **Choses in action are not included** in the terms of a statute subjecting "goods and chattels" to execution. *Sterling v. Com.*, 2 Grant Cas. (Pa.) 162.

50. **Fla.**—*Wilson v. Matheson*, 17 Fla. 630. **Ia.**—*Osborn v. Cloud*, 23 Iowa 104, 92 Am. Dec. 413, since changed by statute, §3971, Code 1897. **S. D.**—*Acme Harv. Mach. Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482.

[a] **Garnishment of judgment debt** or is the proper remedy. *Osborn v. Cloud*, 23 Iowa 104, 92 Am. Dec. 413.

Judgments as subject to attachment, see 3 STANDARD PROC. 295.

Judgments as subject to garnishment, see 10 STANDARD PROC. 426.

Verdicts and awards as subject to garnishment, see 10 STANDARD PROC. 425.



of manual delivery,<sup>51</sup> nor does it come within a statute subjecting "lands and tenements, goods and chattels;"<sup>52</sup> but a provision that "any debt or thing in action, legally or equitably assignable," may be levied on, includes a judgment,<sup>53</sup> as does the provision "bills, notes, credits and all other evidences of indebtedness."<sup>54</sup>

(C.) **BILLS, NOTES, BONDS, ETC.** — At common law and in the absence of statute a promissory note is not subject to execution,<sup>55</sup> though there is authority apparently to the contrary.<sup>56</sup> It is held that a promissory note is "property" or "personal property,"<sup>57</sup> but not "goods and effects;"<sup>58</sup> or "goods and chattels;"<sup>59</sup> or "money and effects,"<sup>60</sup> within the meaning of statutes subjecting the same to levy under execution.

In the absence of statute, bonds are not subject to execution,<sup>61</sup> nor is a warrant drawn by a county on the county treasurer.<sup>62</sup> But notes and bonds are but choses in action and it would seem that in jurisdictions where by statute choses in action are subject to levy, notes and bonds may be reached on execution.<sup>63</sup>

(D.) **CORPORATE STOCK.** — The liability of corporate stock to execution is treated elsewhere in this work.<sup>64</sup>

(IV.) **Property Held Under Bailment.** — (A.) **GENERALLY.** — (1.) *Interest of Bailor.* — The property of one in the possession of another merely

51. *Latham v. Blake*, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17. But see *Aeme Harv. Mach. Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482, that under the Rev. Code Civ. Proc., §§336, 340, a judgment is "personal property" and subject to execution.

52. *Wilson v. Matheson*, 17 Fla. 630.

53. *Steele v. McCarty*, 130 Ind. 547, 30 N. E. 516.

54. *Henry v. Traynor*, 42 Minn. 234, 44 N. W. 11.

55. *Ala.*—*Jones v. Norris*, 2 Ala. 526. *Ark.*—*Field v. Lawson*, 5 Ark. 376. *Ga.*—*McGehee v. Cherry*, 6 Ga. 550. *Ill.*—*Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40; *Bidle v. Hamilton*, 161 Ill. App. 587. *Ind.*—*McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364; *Johnson v. Crawford*, 6 Blackf. 377; *McClelland v. Hubbard*, 2 Blackf. 361. *Me.*—*Smith v. Kennebec & P. R. Co.*, 45 Me. 547. *N. Y.*—*Ingalls v. Lord*, 1 Cow. 240. *Pa.*—*Rhoads v. Megonigal*, 2 Pa. 39. *Tenn.*—*Moore v. Pillow*, 3 Humph. 448. *Tex.*—*Price v. Brady*, 21 Tex. 614.

Negotiable instruments as subject to attachment, see 3 STANDARD PROC. 295.

As subject to garnishment, see 10 STANDARD PROC. 437.

56. See *Anderson v. Valentine*, 15 La. Ann. 379; *Scott v. Niblett*, 6 La. Ann. 182; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Fluker v. Bullard*, 2 La. Ann. 338.

57. Personal property capable of manual delivery. *Hoxie v. Bryant*, 131 Cal. 85, 63 Pac. 153; *Davis v. Mitchell*, 34 Cal. 81; *Mower v. Stickney*, 5 Minn. 407. See also *Fishburn v. Londershausen*, 50 Ore. 363, 92 Pac. 1060.

58. *Grosvenor v. Farmers' & M. Bank*, 13 Conn. 104; *Fitch v. Waite*, 5 Conn. 117.

59. *Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40.

60. *Taylor v. Gillean*, 23 Tex. 508; *Price v. Brady*, 21 Tex. 614.

61. *McGehee v. Cherry*, 6 Ga. 550; *Rhoads v. Megonigal*, 2 Pa. 39.

[a] Bonds and interest coupons not subject. *Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40.

62. *People v. Wayne County*, 5 Mich. 223.

63. See *supra*, II, B, 3, b, (III), (A); and *McGehee v. Cherry*, 6 Ga. 550.

64. See 5 STANDARD PROC. 674.

Corporate stock as subject to garnishment, see 10 STANDARD PROC. 433.

as a bailee and without claim of title is liable to execution for the debt of the bailor.<sup>65</sup>

(2.) *Interest of Bailee.* — The mere naked possession of chattels by a bailee or agent is not such an interest therein as to be subject to an execution against him.<sup>66</sup> But where the bailee has an interest in the property such as a right to its use for a period of time this interest may be sold under execution.<sup>67</sup> By statute in some jurisdictions all property acquired or used by a merchant in his business is subject to execution in satisfaction of his debts.<sup>68</sup>

(B.) **PLEGGED PROPERTY.** — (1.) *Interest of Pledgor.* — According to some decisions property in pledge cannot in the absence of statute be levied on under an execution against the pledgor.<sup>69</sup> However, the generally accepted rule appears to be that the interest of the pledgor may be subjected to execution.<sup>70</sup> In some jurisdictions the lien or claim of

65. *Thomas v. Thomas' Admr.*, 2 A. K. Marsh. (Ky.) 430; *Jenkins v. Eichelberger*, 4 Watts (Pa.) 121, 28 Am. Dec. 691; *Buckner v. Croissant*, 3 Phila. (Pa.) 219, 15 Leg. Int. 325.

Garnishment of bailee, see 10 STANDARD PROC. 409.

As to attachment of property held on bailment, see 3 STANDARD PROC. 309.

66. **U. S.** — *Hatch v. Heim*, 86 Fed. 436, 30 C. C. A. 171. **Ill.** — *McNamara v. Godair*, 161 Ill. 228, 43 N. E. 1071; *Pease v. Rand & Leopold Desk Co.*, 100 Ill. App. 244. **Ia.** — See *Gaar, Scott & Co. v. Nichols*, 115 Iowa 223, 88 N. W. 382. **Minn.** — *Heberling v. Jaggar*, 47 Minn. 70, 49 N. W. 396, 28 Am. St. Rep. 331; *Williams v. McGrade*, 13 Minn. 174. **Miss.** — See *Hall's Self Feeding Cotton Gin Co. v. Berg*, 65 Miss. 184, 3 So. 372. **Neb.** — *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514; *McClelland v. Scroggin*, 35 Neb. 536, 53 N. W. 469; *Shaughnessey v. Lininger, etc. Co.*, 34 Neb. 747, 52 N. W. 717. **N. Y.** — *Jacob v. Watkins*, 10 App. Div. 475, 42 N. Y. Supp. 6. **Ore.** — See *Coos Bay, etc. R. Co. v. Siglin*, 34 Ore. 80, 53 Pac. 504. **Pa.** — *Hamilton v. Billington*, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780.

[a] Property in the possession of a factor to be sold for the benefit of his principal is not liable to execution against the former. *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514.

67. See *Saul v. Kruger*, 9 How. Pr. (N. Y.) 569; *Houston v. Simpson*, 46 N. C. 513.

[a] Use of slaves for a period. *Beale v. Diggers*, 6 Gratt. (47 Va.) 582.

[b] A bailee who has hired a mule

for year, has such an interest as may be sold by execution. *Houston v. Simpson*, 46 N. C. 513.

[c] Where a loan of slaves is made to husband and wife for purpose of raising and supporting their children the use of the slaves being given for their lives, the husband has an interest in the slaves which is subject to execution. *Allen v. Russel*, 19 Tex. 87.

68. *Hall's, etc. Cotton Gin Co. v. Berg*, 65 Miss. 184, 3 So. 372; *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

[a] The mere fact of possession though permitted by the owner is not effectual to bring property within the operation of a statute providing that property "used or acquired" by a trader in carrying on his business shall be liable for his debts. *Hall's, etc. Cotton Gin Co. v. Berg*, 65 Miss. 184, 3 So. 372.

[b] Personal property stored with no power of sale and office furniture rented with the building are not liable to execution under such a statute. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

69. *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; *Hull v. Carnley*, 11 N. Y. 501, 1 Abb. Pr. 158; *Stief v. Hart*, 1 N. Y. 20, 4 How. Pr. 223; *Seymour v. Newton*, 17 Hun (N. Y.) 30; *Saul v. Kruger*, 9 How. Pr. (N. Y.) 569.

As subject to garnishment, see 10 STANDARD PROC. 443.

Attachment of property pledged, see 3 STANDARD PROC. 308.

70. **Colo.** — *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285. **Dak.** — *Van*

the pledgee should be first satisfied,<sup>71</sup> or be waived by the pledgee.<sup>72</sup> In other states the property is sold subject to the rights and interest of the pledgee.<sup>73</sup>

(2.) *Interest of Pledgee.* — Where the pledgee has an interest in the goods that interest may be levied on.<sup>74</sup>

(C.) PROPERTY CONSIGNED FOR SALE. — (1.) *Generally.* — Personalty which has been consigned to a merchant, factor, agent or trader for the purposes of sale, title not passing, is not subject to an execution against such consignee,<sup>75</sup> though such consignee have an interest in the profits

Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897. **Ga.**—People's Nat. Bank v. Wheedon, 115 Ga. 782, 42 S. E. 91. **La.**—Horner v. Dennis, 34 La. Ann. 389; Auge v. Variol, 31 La. Ann. 865; Williams v. St. Stephens, 1 Mart. (N. S.) 417, 2 Mart. (N. S.) 22. **Minn.** Mower v. Stickney, 5 Minn. 407. **Mo.** Milliken-Helm Commission Co. v. C. H. Albers Commission Co., 244 Mo. 38, 147 S. W. 1065. See also Sexton v. Monks, 16 Mo. 156. **N. J.**—Mechanics' Bldg., etc. Assn. v. Conover, 14 N. J. Eq. 219. **N. Y.**—See Stief v. Hart, 1 N. Y. 20, 4 How. Pr. 223; Saul v. Kruger, 9 How. Pr. 569. **Pa.**—Dixon v. White Sewing Machine Co., 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659. **Wis.**—Hass v. Prescott, 38 Wis. 146.

71. **Ga.**—People's Nat. Bank v. Wheedon, 115 Ga. 782, 42 S. E. 91. **Mass.**—Pomeroy v. Smith, 17 Pick. 85. **Tenn.**—Memphis First Nat. Bank v. Pettit, 9 Heisk. 447.

72. Arendale v. Morgan, 5 Sneed (Tenn.) 703.

[a] If pledgee delivers property to sheriff he cannot complain. Mower v. Stickney, 5 Minn. 407.

73. **La.**—Auge v. Variol, 31 La. Ann. 865. **N. J.**—Mechanics' Bldg., etc. Assn. v. Conover, 14 N. J. Eq. 219. **Pa.**—Waverly Coal, etc. Co. v. McKennan, 110 Pa. 599, 1 Atl. 543; Reichenbach v. McKean, 95 Pa. 432; Baugh v. Kirkpatrick, 54 Pa. 84, 93 Am. Dec. 675; Srodes v. Caven, 3 Watts 258.

[a] Pledgee cannot be dispossessed. Hass v. Prescott, 38 Wis. 146.

74. Saul v. Kruger, 9 How. Pr. (N. Y.) 569; *In re* Rollason, 34 Ch. Div. 495 (Eng.) 56 L. J. Ch. 768, 56 L. T. Rep. N. S. 303. See, however, Harding v. Stevenson, 6 Harr. & J. (Md.) 264, holding that property in the possession of one merely as a pawnee or consignee is not subject to an execution against him.

75. **U. S.**—Herryford v. Davis, 102 U. S. 235, 26 L. ed. 160; Merrill v. Rinker, Baldw. 528, 17 Fed. Cas. No. 9,471. **Ga.**—Powell v. Brunner, 86 Ga. 531, 12 S. E. 744. **Ill.**—Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567; Gray v. Agnew, 95 Ill. 315; Loomis v. Barker, 69 Ill. 360; Pease v. Rand, etc. Desk Co., 100 Ill. App. 244; W. O. Dean Co. v. Lombard, 61 Ill. App. 94; Ellsner v. Radcliff, 21 Ill. App. 195. **Ia.**—Robinson v. Chapline, 9 Iowa 91. **La.**—Montgomery v. Brander, 4 Rob. 400. **Md.** Harding v. Stevenson, 6 Harr. & J. 264. **Mass.**—Walker v. Butterick, 105 Mass. 237. **Minn.**—Benz v. Geissell, 24 Minn. 169. **Neb.**—National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514. **N. Y.**—Cole v. Mann, 62 N. Y. 1 (affirming 3 Thomp. & C. 380); Jacob v. Watkins, 10 App. Div. 475, 42 N. Y. Supp. 6. But in Bonesteel v. Flack, 41 Barb. 435, it was held that liquors delivered to a tavern keeper to be retailed, title remaining in the merchant consigning the liquors, could be taken on execution against the tavern keeper. **Pa.**—Bevan v. Crooks, 7 Watts & S. 452; McCullough v. Porter, 4 Watts & S. 177, 39 Am. Dec. 68. **W. Va.**—Barnes Safe & Lock Co. v. Bloch Bros., 38 W. Va. 158, 18 S. E. 482, 45 Am. St. Rep. 846, 22 L. R. A. 850; Brown Mfg. Co. v. William Deering & Co., 35 W. Va. 255, 13 S. E. 383. **Wis.**—See McGraft v. Rugee, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378.

[a] The property of the consignor cannot be seized under execution by a creditor, even to the extent of the consignee's privilege; the creditor of the consignee in such a case, must attach or seize the claim of his debtor in the hands of the consignor. Montgomery v. Brander, 4 Rob. (La.) 400.

[b] An agreement to place goods in the hands of an agent who at the time was insolvent, for the purpose of sale,



to be derived from the sale.<sup>76</sup> Where statutes under certain circumstances subject all property "used or acquired" by a merchant or trader in his business to the payment of his debts, property consigned to him is liable on execution against him.<sup>77</sup>

On execution against the consignor or owner the property is subject to seizure if the title has not vested in the consignee,<sup>78</sup> subject to any interest of the consignee in the property.<sup>79</sup>

(2.) *Where Title Passes to Consignee.* — Where title has passed to the consignee, though a lien or security for the purchase price exist in favor of the consignor, the property is subject to an execution against the consignee.<sup>80</sup>

(V.) *Leased Chattels.* — (A.) *INTEREST OF LESSEE.* — The lessee of personal property has an interest therein which is subject to levy under

upon the terms of his paying to his principal the invoice price of the goods and retaining the overplus for himself does not vest in the agent such an interest as is subject to levy. *McCullough v. Porter*, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68.

[c] Where the owner of property consigns it to another under an agreement that when paid for it shall become the property of the consignee, the title does not pass to the latter until the condition is complied with, and it is not liable to levy and sale upon execution against him. *Cole v. Mann*, 62 N. Y. 1.

[d] Goods consigned to a commission merchant to be stored or sold are not subject to execution for the debt of the consignee; but if he have not the character of a commission merchant, and it does not clearly appear on what terms or for what purpose the goods were consigned, the law is otherwise. *Bevan v. Crooks*, 7 Watts & S. (Pa.) 452.

As to attachment of property held on consignment, see 3 STANDARD PROC. 310.

76. *Ga.*—*Barnett v. The Justices*, Dudley 175. *Minn.*—*Hankey v. Becht*, 25 Minn. 212. *N. Y.*—*Lamb v. Grover*, 47 Barb. 317.

[a] Garnishment of the consignor before division of the profits is the remedy. *Barnett v. The Justices*, Dudley (Ga.) 175.

77. *Head v. Haydock Carriage Co.* (Miss.), 16 So. 420.

[a] Horses placed in custody of a horse-trader to be sold by him are subject under such a statute. *Shannon v. Blum*, 60 Miss. 828. See *Partlow v. Lickliter*, 100 Va. 631, 42 S. E. 671;

*Brown Mfg. Co. v. William Deering & Co.*, 35 W. Va. 255, 13 S. E. 383.

[b] Goods on consignment under such a statute held subject to attachment against consignee. See *Citizens' Bank v. Studebaker Bros. Mfg. Co.*, 71 Miss. 544, 14 So. 733.

78. *Bullitt v. Walker*, 12 La. Ann. 276.

[a] The consignees are but agents of the owner and their constructive possession under the bill of lading does not give them such an ownership as to prevent the goods being seized on a fieri facias. *Chaffraix v. Harper*, 26 La. Ann. 22.

79. Subject to the factor's lien for advances. *Joost v. Scott*, 19 Tex. 473.

80. *U. S.*—*Herryford v. Davis*, 102 U. S. 235, 26 L. ed. 160, though there be a mortgage back to the consignor. *Ill.*—*Peoria Mfg. Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661. *Neb.*—See *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 67 N. W. 174, 58 Am. St. Rep. 691. *N. Y.*—*Bonesteel v. Flack*, 41 Barb. 435, 27 How. Pr. 310; *Ludden v. Hazen*, 31 Barb. 650.

Property held on consignment as subject to attachment, see 3 STANDARD PROC. 310.

[a] Where H. purchased of the plaintiff a quantity of liquors for the purpose of stocking an unlicensed grocery, and gave a receipt therefor, specifying that the same were to remain the property of the seller until paid for, the liquors to be paid for when sold, or returned when called for, it was held that the transaction could not be upheld as a conditional sale; that by the contract of sale and the delivery of the liquors to H. to make a part of

execution,<sup>81</sup> but the lessee's interest must be fixed and determinable at the time of the levy.<sup>82</sup>

(B.) INTEREST OF LESSOR. — Goods leased for years cannot be taken from the lessee on an execution against the lessor but they may be sold subject to the rights of the lessees.<sup>83</sup>

(VI.) Patent Rights and Copyrights. — The recognized rule is that a patent right,<sup>84</sup> or copyright,<sup>85</sup> is not the subject of seizure and sale under execution. However, the patented or copyrighted article itself

his stock in trade and to be retailed to his customers, the property vested in him and became liable for his debts. *Ludden v. Hazen*, 31 Barb. (N. Y.) 650.

81. Mass.—*Wheeler v. Train*, 3 Pick. 255. N. J.—*Woodside v. Adams*, 40 N. J. L. 417. N. Y.—*Otis v. Wood*, 3 Wend. 498; *Van Antwerp v. Newman*, 2 Cow. 543. Eng.—*Duffill v. Spottiswoode*, 3 Car. & P. 435, 14 E. C. L. 650; *Gordon v. Harper*, 7 T. R. 9, 101 Eng. Reprint 828.

82. *Lemmon v. Beattie*, 41 Colo. 68, 91 Pac. 1102.

[a] If lessee has forfeited his interest, he has no such interest as is subject to levy. *Otis v. Wood*, 3 Wend. (N. Y.) 498.

[b] In *Sweeney v. Darcy*, 21 Mont. 188, 53 Pac. 540, two bands of sheep were leased under two leases. By the first it was provided that the lessees were to return the sheep with one-half the increase and make good any loss in the original band greater than fifteen per cent; title to all to remain in the lessor until redelivery. The other lease contained similar provisions. Lessee being involved in financial difficulties and suffering severe losses in the first band, surrendered to the lessor the second band with fifty-eight head of sheep more than the latter was entitled to under the second lease, it being agreed that these fifty-eight head were to make good any loss in the first band when a final division should be made. The second band while in the possession of the lessor was not subject to levy under an execution against the lessees before final division, title to the sheep remaining in the lessor until that time.

83. *Srodes v. Caven*, 3 Watts (Pa.) 258; *Manning's Case*, 8 Coke, 94b, 77 Eng. Reprint 618; *Duffill v. Spottiswoode*, 3 Car. & P. 435, 14 E. C. L. 650. See, however, *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782, that if

cattle be leased for a term of years, they cannot be sold under execution as the property of the lessor, even though the sale be with a reservation of the lessee's right to retain possession of the property during the continuance of the term.

84. U. S.—*Ager v. Murray*, 105 U. S. 126, 26 L. ed. 942; *Ball v. Coker*, 168 Fed. 304; *Newton v. Buck*, 72 Fed. 777; *Erie Wringer Mfg. Co. v. Nat. Wringer Co.*, 63 Fed. 248. Cal.—*Peterson v. San Francisco*, 115 Cal. 211, 46 Pac. 1060. Mass.—*Carver v. Peck*, 131 Mass. 291. Pa.—*Harrington v. Cambridge*, 14 W. N. C. 456; *Hanley v. Fidelity Ins., etc. Co.*, 8 Pa. Dist. Ct. 207; *Wolf v. Bonta Plate Glass Co.*, 5 Lack. Leg. N. 51.

[a] Under special statutory provision subjecting corporate franchises and rights and all the property of insolvent corporations to a special *fieri facias* a patent right belonging to a corporation may be sold. *Erie Wringer Mfg. Co. v. Nat. Wringer Co.*, 63 Fed. 248.

[b] A patent right is neither "personal property capable of manual delivery" nor "debts and credits, and other personal property not capable of manual delivery." *Peterson v. San Francisco*, 115 Cal. 211, 46 Pac. 1060.

[c] Interest in a patent right not subject to execution. *Harrington v. Cambridge*, 14 W. N. C. (Pa.) 456.

85. *Stephens v. Cady*, 14 How. (U. S.) 528, 14 L. ed. 528; *Carver v. Peck*, 131 Mass. 291.

[a] A copyright "has no corporeal tangible substance," and is not subject to seizure and sale by execution. It can be reached by a creditor's bill in chancery, but in such case, the court would probably have to decree a transfer in the mode pointed out in the act of congress. *Stephens v. Cady*, 14 How. (U. S.) 528, 14 L. ed. 528.

[b] "It is very well settled by the decisions of the United States Supreme Court that even after a work is pub-

is subject to levy and sale,<sup>86</sup> but the author cannot be compelled to publish his copyrighted manuscript.<sup>87</sup>

(VII.) Trade-Marks and Trade Secrets. — The right to a trade-mark is held not subject to levy under execution,<sup>88</sup> though a sealed envelope containing trade secrets is.<sup>89</sup>

(VIII.) Unpublished Manuscripts, etc. — It has been held that unpublished manuscripts,<sup>90</sup> as well as the private papers and account books of the judgment debtor,<sup>91</sup> are not liable to levy under execution.

(IX.) Wearing Apparel. — The necessary wearing apparel of a judgment debtor is not subject to execution.<sup>92</sup>

(X.) Vehicles Carrying United States Mail. — It is held that a ferry

lished no creditor can reach the copy-right unless some special provision of law is made on the subject." *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544.

[c] Creditor's bill would seem to be the remedy, see *Ager v. Murray*, 105 U. S. 126, 26 L. ed. 942; *Gillett v. Bate*, 86 N. Y. 87, 10 Abb. N. C. 88; *Correll v. Dickson*, 26 Fed. 454.

As to creditors' suits, see 6 STANDARD PROC. 164.

86. "A patented machine is susceptible of manual seizure, and the unrestricted sale thereof does not involve the transfer of any interest in the patent. The conclusion, therefore, is that whatever right to use the patented machine a defendant in an execution may have, passes with the machine when sold by the sheriff to his vendee." *Wilder v. Kent*, 15 Fed. 217.

[a] Although the grantee of a copyright for a book cannot be deprived by his creditors of any right secured to him by the constitution and acts of congress, yet the protection does not extend to the exemption of visible property received for the sale of such copyrights and existing in his own hands, or choses in action existing in the hands of another for his use, though such be the proceeds of a sale of the copyright, if the manuscript has been delivered over to the purchaser of the copyright, and nothing further is to be done by the grantee of the copyright, to give the work to the public. *Cooper v. Gunn*, 4 B. Mon. (Ky.) 594.

87. *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544.

88. *Gegg v. Bassett*, 3 Ont. L. R. (Can.) 263.

89. Envelope containing a complete description of the secret formula and

process for the manufacture of compound oxygen gas for home and office treatment. *Hanley v. Fidelity Ins., etc. Co.*, 8 Pa. Dist. 207.

90. *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544.

[a] Abstract Books.—But in *Washington Bank v. Fidelity Abstract & Security Co.*, 15 Wash. 487, 46 Pac. 1036, 55 Am. St. Rep. 902, 37 L. R. A. 115, the court speaking of *Dart v. Woodhouse*, *supra*, says: "This case holds that a set of abstract books, such as those in suit, is but the unpublished manuscript of an author, valuable only on account of its literary contents, and belongs to the class of unleviable property, such as a patent right or a copyright, which are held by most of the courts to be unassignable privileges, or incorporeal and intangible rights. We cannot indorse the conclusion or the reasoning of the case just cited. It seems to us that these abstract books were not so intangible or incorporeal that they could not be the subject of levy or of sale, and such was the holding in *Leon Loan & Abstract Co. v. Equalization Board*, 86 Iowa 127, 53 N. W. 94, 41 Am. St. Rep. 486, 17 L. R. A. 199, where the case of *Dart v. Woodhouse*, *supra*, was reviewed."

[b] In *Banker v. Caldwell*, 3 Minn. 94, it appears that unpublished papers were sold under execution but the propriety of this was not questioned. The case holds that by such sale the author did not lose his exclusive right of publication and the sheriff had no authority to publish them.

91. *Oystead v. Shed*, 12 Mass. 506.

92. *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626. See also *Cooke v. Gibbs*, 5 Mass. 193, and *infra*, II, B, 5.



boat carrying United States mail is nevertheless subject to levy and sale under an execution.<sup>93</sup>

(XI.) **Materials of Contractor.** — Where a contract is made for the manufacture or construction of a thing involving the use of work, labor and materials, until the title to the product has passed by reason of the contract or otherwise, it is subject to an execution against the contractor.<sup>94</sup> However, where the materials are not furnished by the contractor they are not subject to levy as his property.<sup>95</sup>

(XII.) **Seats in Stock Exchange.** — While a seat in a stock exchange is not such property as to be subject to levy and sale under an execution against the owner,<sup>96</sup> it may be reached to satisfy the debts of the owner by other appropriate proceeding.<sup>97</sup>

93. *Lathrop v. Middleton*, 23 Cal. 257, 83 Am. Dec. 112. Not subject to an attachment, see *Parker v. Porter*, 6 La. 169. Attachment generally, see 3 STANDARD PROC. 216.

94. N. Y. — *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Merritt v. Johnson*, 7 Johns. 473, 5 Am. Dec. 289. Pa. — See *Watts v. Tibbals*, 6 Pa. 447. Tenn. — *Crockett v. Latimer*, 1 Humph. 272. W. Va. — *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

[a] But see *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522, where A contracted to build a vessel for B at a stipulated price, a part of which was to be paid in installments as the vessel should reach certain stages of completion, and the residue by a note payable ninety days after the boat should be removed. Installments were paid from time to time as stipulated and the materials and work were paid for by A out of this money. B employed an agent to superintend the building, and before the launch put a watchman in charge. Afterwards executions were issued against A, and he being unable to finish her, surrendered the vessel to B. It was held that the property in the vessel had passed to B, and was not subject to the liens of the executions.

95. Lumber was furnished to the contractor to be used in the erection of a building. The lumber was delivered on the ground on which the building was being erected, and subsequently sold on an execution against the contractor; it was held, that the lumber was furnished on the credit of the building, though not used therein, and being so furnished it was the property of the owner of the building and not liable to sale by execution as the

property of the contractor. *White v. Miller*, 18 Pa. 52.

96. Cal. — *Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 37 Am. St. Rep. 42, 21 L. R. A. 399. Ill. — *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437. Mo. — *Eliot v. Merchants' Exchange*, 14 Mo. App. 234. Pa. — *Pancoast v. Gowen*, 93 Pa. 66; *Thompson v. Adams*, 93 Pa. 55.

[a] A patent right is not subject to seizure and sale under execution and a seat in a stock board is certainly not more tangible than a patent right, for the latter can at least be transferred by its owner at his own will, while the former cannot. *Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 37 Am. St. Rep. 42, 21 L. R. A. 399.

97. Proceedings supplementary to execution and appointing a receiver. *Habenicht v. Lissak*, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713, the court saying: "To hold that it cannot be thus applied would establish a rule giving to the members of such associations the power to invest fortunes under the name of licenses and privileges, and by their constitutions and regulations to establish a law of exemption for the same." And see *Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 37 Am. St. Rep. 42, 21 L. R. A. 399; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Londheim v. White*, 67 How. Pr. (N. Y.) 467; *Grocers' Bank v. Murphy*, 60 How. Pr. (N. Y.) 426; *Ritterband v. Baggett*, 4 Abb. N. C. (N. Y.) 67, 10 Jones & S. 556.

[a] It is subject to a bill in equity, though not to execution. *Eliot v. Merchants' Exch.*, 14 Mo. App. 234.

As to creditors' suits, see 6 STANDARD PROC. 164.

(XIII.) **Salaries of Public Employees.**—The salary of a judicial or other public officer, while in the hands of the disbursing officer, cannot be taken on execution.<sup>98</sup> This is a statutory rule in some jurisdictions.<sup>99</sup> The rule is the same though the proceedings are not commenced until after the defendant's term of office has expired and he is no longer an officer.<sup>1</sup>

(XIV.) **Intoxicating Liquors.**—Independent of statutory provisions, intoxicating liquors are property subject to levy and sale under an execution against the owner.<sup>2</sup> The decisions are not in accord as to

98. *Orme v. Kingsley*, 73 Minn. 143, 75 N. W. 1123, 72 Am. St. Rep. 614. To same effect *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 68 N. W. 606, 61 Am. St. Rep. 395; *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177; *Remmey v. Gedney*, 57 How. Pr. (N. Y.) 217, 1 City Ct. Rep. (N. Y.) 28; *Waldman v. O'Donnell*, 57 How. Pr. (N. Y.) 215.

[a] "This doctrine is founded on reasons of public policy, which may be all summed up in the general proposition that any other rule would interfere with the efficiency of the public service." *Orme v. Kingsley*, 73 Minn. 143, 75 N. W. 1123, 72 Am. St. Rep. 614.

[b] "It is almost needless to say that such a diversion of the public moneys by judgment creditors might seriously embarrass the disbursing officers of the government, and might, at the same time, interfere with the proper administration of its judicial system by preventing the money specifically devoted by the public to the support and maintenance of its chosen officer, in a manner becoming the dignity of the office, from ever reaching the object contemplated." A creditor cannot "be allowed to divert the public moneys from the uses and purposes to and for which they were specifically appropriated, by orders or proceedings tending to appropriate the same to himself, in payment of judgments or otherwise. This is upon the pervading principle in all governments, that where private and public interests come in conflict, with proper exceptions the former must yield." *Remmey v. Gedney*, 1 City Ct. Rep. (N. Y.) 28.

[c] **Not Subject to Attachment.** *Buchanan v. Alexander*, 4 How. (U. S.) 20, 11 L. ed. 857. But see *Rodman v. Musselman*, 12 Bush (Ky.) 354, 23 Am. Rep. 724, holding salaries of city and

town employes subject to attachment and garnishment, the court saying: "An exemption of the salaries of city and town employes from coercive appropriation to the payment of their debts would result in a denial of credit to them, and consequently in more injury than benefit."

As subject of garnishment, see 10 STANDARD PROC. 431.

99. *Moll v. Sbisa*, 51 La. Ann. 290, 25 So. 141; *Dunbar v. Dinkgrave*, 10 La. Ann. 545; *Vance v. Lafferanderie*, 4 Rob. (La.) 340.

[a] **Fees** (1) owed by a parish to the sheriff not subject, under such a statute. *Dunbar v. Dinkgrave*, 10 La. Ann. 545. (2) Nor is the salary of a city assessor. *Chaudet v. De Jong*, 16 La. Ann. 399. (3) Salary of a clerk of a recorder's court, who is appointed by the recorder, comes within statute. *Moll v. Sbisa*, 51 La. Ann. 290, 25 So. 141. (4) But an allowance made by a court to one for services as an auditor of the accounts of a succession, may be seized under a fieri facias, it not being regarded as the salary of an office. *Vance v. Lafferanderie*, 4 Rob. (La.) 340.

[b] **Prior to the adoption of the statute** it was held that an execution might be levied on money appropriated by the state legislature for services rendered by the execution debtor. *Flower v. Livingston*, 2 Mart. N. S. (La.) 615.

1. *Orme v. Kingsley*, 73 Minn. 143, 75 N. W. 1123, 72 Am. St. Rep. 614.

[a] But in *Kepley v. Sheehan*, 9 Kan. App. 885, 61 Pac. 333, it is held that fees due or earned after the term of office has expired are not included, as the reason for the rule has then ceased.

2. *State v. Johnson*, 33 N. H. 441.

**Attachment of**, see 3 STANDARD PROC. 279.

the effect of statutes regulating the sale of intoxicating liquors on the question of their being subject to execution. Some courts hold that such statutes apply to sales under judicial process and that liquors are not subject to sale under execution to any greater extent than otherwise,<sup>3</sup> while other jurisdictions make an exception as to sales under process and hold that intoxicating liquors are subject to execution even though they cannot be sold in any other manner.<sup>4</sup> However, the process of the court cannot be used for the purpose of engaging in the sale of intoxicating liquors.<sup>5</sup>

(XV.) *Intermingled Goods.*—Where property of a stranger is mixed with that of the execution debtor so that it cannot be distinguished and separated, the entire mass is subject to levy unless the stranger indicates the portion which is his property.<sup>6</sup> The most usual application of this rule is where the intermingling is for the purpose of defrauding or hindering creditors,<sup>7</sup> but it is also applied where no such

3. *Ia.*—*Niles v. Fries*, 35 Iowa 41. *Kan.*—*Standard Oil Co. v. Angevine*, 6 Kan. App. 312, 51 Pac. 70. *Me.*—*Nichols v. Valentine*, 36 Me. 322. *Mass.*—*Kiff v. Old Colony, etc. R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Ingalls v. Baker*, 13 Allen 449. *B. I.*—*Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298. *S. C.*—*Lanahan v. Bailey*, 53 S. C. 489, 31 S. E. 332, 42 L. R. A. 297, 69 Am. St. Rep. 884.

[a] "If we should hold that a sheriff or other officer having a writ of execution could levy upon and sell intoxicating liquors, we would be compelled to hold, by analogy, that a sheriff could levy a tax warrant upon liquors and sell the same without restraint or restriction; that an assignee in insolvency proceedings would be authorized to sell without limitations or restrictions; that an executor or administrator might sell without limitations or restrictions. Can there be any question that these sales would violate the very letter as well as the spirit of the constitution and the statute?" *Standard Oil Co. v. Angevine*, 6 Kan. App. 312, 51 Pac. 70.

[b] "The debtor could not sell the liquors to his creditor in payment of his debt; nor sell them to others in this commonwealth, to obtain the means of payment, without a violation of law; and the officer is merely the instrument of the law to compel the application, to the satisfaction of the creditor's demand, of property which the debtor would not voluntarily apply." *Ingalls v. Baker*, 13 Allen (Mass.) 449.

4. *Ga.*—*Fears v. State*, 102 Ga. 274, 29 S. E. 463. *Mich.*—*Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. 889. *N. H.*—*State v. Johnson*, 33 N. H. 441. *Vt.*—*Howe v. Stewart*, 40 Vt. 145; *Nutt v. Wheeler*, 30 Vt. 436, 73 Am. Dec. 316.

5. *Fears v. State*, 102 Ga. 274, 29 S. E. 463.

6. *Ala.*—*Lanier v. Branch Bank*, 18 Ala. 625. *Cal.*—*Wellington v. Sedgwick*, 12 Cal. 469; *Daumiel v. Gorham*, 6 Cal. 43. *Fla.*—*Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632. *Ill.*—*Greenberg v. Stevens*, 212 Ill. 606, 72 N. E. 722; *Tuttle v. Hemenway*, 92 Ill. App. 53. *Md.*—*Chappell v. Cox*, 18 Md. 513. *N. H.*—*Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466. *N. Y.*—*Duke v. Welsh*, 16 Jones & S. 516. *Pa.*—*McDowell v. Rissell*, 37 Pa. 164. *Tex.*—See *Brown v. Bacon*, 63 Tex. 595.

[a] Reason of rule is found in the doctrine of estoppel, stranger being estopped if he fail to point out to levying officer just what property is his. *Tuttle v. Hemenway*, 92 Ill. App. 53.

[b] Subject to attachment, see *Johnson v. Emery*, 31 Utah 126, 86 Pac. 869, 11 Ann. Cas. 23, and 3 STANDARD PROC. 278.

7. *Ala.*—*Lanier v. Branch Bank*, 18 Ala. 625. *Cal.*—*Wellington v. Sedgwick*, 12 Cal. 469. *Fla.*—*Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632. *Ill.*—*Tuttle v. Hemenway*, 92 Ill. App. 53. *Md.*—*Chappell v. Cox*, 18 Md. 513.

Property fraudulently conveyed as subject to execution, see *infra*, II, B, 3, o.



purpose is involved, as where due merely to neglect or other fault.<sup>8</sup>

c. *Real Property and Interests Therein.*—(1.) General Statement. At common law lands were not liable to be sold under execution,<sup>9</sup> though they might be taken in execution to satisfy a debt due the state.<sup>10</sup> This rule was early changed by statute,<sup>11</sup> and the modern rule is that real property is subject to levy under execution,<sup>12</sup> even though no lien existed upon such property prior to the levy.<sup>13</sup> Only such in-

8. *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233. See *Johnson v. Emery*, 31 Utah 126, 86 Pac. 869, 11 Ann. Cas. 23.

9. Ky.—*Due v. Bankhardt*, 151 Ky. 624, 152 S. W. 786; *Barbour v. Breckenridge*, 4 Bibb 548. Md.—*Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236; *Duvall v. Waters*, 1 Bland 569, 18 Am. Dec. 350; *Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. Mont.—*McMillan v. Davenport*, 44 Mont. 23, 118 Pac. 756. N. Y.—*Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189. S. C.—*Drayton v. Marshall*, Rice Eq. 373, 33 Am. Dec. 84.

Attachment of real property, see 3 STANDARD PROC. 272.

Real property as subject to garnishment, see 10 STANDARD PROC. 432.

10. *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327; *Murray v. Ridley*, 3 Harr. & McH. (Md.) 171.

[a] "In the case of the king, however, an execution always issued against the lands as well as the goods of a public debtor; because the debtor was considered as being not only bound in person, but as a feudatory who held mediately or immediately from the king; and, therefore, holding what he had from the king, he was from thence to satisfy what he owed to the king." *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327.

11. *Allen & Gardner v. Summers*, 3 B. Mon. (Ky.) 490; *Barbour v. Breckenridge*, 4 Bibb (Ky.) 548. See *Jones v. Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

[a] The statute of 5 Geo. 2, ch. 7, stripped lands in the colonies of the sanctity with which they had been guarded and by subjecting them to sale, no longer considered them as a secondary fund for the payment of debts in the hands of the debtor, but rendered them equally liable with his personality. Plaintiff may elect whether

he will seize lands or goods. *Hanson v. Barnes' Lessee*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322.

12. See the statutes of the several states and the following cases: Cal. *Fish v. Fowlie*, 58 Cal. 373; *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256. Colo.—*Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444. Ind.—*Frakes v. Brown*, 2 Blackf. 295. Mo.—*Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664. N. J.—*Close v. Close*, 28 N. J. Eq. 472. N. Y. *Sheridan v. House*, 4 Abb. Dec. 218, 43 N. Y. 569; *Griffin v. Spencer*, 6 Hill 525. Pa.—*Gordon v. Inghram*, 32 Pa. 214; *Humphreys v. Humphreys*, 1 Yeates 427. S. C.—*Wieters v. Timmons*, 25 S. C. 488, 1 S. E. 1.

[a] "Land" embraces "all titles, legal or equitable, perfect or imperfect (*Leese v. Clark*, 20 Cal. 387), including such rights as lie in contract—those which are executory as well as those which are executed. (*Soulard v. United States*, 4 Pet. 511.) Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale." *Fish v. Fowlie*, 58 Cal. 373.

[b] Muniments of title to lands are not the realty and so a levy on the former is not equivalent to a levy on the latter. *Welch v. Rogers*, Howell N. P. (Mich.) 255.

[c] In Louisiana where the principal, interest and costs of a judgment do not amount to fifty dollars, it is held the sheriff has no right to sell immovable property to satisfy the judgment. *Zimmerman v. Bartchy*, 14 La. Ann. 520.

13. *Palmer v. Clark*, 4 Abb. N. C. (N. Y.) 25; *Garsed v. Hutchinson*, 2 W. N. C. (Pa.) 305.

[a] "Under the execution, doubtless, lands not subject to the judgment may be levied upon." *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

[b] Lands acquired after the judgment under which the execution issues

terests, however, as may be disposed of by the debtor himself are subject to execution.<sup>14</sup> The fact that an estate is subject to defeasance upon the happening of some contingency does not prevent the levy of an execution thereon.<sup>14½</sup>

(II.) **Interests Under Unrecorded Deed.**—(A.) **EXECUTION AGAINST GRANTOR.**—Under the statutes of many states, as against judgment creditors without notice, a conveyance by an unrecorded deed does not divest the grantor of title, and therefore the property may be subjected to execution by such creditors.<sup>15</sup> If such creditors have notice, actual or constructive, this rule does not apply,<sup>16</sup> unless the conveyance be void as to creditors notwithstanding notice.<sup>17</sup>

may be levied on. *Green v. Steelman*, 10 N. J. L. 193; *King v. King*, 247 Pa. 89, 93 Atl. 20.

14. *Emerson v. Marks*, 24 Ill. App. 642.

14½. *Sheridan v. House*, 4 Abb. Dec. (N. Y.) 218.

[a] Estate in fee, or in tail, defeasible upon a contingency, is liable to be taken in execution by a creditor of the tenant, and held until the happening of the contingency. *Phillips v. Rogers*, 12 Mete. (Mass.) 405.

Contingent remainder, see *supra*, II, B, 3, m, (I), (B), (2).

15. **D. C.**—*Nelson v. Henry*, 2 Mack. 259. **La.**—*Doughty v. Sheriff*, 25 La. Ann. 290; *Lyons v. Cenas*, 22 La. Ann. 113. **N. J.**—*Hodge's Exrs. v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 257; *Lewis v. Hall*, 7 N. J. Eq. 107. **N. C.**—*Moore v. Collins*, 15 N. C. 384.

[a] The rule established by the statute of frauds and the registry laws is, that the creditor is entitled to pursue the ostensible title even though it may not be the real title of the debtor. *Nelson v. Henry*, 2 Mack. (D. C.) 259.

[b] Where a wife has obtained a judgment against her husband under which his property has been sold and purchased by her, the sale to her not being recorded, after the purchase the judgment creditors of her husband may seize the same property as his, and the wife has not the right to enjoin the sale thereof. *Doughty v. Sheriff*, 25 La. Ann. 290.

[c] A process verbal of the sale of real estate by the order of the probate court has no effect against third parties, or seizing creditors, until it is recorded or registered in the parish where the property is situated. *Lyons v. Cenas*, 22 La. Ann. 113.

16. *Hart v. Farmers' & Mechanics'*

*Bank*, 33 Vt. 252, the court saying: "But where a party proposes to take advantage of the literal application of the provisions of the registry system to perpetrate fraud, by levying upon the land, or purchasing it, after he has knowledge of an unregistered deed, the law interferes, by mere construction, and engrafts an exception, not named in the statute, but which it is necessary to imply, in order to defeat the fraudulent use of the provisions of the statute, which it is always safe to presume that the legislature did not intend. So too, if the party has constructive, or implied notice of an unregistered deed, he is not permitted to acquire a title from the grantor, which shall override it. As if he find the grantee in possession of the premises, or is informed of any other fact, which would naturally put a careful and prudent man upon inquiry, in a direction where he might obtain information in regard to the title, and he omit to pursue the inquiry; and some other similar cases."

[a] **Notice may be implied or constructive as well as actual.** *Hodge's Exrs. v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 257; *Lewis v. Hall*, 7 N. J. Eq. 107; *Hart v. Farmers & Mechanics' Bank*, 33 Vt. 252.

[b] **Possession** (1) of real estate is notice of the title of the possessor; and if he be in possession under an unrecorded deed the property will not be subject to judgments against his vendor, rendered since the execution of the deed. *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456. (2) **Possession**, if it be open, notorious, exclusive and unequivocal is implied or constructive notice. *Hodge's Exrs. v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 257.

17. *Coward v. Culver*, 12 Heisk. (Tenn.) 540.

(B.) EXECUTION AGAINST GRANTEE. — Though the deed to property be unrecorded, generally title passes, except as against creditors and bona fide purchasers, and the property may be sold on execution against the grantee.<sup>18</sup>

(III.) Interests in Public Lands. — The estate of one in lands purchased of the government, for which he has received a certificate of final payment may be levied upon and sold under execution prior to the issuance of a patent.<sup>19</sup> Until the purchase price is fully paid no title or interest is acquired which can be sold by execution.<sup>20</sup> A mere

18. *Davis v. Inscoc*, 84 N. C. 396; *Morris v. Ford*, 17 N. C. 412; *Wilkins v. May*, 3 Head (Tenn.) 173; *Coward v. Culver*, 12 Heisk. (Tenn.) 540; *Simmons v. McKissick*, 6 Humph. (Tenn.) 259; *Shields v. Mitchell*, 10 Yerg. (Tenn.) 1; *Vance's Heirs v. McNairy*, 3 Yerg. (Tenn.) 171, 24 Am. Dec. 553.

[a] Where land is conveyed by deed which is not recorded and the grantee fraudulently destroys the deed, the purchaser at a sale under execution against the grantee succeeds to all the rights of the grantee and is entitled to a conveyance of the title from the grantor. *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721.

[b] Where land conveyed by an unrecorded deed is sold under execution against the grantee it is the duty of the grantee to have the deed registered or to deliver it to the purchaser at the execution sale; if he withholds it, equity will divest his title, and vest the legal title in the purchaser. *Vance v. McNairy*, 3 Yerg. (Tenn.) 171, 24 Am. Dec. 553.

[c] Where title does not pass until the deed is recorded, an execution against the grantee cannot be levied on the property. *Stinson v. Russell*, 2 Overt. (Tenn.) 40. The holding in this case that title does not pass until deed is registered has been overruled. *Vance v. McNairy*, 3 Yerg. (Tenn.) 171; *Shields v. Mitchell*, 10 Yerg. (Tenn.) 1.

19. *Ala.*—*Falkner v. Leith*, 15 Ala. 9; *Goodlet v. Smithson*, 5 Port. 245, 30 Am. Dec. 561. *Ill.*—*Jackson v. Spink*, 59 Ill. 404. *Ia.*—*Levi v. Thompson*, *Morris* 235 (by statute, *affirmed* in 4 How. [U. S.] 17, 11 L. ed. 856); *Cavender v. Smith's Heirs*, 5 Iowa 157. *Mich.*—*Foster v. Whelpley*, 123 Mich. 350, 82 N. W. 123; *Kercheval v. Wood*, 3 Mich. 509, under statute. *Miss.* *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358; *Huntingdon v. Grantland*,

33 Miss. 453; *Martin v. Nash*, 31 Miss. 324; *Lindsey v. Henderson*, 27 Miss. 502. *Mo.*—*Block v. Morrison*, 112 Mo. 343, 20 S. W. 340; *Hammond v. Johnston*, 93 Mo. 198, 6 S. W. 83. *N. C.* *Wilson v. Deweese*, 114 N. C. 653, 19 S. E. 699. *Tex.*—*Martin v. Bryson*, 31 Tex. Civ. App. 98, 71 S. W. 615. *Wyo.* *Muir v. Bousey*, 146 Pac. 595.

[a] Between the time of presentation and confirmation of a claim under the act of congress passed March 3, 1807, for the adjustment of land titles in Missouri and before the issuance of a patent, the claimant has a property which is subject to execution. *Landes v. Brant*, 10 How. (U. S.) 348, 13 L. ed. 449.

[b] Land held under a special warrant, *i. e.*, where specific land is described, may be subjected to execution, but land held under an indescriptive warrant cannot be so levied upon. *Lewis v. Meredith*, 3 Wash. C. C. 81, 15 Fed. Cas. No. 8,328.

[c] Interest of purchaser of seminary lands may be reached by execution under special statute. Except for statute it could be reached only in equity. *Smith v. State*, 21 Miss. 140.

[d] One in possession, claiming title derived with warranty from an entry and survey not patented has an estate that may be sold on execution. *Jackson's Lessee v. Williams*, 10 Ohio 69.

20. *Sage v. Cartwright*, 9 N. Y. 49; *Deaver v. Parker*, 37 N. C. 40. But see *McWilliams v. Withington*, 7 Sawy. 205, 7 Fed. 326.

[a] A grant from the state which does not become perfect until certain fees are paid is not subject to execution prior to such payment. *Garlick's Lessee v. Robinson*, 12 Ga. 340.

[b] Where school lands are purchased from the state which are to be conveyed on payment of the residue of the purchase price, they are not subject



preemption claim is not such an interest as may be sold under execution,<sup>21</sup> though by statute in some states, lands held by entry are liable to execution.<sup>22</sup> The interest of one who holds as an occupant claimant is not subject to execution,<sup>23</sup> and improvements on public lands are not subject to execution.<sup>24</sup> But the possessory right to a mining claim is property which may be sold on execution.<sup>25</sup>

An unexecuted warrant for land in the hands of the surveyor is not the subject of levy and sale as the property of the warrantee.<sup>26</sup>

(IV.) Possession Without Title or Claim Without Possession. — One who has the bare naked legal title to property without any beneficial interest or possession has no such interest as is subject to an execution against him.<sup>27</sup> Generally possession is an estate subject to execution, and its sale under process against the possessor gives the purchaser all the rights accruing from the possession of the defendant,<sup>28</sup> together

to execution until this balance is paid. *Jeffries v. Sherburn*, 21 Ind. 112.

21. Ark.—*Healy v. Conner*, 40 Ark. 352. Cal.—*Moore v. Besse*, 43 Cal. 511. Mo.—*Cravens v. Moore*, 61 Mo. 178; *Bray v. Ragsdale*, 53 Mo. 170.

22. By special statute. *Hall v. Heffly*, 6 Humph. (Tenn.) 444; *Heffly v. Hall*, 5 Humph. (Tenn.) 581.

[a] An entry or survey for land is an inchoate legal title, and may be sold by execution. *Thomas v. Marshall*, Hard. (Ky.) 19.

23. *Brown v. Massey*, 3 Humph. (Tenn.) 470.

[a] But the right to land acquired by actual settlement, is the subject of levy and sale under execution. *Myers v. Myers*, 8 Watts (Pa.) 430.

As to land privately owned, see the section following.

24. *Healey v. Conner*, 40 Ark. 352; *Hatfield v. Wallace*, 7 Mo. 112.

[a] *Contra*.—In *Switzer v. Skites*, 8 Ill. 529, 44 Am. Dec. 723, it is held that improvements of settlers upon public lands are property which might be sold under execution.

[b] Mere possession and improvement of land belonging to the United States, however valuable, is not subject to levy under an execution. *Rhea, Conner & Co. v. Hughes*, 1 Ala. 219, 34 Am. Dec. 772.

[c] Right to recover for improvements made by a person in possession having no other interest in the land, is not subject to sale under execution. *Hendricks v. Snediker*, 30 Tex. 296.

25. *McKeon v. Bisbee*, 9 Cal. 137, 70 Am. Dec. 642; *Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777.

26. *Kinter v. Jenks*, 43 Pa. 445.

[a] "Before survey made, such a warrant gives no interest in land: . . . What then is the nature of such a warrant, or of the right conferred by it? It is a mere license-authority to do a particular thing for the warrantee's benefit; it is an order to perform an act which may give him an estate in land, but in the meantime it is no more than a thing in action; and though equity might execute an agreement to transfer it, it is not assignable at law." And so held not subject to execution. *Heath v. Knapp*, 10 Watts (Pa.) 405.

27. *Osterman v. Baldwin*, 6 Wall. (U. S.) 116, 18 L. ed. 730. See also cases cited, *infra*, II, B, 3, h, (II), (B).

28. III.—*Thomas v. Bowman*, 29 Ill. 426; *Turney v. Saunders*, 5 Ill. 527. N. H.—*Murray v. Emmons*, 19 N. H. 483. N. Y.—*Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Town*, 4 Cow. 599; *Dickinson v. Smith*, 25 Barb. 102; *Colvin & Johnson v. Baker*, 2 Barb. 206; *Talbot v. Chamberlin*, 3 Paige 219; *Jackson v. Parker*, 9 Cow. 73; *Griffin v. Spencer*, 6 Hill 525. Ohio. *Miner v. Wallace*, 10 Ohio 403; *Scott v. Douglass*, 7 Ohio 227; *Gray v. Tappan*, Wright 117. Pa.—*Scheetz v. Fitzwater*, 5 Pa. 126. Wis.—*Swift v. Agnes*, 33 Wis. 228; *Banker v. Rand*, 19 Wis. 253; *Dean v. Pyncheon*, 3 Pin. 17.

[a] Possession is *prima facie* such an interest as is subject to execution. *McCaskle v. Amarine*, 12 Ala. 17.

[b] A person in possession of the premises is presumed, in law, to be the owner, or at least to have an in-

with the right to enter and enjoy the possession to the same extent as it could have been lawfully enjoyed by the defendant in execution if no sale had been made.<sup>29</sup> However, if it appear that the land in question is public land,<sup>30</sup> or that the one in possession holds merely as a tenant by sufferance, or at will,<sup>31</sup> a sale on execution against him gives the purchaser no right to the property.

(V.) **Chattels Real.**—(A.) **GENERALLY.**—An estate for years in real property is subject to seizure and sale under execution,<sup>32</sup> being regarded as a chattel.<sup>33</sup>

(B.) **ESTATES BY SUFFERANCE OR AT WILL.**—The interest of one who holds merely as a tenant at sufferance or at will is not subject to execution.<sup>34</sup>

(C.) **LEASEHOLD INTERESTS.**—Leasehold interests are generally subject to levy and sale under an execution against the lessee, as chattels,<sup>35</sup> even though the lessee has sublet the premises or has fraudulent-

interest which is the subject of sale on judgment and execution against him, and in an action of ejectment brought by the purchaser at a sheriff's sale, or his grantee, against such defendant, to recover the possession, the latter cannot show an outstanding title in another, to defeat the action. *Dickinson v. Smith*, 25 Barb. (N. Y.) 102.

29. *Ill.*—*Turney v. Saunders*, 5 Ill. 527. *N. H.*—*Murray v. Emmons*, 19 N. H. 483. *N. Y.*—*Kellogg v. Kellogg*, 6 Barb. 116.

30. See *supra*, II, B, 3, c, (III).

31. *Colvin & Johnson v. Baker*, 2 Barb. (N. Y.) 206. *Supra*, II, B, 3, c, (V).

32. *Ind.*—*Barr v. Doe ex dem. Binford*, 6 Blackf. 335, 38 Am. Dec. 146. *N. H.*—*Adams v. French*, 2 N. H. 387. *N. Y.*—*Bigelow v. Finch*, 17 Barb. 394. *N. C.*—*Doe v. Peters*, 44 N. C. 457, 59 Am. Dec. 563. *Pa.*—*Sowers v. Vie*, 14 Pa. 99; *Lerew v. Rinehart*, 3 Pa. Co. Ct. 50. *Eng.*—*In re Newcastle*, L. R. 8 Eq. 700, 39 L. J. Ch. 68, 21 L. T. Rep. (N. S.) 343, 18 Wkly. Rep. 8.

But see *Duggan v. Kitson*, 20 U. C. Q. B. 316.

[a] **Reservation of minerals and right to mine for a period of years.** *First Nat. Bank v. Dow*, 41 Hun (N. Y.) 13, 2 N. Y. St. 170.

33. *Williams v. Downing*, 18 Pa. 60; *Dalzell v. Lynch*, 4 Watts & S. (Pa.) 255.

34. *Miss.*—*Wildy v. Doe*, 26 Miss. 35. *N. Y.*—*Bigelow v. Finch*, 17 Barb. 394, 11 Barb. 498; *Colvin & Johnson v. Baker*, 2 Barb. 206. *Ohio.*—*Waggoner v. Speck*, 3 Ohio 292.

*Contra*, *Gerber v. Hartwig*, 11 W. N. C. (Pa.) 197.

35. *Conn.*—See *Mun v. Carrington*, 2 Root 15. *Ga.*—See *James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co.*, 140 Ga. 593, 79 S. E. 465. *Ind.*—*Barr v. Doe ex dem. Binford*, 6 Blackf. 335, 38 Am. Dec. 146. *Ia.*—*Strawhaeker v. Ives*, 114 Iowa 661, 87 N. W. 669. *Ky.*—*Smith v. Scanlon*, 106 Ky. 572, 51 S. W. 152. *Md.*—*Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236. *Mass.*—*Shelton v. Codman*, 3 Cush. 318; *Chapman v. Gray*, 15 Mass. 439. *Mich.*—*Buhl v. Kenyon*, 11 Mich. 249, 83 Am. Dec. 738. *N. Y.*—*Bigelow v. Finch*, 17 Barb. 394. *N. C.*—*Doe v. Peters*, 44 N. C. 457, 59 Am. Dec. 563. *Ohio.*—See *Northern Bank v. Roosa*, 13 Ohio 334; *Bisbee's Lessee v. Hall*, 3 Ohio 449; *Acklin v. Waltermier*, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629. *Okla.*—*Powell v. Nichols*, 26 Okla. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886. *Pa.*—*Bismarek Bldg., etc. Assn. v. Bolster*, 92 Pa. 123; *Williams v. Downing*, 18 Pa. 60; *Lefever v. Armstrong*, 15 Pa. Super. 565; *Sterling v. Com.*, 2 Grant's Cas. 162; *Dalzell v. Lynch*, 4 Watts & S. 255; *Lerew v. Rinehart*, 3 Pa. Co. Ct. 50. *Tenn.*—*Thomas' Lessee v. Blackmore*, 5 Yerg. 113. *Eng.*—*Sparrow v. Bristol*, 1 Marsh. 10, 4 E. C. L. 454; *Taylor v. Cole*, 3 T. R. 292, 100 Eng. Reprint 582.

[a] **Lease for less than five years cannot be levied on as real property under the New York statute.** *United States Oxygen Co. v. Bernard A. Buge*, 136 N. Y. Supp. 297.

ly assigned the lease.<sup>36</sup> The interest of a person under an agreement that a lease shall be executed is not subject to execution.<sup>37</sup> So an equitable interest of a lessee,<sup>38</sup> or the equity of redemption which a lessee has in a leasehold estate,<sup>39</sup> cannot be seized on execution. The effect of a provision in a lease against subletting or assignment, made pursuant to a statutory requirement cannot be evaded by a sale under an execution against the lessee,<sup>40</sup> but if not violative of a statutory provision against subletting, the leasehold may be sold under execution even though there be a covenant in the lease against subletting or assignment, provided such sale be not merely simulated to evade the covenant.<sup>41</sup> A lease per autre vie is held not subject to levy and sale under execution as personal property.<sup>42</sup>

(VI.) **Ground Rents.** — A rent reserved upon a conveyance in fee of land is not liable to be sold on execution.<sup>43</sup>

d. *License, Franchise, Privilege, or Easement.* — A privilege<sup>44</sup> or li-

[b] **Lease for ninety-nine years** subject to execution as a chattel. *Bisbee's Lessee v. Hall*, 3 Ohio 449. But see *Duggan v. Kitson*, 20 U. C. Q. B. 316 (not on execution from inferior court). *Contra*, under statute. *Northern Bank v. Roosa*, 13 Ohio 335.

[c] **Under a lease for nine hundred and ninety-nine years**, the interest of the lessee is subject to execution as real property and not as personalty. *Mun v. Carrington*, 2 Root (Conn.) 15.

**Attachment of leasehold interests**, see 3 STANDARD PROC. 319.

**As to garnishment of lessee for rent due lessor**, see 10 STANDARD PROC. 465.

**Garnishment at instance of creditors of lessee**, see 10 STANDARD PROC. 466.

**Leasehold estate held in trust**, see *infra*, II, B, 3, k, (II), (B).

36. *Smith v. Seanlan*, 106 Ky. 572, 51 S. W. 152.

37. *Bigelow v. Finch*, 17 Barb. (N. Y.) 394.

38. *Tischler v. Robinson*, 56 Fla. 699, 48 So. 45.

39. *Loring v. Melendy*, 11 Ohio 355.

40. **U. S.**—*Mexican Nat. Coal, etc. Co. v. Frank*, 154 Fed. 217. **Mo.**—*Holiday v. Aehle*, 99 Mo. 273, 12 S. W. 797. **Tex.**—*Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044.

41. **Mass.**—*Smith v. Putnam*, 3 Pick. 221. **N. Y.**—See *Riggs v. Pursell*, 66 N. Y. 193; *Jackson v. Corliss*, 7 Johns. 531; *Jackson v. Silvernail*, 15 Johns. 278. **Okla.**—*Powell v. Nichols*, 26 Okla. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886.

[a] "By the weight of authority,

covenants in leases against assignment or subletting, where intended by the parties to apply only to the voluntary acts of the tenant, the lease is not forfeited by any transfer made by operation of law, including sales under execution. A holding otherwise would in effect permit the creation of valuable interests in lessees which may be held by them in defiance of creditors." *Powell v. Nichols*, 26 Okla. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886.

42. *Com. v. Allen*, 2 Phila. (Pa.) 22.

43. *Payn v. Beal*, 4 Denio (N. Y.) 405, *overruling* *People v. Haskins*, 7 Wend. (N. Y.) 463. *Contra*, *Hurst v. Lithgow*, 2 Yeates (Pa.) 24, 1 Am. Dec. 326. See also *White's Estate*, 167 Pa. 206, 31 Atl. 569.

44. *Heath v. Knapp*, 10 Watts (Pa.) 405.

[a] **A perpetual scholarship** in a college granted in recognition of a donation, entitling the donor to keep one pupil in the college, is not a power over or interest in real or tangible property. It is but a privilege personal to the donor and not subject to sale under execution. *Cleveland Nat. Bank v. Morrow*, 99 Tenn. 527, 42 S. W. 200, 63 Am. St. Rep. 853, 38 L. R. A. 758.

**Option to purchase**, see *supra*, II, B, 3, s, (IV).

**Patent rights and copyrights**, see *infra*, II, B, 3, b, (VI).

**Seat on stock exchange**, see *infra*, II, B, 3, b, (XII).

**Trade-marks**, see *infra*, II, B, 3, b, (VII).

**Unpublished manuscripts**, see *infra*, II, B, 3, b, (VIII).



cense,<sup>45</sup> merely personal, gives no interest which can be sold on execution.

Whether the right to mine or remove minerals from land may be levied on, and, if so, whether as personality or realty, depends upon the nature of the right, that is, whether it is a mere license,<sup>46</sup> a lease,<sup>47</sup> or an easement or profit a prendre.<sup>48</sup>

**Easements.** — The estate or interest represented by an easement is subject to levy and sale under execution.<sup>49</sup>

A franchise being a mere incorporeal hereditament is not, in the absence of statute, subject to seizure and sale upon execution.<sup>50</sup> A statute subjecting corporate franchises to execution in satisfaction of

**Rights under land warrant, see *supra*, II, B, 3, c, (III).**

45. *Heath v. Knapp*, 10 Watts (Pa.) 405. See *Meridian Nat. Bank v. McConica*, 8 Ohio Cir. Ct. 442.

[a] A license to enter upon land and sever and remove trees therefrom is a personal trust and not subject to levy under execution. *Potter v. Everett*, 40 Mo. App. 152.

Interest in standing timber to be removed during a certain period, see *supra*, II, B, 3, t, (III).

46. See *Meridian Nat. Bank v. McConica*, 8 Ohio Cir. Ct. 442, holding that a so-called "oil lease" created merely a license which could not be levied on but must be reached by action in the manner provided by statute.

47. See *First Nat. Bank v. Dow*, 41 Hun (N. Y.) 13, 2 N. Y. St. 170.

As to levy on leasehold interests, see *supra*, II, B, 3, c, (V), (C). Compare, *supra*, II, B, 3, b, (V).

48. See *Canadian Ry. Acc. Co. v. Williams*, 21 Ont. L. R. 472, holding that certain contracts called "oil leases," which gave the exclusive right to mine for and produce oil and gas during a specified period, were more than a mere license, and created a profit a prendre, which must be levied on and sold as realty and not as personality.

[a] Under a deed excepting and reserving all the oil, gas and other minerals in and beneath the surface of the premises, with the exclusive right to dig, mine, bore and operate for the same on said premises, ingress thereto and egress therefrom, as the same may be necessary or convenient for such operations for a period of twelve years and with the right during said period to use so much of said premises as may be convenient or necessary, to erect and

place thereon tanks, engines, derricks, etc., for the purpose of such operations, and at any time to remove therefrom all such tanks, etc., and also reserving the right to take water off said premises; the interest of the grantor is a chattel real and subject to execution against him. *First Nat. Bank v. Dow*, 41 Hun (N. Y.) 13, 2 N. Y. St. 170. As to levy on chattels real, see *supra*, II, B, 3, c, (V).

49. *Evangelical, etc. House v. Buffalo Hydraulic Assn.*, 64 N. Y. 561, *affirming* 4 Hun 419, 6 Thomp. & C. 589.

[a] The estate or interest of a corporation in real property, though but an easement, is the subject of levy and sale as property distinct from the incorporeal franchise of the corporation. *Evangelical, etc. Home v. Buffalo, etc. Assn.*, 64 N. Y. 561, *affirming* 4 Hun 419, 6 Thomp. & C. 589.

50. *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *Munroe v. Thomas*, 5 Cal. 470.

[a] "A franchise is merely a privilege, and is not the subject to sale and transfer without the consent of the authority by which it was granted. 'The persons to whom such privileges are granted hold them in trust, and, therefore, they cannot be transferred by forced sale (*Monroe v. Thomas*, 7 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286); nor by voluntary assignment, unless by the permission of government, and even then, if a special mode of transfer is pointed out, that mode must be followed.' (*Wood v. Truckee Turnpike Co.*, 24 Cal. 487; *People v. Duncan*, 41 Cal. 509)." *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.

**Corporate franchises, see 5 STANDARD PROC. 672.**

Property essential to enjoyment of a corporate franchise, see 5 STANDARD PROC. 673.

the debts of the corporation does not render a franchise held by an individual liable to an execution against him.<sup>51</sup>

e. *Public Property and Institutions*.<sup>52</sup>—In some jurisdictions in the absence of statute an execution may not issue against a public corporation or quasi corporation,<sup>53</sup> while in other states a contrary rule is recognized.<sup>54</sup> But in any event, on the ground of public policy, the property of such a corporation<sup>55</sup> held for public or governmental

51. *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.

52. As to whether property of citizens is subject to levy on execution against a public corporation, see *infra*, II, B, 3, f.

53. U. S.—*Amy v. City of Galena*, 10 Biss. 263, 7 Fed. 163. Ill.—*Dolton v. Dolton*, 196 Ill. 154, 63 N. E. 642; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Bloomington v. Brokaw*, 77 Ill. 194; *Odell v. Schroeder*, 58 Ill. 353; *Elrod v. Bernadotte*, 53 Ill. 368; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Chicago v. Hasley*, 25 Ill. 595. Pa.—*Monaghan v. Philadelphia*, 28 Pa. 207; *Fairbanks Co. v. Kirk*, 12 Pa. Super. 210. Wis.—*Crane v. Fond du Lac*, 16 Wis. 196.

54. Kan.—*Independence v. Trouvalle*, 15 Kan. 70. Ky.—*Cook v. Lyon County*, 6 Ky. L. Rep. 361. Okla.—*Beadles v. Fry*, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855. Tex.—*Gordon v. Thorp* (Tex. Civ. App.), 53 S. W. 357. But see *McGregor v. Cook*, 16 S. W. 936. W. Va.—*Brown v. Gates*, 15 W. Va. 131.

55. U. S.—*New Orleans v. Louisiana Const. Co.*, 140 U. S. 654, 11 Sup. Ct. 968, 35 L. ed. 556; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Klein v. New Orleans*, 99 U. S. 149, 25 L. ed. 430; *Weber v. Lee County*, 6 Wall. 210, 18 L. ed. 781; *Kerr v. New Orleans*, 126 Fed. 920, 61 C. C. A. 450; *United States v. Board of Auditors*, 28 Fed. 407; *United States v. Hare*, 4 Sawy. 653, 25 Fed. Cas. No. 15,303. Ala.—*Equitable Loan & Security Co. v. Edwardsville*, 143 Ala. 182, 38 So. 1016, 111 Am. St. Rep. 34; *Murphree v. Mobile*, 104 Ala. 532, 16 So. 544 (by statute); *Birmingham v. Rumsey*, 63 Ala. 352. Cal.—*Tulare Irr. Dist. v. Collins*, 154 Cal. 440, 97 Pac. 1124; *Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 50 Pac. 277; *Sharp v.*

*County of Contra Costa*, 34 Cal. 284; *Fulton v. Hanlow*, 20 Cal. 450; *Hart v. Burnett*, 15 Cal. 530; *Wood v. San Francisco*, 14 Cal. 190. Ga.—*Curry v. Savannah*, 64 Ga. 290, 37 Am. Rep. 74; *Fleishel & Kimsey v. Hightower*, 62 Ga. 324. Ind.—*School Town v. Somerville*, 181 Ind. 463, 104 N. E. 859; *Lowe v. Howard County*, 94 Ind. 553; *Indianapolis, etc. R. Co. v. Indianapolis*, 12 Ind. 620. Ia.—*Ransom v. Boal*, 29 Iowa 68, 4 Am. Rep. 195. Kan.—*Yoxall v. Osborne County Comr.*, 20 Kan. 581. Ky.—*Cook v. Lyon County*, 6 Ky. L. Rep. 361. La.—*McKnight v. Grant*, 30 La. Ann. 361, 31 Am. Rep. 226; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *Police Jury v. Michel*, 4 La. Ann. 84. Md.—*Darling v. Baltimore*, 51 Md. 1. Mo.—*Catron v. Lafayette*, 125 Mo. 67, 28 S. W. 331. N. J.—*Lyon v. Elizabeth*, 43 N. J. L. 158. N. Y.—*Brinckerhoff v. Board of Education*, 6 Abb. Pr. (N. S.) 428, 2 Daly 443, 37 How. Pr. 499; *Darlington v. New York*, 31 N. Y. 164, 28 How. Pr. 352, 88 Am. Dec. 248. N. C.—*Lilly v. Taylor*, 88 N. C. 489. Ohio.—*City of Cincinnati v. Cameron*, 6 Ohio Dec. 727, 7 Am. Law Rec. 592. Okla.—*Beadles v. Fry*, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855. Utah.—*Emery v. Burrenson*, 14 Utah 328, 47 Pac. 91, 60 Am. St. Rep. 898, 37 L. R. A. 732. Wis.—*Crane v. Fond du Lac*, 16 Wis. 196.

[a] *Police Boat*.—*The Protector*, 20 Fed. 207.

[b] Though such property may have been used temporarily for private purposes. *Murphree v. Mobile*, 104 Ala. 532, 16 So. 544.

[c] *Pueblo lands of city of San Francisco* not subject. *Townsend v. Greeley*, 5 Wall. (U. S.) 326, 18 L. ed. 547; *Hart v. Burnett*, 15 Cal. 530.

[d] *Rents of public property* not subject to execution. *Klein v. New Orleans*, 99 U. S. 149, 25 L. ed. 430; *Kline v. Parish of Ascension*, 33 La. Ann. 562.

purposes cannot be levied on. Thus public buildings,<sup>56</sup> as court houses,<sup>57</sup> school buildings,<sup>58</sup> engines and engine houses,<sup>59</sup> hospitals,<sup>60</sup> or prisons,<sup>61</sup> cannot be taken on execution. Nor can public squares,<sup>62</sup> streets,<sup>63</sup> lands held for school purposes,<sup>64</sup> wharves,<sup>65</sup> water fronts,<sup>66</sup> markets,<sup>67</sup> or parks,<sup>68</sup> be so taken. So taxes and revenues of a public corporation cannot be taken on execution.<sup>69</sup> City waterworks may not

[e] **Insurance money, from destroyed public property,** the destroyed property not being subject to execution, partakes of the character of the property destroyed and cannot be taken on execution. *Ellis v. Pratt*, 111 Ala. 629, 20 So. 649, 56 Am. St. Rep. 76, 33 L. R. A. 264.

[f] **After repeal of a town charter** the town property such as public buildings is under control of the state and not subject to town debts. *Lilly v. Taylor*, 88 N. C. 489.

[g] **Acquisition Subject to Prior Execution Lien.**—Where a judgment was obtained against one who owned a mule, and execution issued thereon, the fact that the county authorities subsequently bought the mule from the defendant in execution and used it on the county roads, did not destroy the lien of the execution or prevent levy upon the mule. *Sumter County v. Hanes, Jones & Cadbury Co.*, 143 Ga. 124, 84 S. E. 425.

[h] **Mandamus is the remedy** in case a public corporation fails to pay the judgment. *Emery v. Burresen*, 14 Utah 328, 47 Pac. 91, 60 Am. St. Rep. 898, 37 L. R. A. 732. See titles "**Mandamus**;" "**Municipal Corporations**."

56. *New Orleans v. Morris*, 3 Woods 103, 18 Fed. Cas. No. 10,182; *Monroe v. Johnson*, 106 La. 350, 30 So. 840.

57. *Yoxall v. Osborne County*, 20 Kan. 581; *Police Jury v. Michel*, 4 La. Ann. 84.

58. **U. S.**—*Featherman v. Louisiana State Seminary*, 2 Woods 71, 8 Fed. Cas. No. 4,713. **Ga.**—*Fleishel & Kimsey v. Hightower*, 62 Ga. 324. **Mo.** *State ex rel. Board of Education v. Tiedemann*, 69 Mo. 306, 33 Am. Rep. 498; *Allen v. Trustees of School District No. 1*, 23 Mo. 418.

59. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

[a] **In New York** the Metropolitan Fire Department, being created by act of the legislature, including the cities of New York and Brooklyn, which are otherwise independent municipalities, and having extensive powers, which it

can exercise without interference from those cities, the property of that department, both its apparatus and its funds, may be reached by execution in satisfaction of judgments against the department. *Clarissy v. Metropolitan Fire Dept.*, 7 Abb. Pr. (N. S.) 352.

60. *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *State v. Finlay*, 33 La. Ann. 113.

61. *New Orleans v. Morris*, 3 Woods 103, 18 Fed. Cas. No. 10,182; *Police Jury v. Michel*, 4 La. Ann. 84.

62. **U. S.**—*Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. **Ind.** *Lowe v. Howard County Comm.*, 94 Ind. 553. **Ia.**—*Ransom v. Boal*, 29 Iowa 68, 4 Am. Rep. 195.

63. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Wood v. San Francisco*, 14 Cal. 190.

64. *State ex rel. Robbins v. County Court*, 51 Mo. 82; *Allen v. Trustees of School District No. 1*, 23 Mo. 418.

[a] Not subject to execution for a debt incurred in building a school house. *Allen v. Trustees of School District No. 1*, 23 Mo. 418.

65. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

66. *Hitchcock v. Galveston Wharf Co.*, 50 Fed. 263; *Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 50 Pac. 277.

67. *New Orleans v. Morris*, 3 Woods 103, 18 Fed. Cas. No. 10,182.

[a] **A market**, not subject to execution, is a place where vegetables, fish and meats of all sorts are furnished for the daily sustenance of the population of a city. It being an incident, and indeed a necessity to a large and populous town. A market bazaar, that is to say, a place in which merchandise is sold and purchased, but from which traffic in all comestibles is excluded, cannot be considered a market which is not subject to execution. *New Orleans v. Morris*, 3 Woods 103, 18 Fed. Cas. No. 10,182.

68. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

69. **U. S.**—*Peterkin v. New Orleans*,



be levied on in those jurisdictions where such property is deemed to be held by the city in its governmental capacity.<sup>70</sup> Property dedicated to charitable purposes by a municipality is not subject to execution.<sup>71</sup> In some jurisdictions, however, property which is not held for public purposes, the seizure of which would not suspend or impair the exercise of governmental functions, is subject to execution.<sup>72</sup> Under this rule bonds or stocks held by a municipal corporation are subject to levy under execution.<sup>73</sup>

2 Woods 100, 19 Fed. Cas. No. 11,026; New Orleans *v.* Morris, 3 Woods 103, 18 Fed. Cas. No. 10,182. Cal.—Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290. Ill.—Chicago *v.* Hasley, 25 Ill. 485. La.—New Orleans, etc. R. Co. *v.* Municipality No. 1, 7 La. Ann. 148; Egerton *v.* Third Municipality of New Orleans, 1 La. Ann. 435. Okla.—Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855. Tex.—Sherman *v.* Williams, 84 Tex. 422, 19 S. W. 606, 31 Am. St. Rep. 66; Gordon *v.* Thorp (Tex. Civ. App.), 53 S. W. 357. W. Va.—Brown *v.* Gates, 15 W. Va. 131.

[a] Even though the municipal corporation is in debt and has no means of payment except the taxes which it is authorized to collect. Neither the place nor the manner in which the revenues of a municipal corporation are kept divests them of their public character or subjects them to be diverted from the purposes for which the law authorized them to be collected. Peterkin *v.* New Orleans, 2 Woods 100, 19 Fed. Cas. No. 11,026.

[b] An act which authorizes the seizure under execution of "all sums of money which may be due to the debtor in whatsoever right," must be understood as referring exclusively to that class of rights defined and protected as the rights of property. Taxes imposed for the protection of those rights form no part of them. Egerton *v.* Third Municipality of New Orleans, 1 La. Ann. 435.

[c] Ground rents to which the legislature has given a destination or appropriation, as a portion of the permanent revenue of the city to enable the municipal authority to exercise its powers of police and government, cannot be seized. New Orleans, etc. R. Co. *v.* Municipality No. 1, 7 La. Ann. 148.

70. New Orleans *v.* Morris, 105 U. S. 600, 26 L. ed. 1184; Brockenbrough *v.*

Board of Water Comrs., 134 N. C. 1, 46 S. E. 28.

71. Louisville *v.* Commonwealth, 1 Duvall (Ky.) 295, 85 Am. Dec. 624.

72. U. S.—Kerr *v.* New Orleans, 126 Fed. 920, 61 C. C. A. 450; Hart *v.* New Orleans, 12 Fed. 292. Ala.—Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740; Birmingham *v.* Rumsey, 63 Ala. 352. Ind.—State *v.* Buckles, 8 Ind. App. 282, 35 N. E. 846, 52 Am. St. Rep. 476. Ky.—Louisville *v.* Com., 1 Duvall 295, 85 Am. Dec. 624; Cook *v.* Lyon County, 6 Ky. L. Rep. 361. La.—New Orleans *v.* Home Mut. Ins. Co., 23 La. Ann. 61. N. Y.—Brinckerhoff *v.* Board of Education, 6 Abb. Pr. (N. S.) 428, 2 Daly 443, 37 How. Pr. 499. Okla.—Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855. Tex.—Laredo *v.* Benavides, 25 S. W. 482; Sherman *v.* Williams, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

[a] Where land owned by a city and claimed by it to be exempt from levy and sale under execution because used for burial purposes, has been owned by it for over twenty-five years, and during all that time nobody has been buried therein, nor has the land been dedicated or appropriated for cemetery purposes, such land is subject to execution. Murphree *v.* Mobile, 104 Ala. 532, 16 So. 544.

[b] An acre of land cut off from other municipal land by a railroad and not held by the city for any governmental uses, is no more than as private property held by an individual and is subject to levy and sale under execution against the city. Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740.

[c] The temporary use of land as a burial place years before does not prevent its sale under execution, it never having been dedicated either expressly or by acquiescence to any public use. McEnery *v.* Pargoud, 10 La. Ann. 497. 73. Kerr *v.* New Orleans, 126 Fed.

f. *Of Citizen When Execution Against Public Corporations.*—The private property of the inhabitants of a city or county cannot be taken to satisfy an execution against the public corporation,<sup>74</sup> though in the New England states a contrary rule is recognized.<sup>75</sup>

920, 61 C. C. A. 450; *Orelich v. Pittsburg*, 5 Clark 485, 18 Fed. Cas. No. 10,444.

[a] **Bonds owned as an investment** of funds of a city are subject to execution. *New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61.

[b] **Creditor's bill** will lie to reach bonds and mortgages of a county. *Lyell v. St. Clair County*, 3 McLean 580, 15 Fed. Cas. No. 8,621. See the title "**Creditor's Suits**," 6 STANDARD PROC. 164.

74. **U. S.**—*Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. **Ala.** *Miller v. McWilliams*, 50 Ala. 427, 20 Am. Rep. 297. **Cal.**—*Emerie v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742. **Miss.** *Horne v. Coffey*, 25 Miss. 434. **Pa.** *North Lebanon v. Arnold*, 47 Pa. 488. **Eng.**—*Russell v. The Men of Devon*, 2 T. R. 667, 671, 100 Eng. Reprint 359.

[a] The court in *Emerie v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742, says: "We are unable to find any adjudged case in the other states going to the extent of the court in New England, and, as we have seen, the rule is there regarded as peculiar, or founded on immemorial usage. There appear to us insurmountable difficulties in the way of any just application of the rule. The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment, or the levy of the execution; those who opposed the creation of the liability may be subjected to its payment, whilst those by whose fault the burden has been imposed may be entirely relieved of responsibility. Again, it is a settled principle that whenever one of several is held liable for their joint debt, he may have recourse, upon its payment, to the other for contribution. To enforce this right against the inhabitants of a county, even where its population is small, would lead to such a multiplicity of suits as to render the right utterly valueless."

[b] The right to proceed against the private property of the citizen was not given by the common law. *Emerie*

*v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742.

[c] **After repeal of a town charter** property of individual citizen cannot be subject to execution. *Lilly v. Taylor*, 88 N. C. 489.

[d] **Taxation** is method of reaching property of individual citizen for municipal debt. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

[e] "It must be conceded that each citizen of the borough, whilst he remains such, is liable for his due proportion of these debts, according to the value of his property subject to taxation. But it is by taxation alone that the duty can be enforced." *North Lebanon v. Arnold*, 47 Pa. 488.

75. **U. S.**—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. ed. 923. **Conn.**—*Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148; *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46. **Me.**—*Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751 (by statute); *Fernald v. Lewis*, 6 Greenl. 264; *Adams v. Wiscasset Bank*, 1 Greenl. 361, 10 Am. Dec. 88. **Mass.** *Gaskill v. Dudley*, 6 Metc. 546, 39 Am. Dec. 750; *Chase v. Merrimack Bank*, 19 Pick. 564, 31 Am. Dec. 163; *Brewer v. New Gloucester*, 14 Mass. 216.

[a] In *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148, a judgment was recovered against a municipal corporation and the court in holding that the execution issued upon the judgment might be levied upon and satisfied out of the private property of an individual member of the corporation, says: "We know that the relation in which members of municipal corporations in this state have been supposed to stand, in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts."

g. *Mortgaged Property*.—(I.) On Execution Against Mortgagor.<sup>76</sup>—(A.) CHATTELS.—At common law on the mortgage of personal property title passed to the mortgagee subject to the equitable right of the mortgagor to reclaim it and in the absence of statute many courts hold that the latter's interest cannot be subjected to execution.<sup>77</sup> Some courts have modified this rule to the extent of holding that the mortgagor's interest cannot be taken on execution unless the amount of the mortgage debt be first tendered or paid the mortgagee.<sup>78</sup> Where the mortgagee is regarded as the owner and entitled to possession a provision in the mortgage giving the mortgagor possession for a definite time does not give the latter such an interest that it may be levied on under execution.<sup>79</sup> The generally recognized rule by statute or otherwise is that where the mortgagor is entitled to the possession as against the mortgagee the chattels are liable to be sold on execution against the mortgagor before breach of the condition,<sup>80</sup> or before the

76. As subject to attachment, see 3 STANDARD PROC. 315.

Garnishment of property subject to chattel mortgage, see 10 STANDARD PROC. 443.

77. **U. S.**—Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. ed. 168; Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488. **Ark.** Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61. **D. C.**—Mayse *v.* Gaddis, 2 App. Cas. 20. **Ia.**—Deering *v.* Wheeler, 76 Iowa 496, 41 N. W. 200; McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298; Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841; Vanslyck *v.* Mills, 34 Iowa 375; Gordon *v.* Hardin, 33 Iowa 550; Campbell *v.* Leonard, 11 Iowa 489. **Mass.**—Cochrane *v.* Rich, 142 Mass. 15, 6 N. E. 781; Evans *v.* Warren, 122 Mass. 303; Prout *v.* Root, 116 Mass. 410; Lamb *v.* Johnson, 10 Cush. 126; Lyon *v.* Coburn, 1 Cush. 278; Brackett *v.* Bullard, 12 Mete. 308; Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202; Cantzon's Lessee *v.* Dorr, 27 Miss. 245; Baldwin *v.* Jenkins, 23 Miss. 206; Henry *v.* Fullerton, 13 Smed. & M. 631; Boarman *v.* Catlett, 13 Smed. & M. 149; Wolfe *v.* Doe *ex dem.* Dowell, 13 Smed. & M. 103, 51 Am. Dec. 147; Thornhill *v.* Gilmer, 4 Smed. & M. 153. **Mo.** Spalding *v.* Taylor, 1 Mo. App. 34. **N. H.**—Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25. **S. C.**—Spriggs *v.* Camp, 2 Spears 181. **W. Va.**—Doheny *v.* Atlantic Dynamite Co., 41 W. Va. 1, 23 S. E. 525. **Eng.**—Plunket *v.* Penson, 2 Atk. 290, 26 Eng. Reprint 577.

78. **Ia.**—Campbell *v.* Leonard, 11 Iowa 489. **Me.**—Smith *v.* Smith, 24 Me. 555; Wolf *v.* Dorr, 24 Me. 104;

Holbrook *v.* Baker, 5 Greenl. 309, 17 Am. Dec. 236. **Okla.**—Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627.

79. Des Moines Packing Co. *v.* Uncaphor (Iowa), 156 N. W. 171.

80. **Ala.**—O'Neal *v.* Wilson, 21 Ala. 288; Harbinson *v.* Harrell, 19 Ala. 753; Fontaine & Dent *v.* Beers & Smith, 19 Ala. 722; McDonald *v.* Foster, 5 Ala. 664; Magee *v.* Carpenter, 4 Ala. 469; Purnell *v.* Hogan, 5 Stew. & P. 192; McGregor *v.* Hall, 3 Stew. & P. 397. **Ill.**—Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306 (*reversing* 70 Ill. App. 251); Simmons *v.* Jenkins, 76 Ill. 479; Durfee *v.* Grinnell, 69 Ill. 371; Pike *v.* Colvin, 67 Ill. 227; Spaulding *v.* Mozier, 57 Ill. 148; Merritt *v.* Niles, 25 Ill. 282; People *v.* Dickinson, 65 Ill. App. 99; Holaday *v.* Bartholomae, 11 Ill. App. 206. **Ind.**—Foster *v.* Bringham, 99 Ind. 505; Louthain *v.* Miller, 85 Ind. 161; Emmons *v.* Hawn, 75 Ind. 356; Hackleman *v.* Goodman, 75 Ind. 202; Manns *v.* Brookville Nat. Bank, 73 Ind. 243; Sparks *v.* Compton, 70 Ind. 393; Raymond *v.* Parisho, 70 Ind. 256; Olds *v.* Andrews, 66 Ind. 147; Headrick *v.* Brattain, 63 Ind. 438; Landers *v.* George, 49 Ind. 309; Coe *v.* McBrown, 22 Ind. 252; Schrader *v.* Wolfelin, 21 Ind. 238; Heimberger *v.* Boyd, 18 Ind. 420. **Ia.**—Rindskoff Bros. & Co. *v.* Lyman, 16 Iowa 260. **Kan.**—Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751. **Ky.**—Chisholm *v.* Mitchell, 5 J. J. Marsh. 361; Jameson *v.* Porter, 2 Mon. 71; Squires *v.* Smith, 10 B. Mon. 33. **La.**—Zollkoffer *v.* Briggs, 19 La. 521. **Mass.**—Prout *v.* Root, 116



mortgage is foreclosed in equity or under a power of sale contained in the mortgage,<sup>81</sup> being sold subject of course to the lien of the mortgage and the rights of the mortgagee.<sup>82</sup> In some jurisdictions, though the mortgagor be in possession, where the mortgagee may take possession at his pleasure,<sup>83</sup> or the mortgagor's right of possession is for no definite time,<sup>84</sup> the mortgagor has no interest which is subject to execution. After condition broken,<sup>85</sup> notwithstanding the prop-

Mass. 410. **Mich.**—Haynes *v.* Leppig, 40 Mich. 602; Nelson *v.* Ferris, 30 Mich. 497; Cary *v.* Hewitt, 26 Mich. 228. **Minn.**—Galde *v.* Forsyth, 72 Minn. 248, 75 N. W. 219. **Miss.**—Hunter *v.* Hunter, Walk. 194. **Mo.**—Pollock *v.* Douglas, 56 Mo. App. 487; Springate *v.* Koppelman Furn. Co., 51 Mo. App. 1; State *v.* Carroll, 24 Mo. App. 358. **N. J.**—Atkinson *v.* Hires, 43 N. J. L. 297; Woodside *v.* Adams, 40 N. J. L. 417; Doughten & Wilson *v.* Gray, 10 N. J. Eq. 323. **N. Y.**—Hamill *v.* Gillespie, 48 N. Y. 556, 559; Hathaway *v.* Brayman, 42 N. Y. 322, 1 Am. Rep. 524; Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56 (*reversing* 23 How. Pr. 84); Manning *v.* Monaghan, 28 N. Y. 585 (*affirming* 10 Bosw. 231); Goulet *v.* Asseler, 22 N. Y. 225; Galen *v.* Brown, 22 N. Y. 37; Hull *v.* Carnley, 11 N. Y. 501, 1 Abb. Pr. 158 (*reversing* 2 Duer 99); Livor *v.* Orser, 5 Duer 501; Fairbanks *v.* Bloomfield, 5 Duer 434; Gelhaar *v.* Ross, 1 Hilt. 117; Lyman *v.* Bowe, 5 N. Y. Civ. Proc. 157, 12 Daly 281, 66 How. Pr. 481; Lansingburgh Bank *v.* Crary, 1 Barb. 542; Craft *v.* Brandow, 61 App. Div. 247, 70 N. Y. Supp. 364; Goodrich *v.* Bowe, 1 N. Y. City Ct. 338. **Ohio.**—Kelly *v.* Purcell, 6 Ohio Dec. (Reprint) 920; Curd *v.* Wunder, 5 Ohio St. 92. **R. I.**—Arnold *v.* Chapman, 13 R. I. 586. **Tex.**—Rayson *v.* Reid, 55 Tex. 266; Wootton *v.* Wheeler, 22 Tex. 338; Blum *v.* Conrad, 1 White & W. Civ. Cas., §1217; Mensing *v.* Axer, 2 Pos. Unrep. Cas. 268. **Wis.**—Saxton *v.* Williams, 15 Wis. 292.

[a] In *Wilkerson v. Stasny & Holub* (Tex. Civ. App.), 183 S. W. 1191, this is declared to be the rule both at common law and under statute.

[b] Where the estate of the mortgagor is treated as a legal title it is subject to execution against him. *Gorham v. Arnold*, 22 Mich. 247.

[c] Remedy of mortgagee is to follow the property into the hands of the purchaser and require its delivery to him or the payment of his mortgage

debt. *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56.

81. **Ala.**—Planters', etc. Bank *v.* Willis, 5 Ala. 770; Horton *v.* Hovater, 11 Ala. App. 413, 66 So. 939; Logan *v.* Smith Bros. & Co., 9 Ala. App. 459, 63 So. 766. **Ill.**—Pike *v.* Colvin, 67 Ill. 227. **Ind.**—Landers *v.* George, 49 Ind. 309. **Wis.**—Cotton *v.* Watkins, 6 Wis. 629; Cotton *v.* Marsh, 3 Wis. 221.

[a] By statute (1) "at any time before actual foreclosure" of the mortgage may be taken on execution against mortgagor. *Haynes v. Leppig*, 40 Mich. 602; *Cary v. Hewitt*, 26 Mich. 228; *Van Brunt v. Wakelee*, 11 Mich. 177. (2) Mortgage is not actually foreclosed until right of redemption is lost. *Haynes v. Leppig*, 40 Mich. 602.

82. **Ill.**—Spaulding *v.* Mozier, 57 Ill. 148. **Ind.**—Foster *v.* Bringham, 99 Ind. 505; Heimberger *v.* Boyd, 18 Ind. 420. **Mich.**—Nelson *v.* Ferris, 30 Mich. 497. **N. J.**—Atkinson *v.* Hires, 43 N. J. L. 297; Woodside *v.* Adams, 40 N. J. L. 417. **N. Y.**—Lansingburgh Bank *v.* Crary, 1 Barb. 542. **Ohio.**—Kelly *v.* Purcell, 6 Ohio Dec. (Reprint) 920, 8 Am. L. Rec. 705. **Tex.**—Wootton *v.* Wheeler, 22 Tex. 338. **Wis.**—Cotton *v.* Marsh, 3 Wis. 221.

83. **Ia.**—Rindskoff Bros. & Co. *v.* Lyman, 16 Iowa 260. **Mich.**—Eggleston *v.* Mundy, 4 Mich. 295. **Mo.**—King *v.* Bailey, 8 Mo. 332. **N. Y.**—Farrell *v.* Hildreth, 38 Barb. 178.

84. **Ia.**—Rindskoff Bros. & Co. *v.* Lyman, 16 Iowa 260. **Mich.**—Eggleston *v.* Mundy, 4 Mich. 295. **Neb.**—Peckinbaugh *v.* Quillin, 12 Neb. 586, 12 N. W. 104. **N. Y.**—Mattison *v.* Baucus, 1 N. Y. 295, 4 How. Pr. 367.

[a] In order to bring the interest of a mortgagor of chattels within the power of an execution, there must be an absolute right of possession for a certain and definite period, at the time the levy is made. *Farrell v. Hildreth*, 38 Barb. (N. Y.) 178.

85. **U. S.**—*In re Moark-Nemo Con.* Min. Co., 219 Fed. 340. **Ala.**—Thomp-

erty has been suffered to remain in the possession of the mortgagor,<sup>86</sup> or after the mortgagee has taken possession under an "insecurity" clause in the mortgage,<sup>87</sup> the mortgagor's interest is not subject to sale under execution. The disproportion between the mortgage debt and the value of the property is immaterial.<sup>88</sup>

(B.) REAL PROPERTY. — The mortgagor's interest in mortgaged real property may be sold on execution, before<sup>89</sup> breach of condition, but

son v. Thornton, 21 Ala. 808; Planters' etc. Bank v. Willis, 5 Ala. 770; Adams v. Tanner, 5 Ala. 740; Perkins v. Mayfield, 5 Port. 182. **Colo.**—Metzler v. James, 12 Colo. 322, 19 Pac. 885. **Ill.** Pike v. Colvin, 67 Ill. 227. **Ky.**—Newman v. Mantle, 109 Ky. 292, 58 S. W. 783, 95 Am. St. Rep. 372. **Mich.**—Bacon v. Kimmel, 14 Mich. 201; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec. 480. **Miss.**—See Commercial Bank v. Waters, 10 Smed. & M. 559. **Mo.**—Yeldell & Barnes v. Stemmons, 15 Mo. 443; King v. Bailey, 8 Mo. 332; Burge v. Hunter, 93 Mo. App. 639, 67 S. W. 697; Pollock v. Douglas, 56 Mo. App. 487; Springate v. Koppelman Furn. Co., 51 Mo. App. 1; State v. Carroll, 24 Mo. App. 358; Rodgers v. Lidwell, 3 Mo. App. 600; Spalding v. Taylor, 1 Mo. App. 34. **Neb.**—Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104. **N. H.**—See Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25, not subject to attachment. **N. Y.** Leadbetter v. Leadbetter, 125 N. Y. 290, 26 N. E. 265, 21 Am. St. Rep. 738 (*affirming* 11 N. Y. Supp. 228); Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 11 Am. St. Rep. 816; Nichols v. Mead, 47 N. Y. 653 (*affirming* 2 Lans. 222); Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Manning v. Monaghan, 28 N. Y. 585; Galen v. Brown, 22 N. Y. 37; Porter v. Parmley, 2 Jones & S. 398, 43 How. Pr. 445; Champlin v. Johnson, 39 Barb. 606; Fairbanks v. Bloomfield, 5 Duer 434; Gelhaar v. Ross, 1 Hilt. 117; Baltes v. Ripp, 1 Abb. Dec. 78, 3 Keyes 210; Kleinberger v. Brown, 26 Jones & S. 4, 8 N. Y. Supp. 866; Gelhaar v. Ross, 1 Hilt. 117; Baxter v. Gilbert, 12 Abb. Pr. 97; Marsh v. Lawrence, 4 Cow. 461; Craft v. Brandow, 61 App. Div. 247, 70 N. Y. Supp. 364; Biehler v. Irwin, 84 N. Y. Supp. 574. **N. C.**—Whitesides v. Williams, 22 N. C. 153. **S. C.**—*Ex parte* Lorenz, 32 S. C. 365, 11 S. E. 206, 17 Am. St. Rep. 862. **Vt.**—Norris v. Sowles, 57 Vt. 360.

[a] If the debt intended to be secured, becomes due, and the mortgage

provides that in such event the mortgagee shall be entitled to the immediate possession of the property, or be authorized to sell the same, the property cannot then be sold on execution against the mortgagor. Planters' and Merchants' Bank v. Willis & Co., 5 Ala. 770.

[b] The remedy against mortgagor after condition broken and mortgagee has taken possession is to garnishee any surplus in the hands of mortgagee. Pike v. Colvin, 67 Ill. 227.

Garnishment, see 10 STANDARD PROC. 365.

[c] Proceeding in equity only remedy against mortgagor after default. Craft v. Brandow, 61 App. Div. 247, 70 N. Y. Supp. 364.

[d] But in Wisconsin if the mortgagor have an equity of redemption, though it be after the debt has matured that interest is subject to execution. J. I. Case Threshing Mach. Co. v. Johnson, 152 Wis. 8, 139 N. W. 445.

86. Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104; Champlin v. Johnson, 39 Barb. (N. Y.) 606; Stewart v. Slater, 6 Duer 83.

87. **Ill.**—Simmons v. Jenkins, 76 Ill. 479. **Ia.**—Wells v. Chapman, 59 Iowa 658, 13 N. W. 841. **Minn.**—Galde v. Forsyth, 72 Minn. 248, 75 N. W. 219. **N. Y.**—Hathaway v. Brayman, 42 N. Y. 322, 1 Am. Rep. 524; Farrell v. Hildreth, 38 Barb. 178; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Mattison v. Bancus, 1 N. Y. 295, 4 How. Pr. 367.

[a] Where the mortgagee is authorized to take possession if the property be levied on or he shall at any time feel unsafe or insecure it is only with the permission or non-action of the mortgagee that the property can be sold under execution against the mortgagor. Durfee v. Grinnell, 69 Ill. 371. See also Simmons v. Jenkins, 76 Ill. 479.

88. Thompson v. Thornton, 21 Ala. 808.

89. **U. S.**—Van Ness v. Hyatt, 13

not after.<sup>90</sup> The equity of redemption of the mortgager in land was not liable to execution at common law,<sup>91</sup> but the rule now recognized in many jurisdictions is that the mortgagor's equity of redemption is such an interest as may be subjected to an execution against him,<sup>92</sup> whether mortgagor or mortgagee be in possession.<sup>93</sup> After the equity

Pet. 294, 10 L. ed. 168. **Ala.**—Gassenheimer v. Moulton, 80 Ala. 521, 2 So. 652. **Kan.**—Jenkins v. Green, 22 Kan. 562. **Mass.**—Prout v. Root, 116 Mass. 410; Blanchard v. Colburn, 16 Mass. 345. **Miss.**—Huntington v. Cotton, 31 Miss. 253. **N. J.**—Doughten & Wilson v. Gray, 10 N. J. Eq. 323; Ketchum v. Johnson, 4 N. J. Eq. 370. **Ohio.** Farmers' Bank v. Commercial Bank, 10 Ohio 71; Phelps v. Butler, 2 Ohio 224; Ely's Lessee v. McGuire, 2 Ohio 223.

90. Ketchum v. Johnson, 4 N. J. Eq. 370.

91. **U. S.**—Van Ness v. Hyatt, 13 Pet. 294, 10 L. ed. 168; Hill v. Smith, 2 McLean 446, 12 Fed. Cas. No. 6,499. **Miss.**—Boorman v. Catlett, 13 Smed. & M. 149. **Mo.**—McNair v. O'Fallon, 8 Mo. 188. **N. H.**—Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25. **N. C.**—Camp v. Coxe, 18 N. C. 52; Allison v. Gregory, 5 N. C. 333. **Tenn.**—Hurt v. Reeves, 5 Hayw. 50.

[a] Under a statute providing that "the equitable title or claim to land or other real estate" shall "be liable to the payment of debts, by suit in chancery and not otherwise," an equity of redemption in mortgaged lands cannot be sold under execution at law against the mortgagor, issued on a judgment which was rendered after the law-day of the mortgage. Paulling v. Barron, Meade & Co., 32 Ala. 9.

[b] In Tennessee this is still the rule. Wilkins v. Johnson (Tenn. Ch.), 54 S. W. 1001.

92. **Ala.**—Gassenheimer v. Moulton, 80 Ala. 521, 2 So. 652; Shaw & Cox v. Lindsey, 60 Ala. 344; Childress v. Monette, 54 Ala. 317. **Cal.**—Knight v. Fair, 9 Cal. 117. **Colo.**—Seaman v. Hax, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341. **Conn.**—Punderson v. Brown, 1 Day 93, 2 Am. Dec. 53. **Ill.**—Walters v. Defenbaugh, 90 Ill. 241; Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270; Curtis v. Root, 20 Ill. 53; Fitch v. Pinckard, 5 Ill. 69. **Ind.**—Dean v. Phillips, 17 Ind. 406; Watkins v. Gregory, 6 Blackf. 113. **Ky.**—Brace v. Shaw,

16 B. Mon. 43; Dougherty v. Linthicum, 8 Dana 194. **Me.**—Bodwell Granite Co. v. Lane, 83 Me. 168, 21 Atl. 829; Stewart v. Crosby, 50 Me. 130. **Md.**—Ford v. Philpot, 5 Harr. & J. 312. **Mass.** Reed v. Bigelow, 5 Pick. 281; Crane v. March, 4 Pick. 131, 16 Am. Dec. 329. **Mich.**—Gorman v. Arnold, 22 Mich. 247, estate of mortgagor being as a legal title. **Miss.**—Byrd v. Clarke, 52 Miss. 623. **Mo.**—Benton v. O'Fallon, 8 Mo. 650; McNair v. O'Fallon, 8 Mo. 188. **N. Y.**—Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623 (affirming 3 Lans. 509); Jackson v. Rhodes, 8 Cow. 47; Waters v. Stewart, 1 Caines Cas. 47. **N. C.**—Camp v. Coxe, 18 N. C. 52. **S. D.**—Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

[a] In Reed v. Bigelow, 5 Pick. (Mass.) 281, it was held that after a sale on execution of an equity of redemption, the mortgagor has an interest remaining in him which he may convey by way of mortgagee, and his right of redeeming this second mortgage may be attached and sold on execution.

[b] To sell the entire estate when the equity of redemption is levied on, requires the consent of the mortgagor, mortgagee and plaintiff in fieri facias. Milner v. Pitts & Son, 117 Ga. 794, 45 S. E. 67.

[c] When judgment is for the mortgage debt an execution thereunder cannot be levied on the mortgaged property to sell the equity of redemption of the mortgagor. Preston v. Ryan, 45 Mich. 174, 7 N. W. 819; Gale v. Hammond, 45 Mich. 147, 7 N. W. 761.

[d] But where there is a provision in the mortgage-deed that the mortgagee may have the land discharged of his right of redemption at his election on paying a further stipulated sum, the right of redemption is not subject to execution sale. Thompson v. Parker, 55 N. C. 475.

93. Gassenheimer v. Moulton, 80 Ala. 521, 2 So. 652; Watkins v. Gregory, 6 Blackf. (Ind.) 113.



of redemption has been cut off the mortgagor has no leviable interest.<sup>94</sup>

(C.) AFTER MORTGAGE SATISFIED. — If the mortgage debt has been paid the property is liable to sale under execution at law against the mortgagor,<sup>95</sup> whether the property be real or personal.<sup>96</sup> So when the mortgagee of personal property has sold enough of it to satisfy the mortgage debt and expenses of sale, the residue becomes subject to seizure upon execution against mortgagor.<sup>97</sup>

(II.) On Execution Against Mortgagee. — (A.) CHATTELS. — While the mortgagor is in possession before condition broken the interest of the mortgagee in the mortgaged chattels is not subject to execution.<sup>98</sup> After breach of condition, in some jurisdictions, the mortgagee has such a property in the chattels as may be levied on under execution,<sup>99</sup> though the mortgagor retain possession.<sup>1</sup> In other states until foreclosure the mortgagee's interest cannot be so levied upon.<sup>2</sup>

(B.) REAL PROPERTY. — The interest of a mortgagee in lands is not subject to execution before breach of condition.<sup>3</sup> Even though there has been a breach of condition, the mortgagee before foreclosure and

94. If the levy is made before expiration of the equity of redemption which expires before sale under the execution, the purchaser acquires nothing. *Shaw & Cox v. Lindsey*, 60 Ala. 344.

95. *Boarman v. Catlett*, 13 Smed. & M. (Miss.) 149; *Wolfe v. Doe*, 13 Smed. & M. (Miss.) 103, 51 Am. Dec. 147.

96. *Wolfe v. Doe*, 13 Smed. & M. (Miss.) 103, 51 Am. Dec. 147.

97. *Johnson v. Seneca State Bank*, 59 Kan. 250, 52 Pac. 860.

98. *Chapman v. Hunt*, 13 N. J. Eq. 370; *Doughten & Wilson v. Gray*, 10 N. J. Eq. 323.

99. Fla.—*Phillips v. Hawkins*, 1 Fla. 262. N. Y.—*Ferguson v. Lee*, 9 Wend. 258. Neb.—*Adams v. Nebraska City Nat. Bank*, 4 Neb. 370.

1. Though the property remain in the hands of the mortgagor after forfeiture it is subject to execution against the mortgagee. *Ferguson v. Lee*, 9 Wend. (N. Y.) 258.

2. Mass.—*Murphy v. Galloupe*, 143 Mass. 123, 8 N. E. 894; *Prout v. Root*, 116 Mass. 410. Ore.—*Knowles v. Herbert*, 11 Ore. 54, 240, 4 Pac. 126. Wash.—*Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

[a] In *Murphy v. Galloupe*, 143 Mass. 123, 8 N. E. 894, it is held that the interest of the mortgagee cannot be made attachable by joining the mortgagor and mortgagee as defend-

ants in an action upon a joint debt.

[b] While the mortgagor has an equity of redemption which is subject to execution the mortgagee's interest is not also subject, for such a rule would give different officers under executions by different parties equal rights in the same property. *Hunter v. Hunter, Walk.* (Miss.) 194.

3. Ia.—*Scott v. McWhirter*, 49 Iowa 487. Miss.—See *Brooks v. Kelly*, 63 Miss. 616. N. J.—*Doughten & Wilson v. Gray*, 10 N. J. Eq. 323.

[a] Where land is conveyed in good faith, and in consideration of the agreement of the grantee, the performance of which is secured by a mortgage on the land, to furnish the grantor with a life support, the land is not subject to levy and sale under an execution issued against the grantor. *Chandler v. Parsons*, 100 Mich. 313, 58 N. W. 1011.

[b] In *Rickert v. Madeira*, 1 Rawle (Pa.) 325, the Pennsylvania court without undertaking to mark the extent of the doctrine in that state held that the interest of a mortgagee, whether the mortgage be legal or equitable, cannot be taken on execution.

[c] Sale on execution against the vendee of the mortgagee gives the purchaser no title since when mortgagee conveys land the vendee gets only an equitable title. *Johnston v. Case*, 131 N. C. 491, 42 S. E. 957.

entry,<sup>4</sup> has no interest which is subject to execution, whether the execution be against the mortgagee alone or an attempt is made to sell the entire estate under execution against mortgagor and mortgagee.<sup>5</sup> However, where on entry or foreclosure the mortgagee acquires the legal title it becomes the subject of execution against him.<sup>6</sup>

h. *Conveyed To Secure Indebtedness.*—According to some authorities the interest of one who makes an absolute conveyance of real estate,<sup>7</sup> or an absolute transfer of personal property<sup>8</sup> to secure a debt,

4. Ark.—*Harman v. May*, 40 Ark. 146; *State v. Lawson*, 6 Ark. 269. Conn.—*Huntington v. Smith*, 4 Conn. 235. Del.—*Coach v. Geery*, 3 Harr. 280. Ill.—*Nicholson v. Walker*, 4 Ill. App. 404. Ky.—*Buck v. Sanders*, 1 Dana 187; *Cooper v. Martin*, 1 Dana 23. Me.—*Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Randall v. Farnham*, 36 Me. 86; *Coombs v. Warren*, 34 Me. 89; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646. Mass.—*Prout v. Root*, 116 Mass. 410; *Blanchard v. Colburn*, 16 Mass. 345; *Eaton v. Whiting*, 3 Pick. 484; *Marsh v. Austin*, 1 Allen 235. But see *Hooton v. Grout*, Quincy 343. N. H.—*Glass v. Ellison*, 9 N. H. 69; *Kelly v. Burnham*, 9 N. H. 20. N. Y.—*Jackson v. Willard*, 4 Johns. 41; *Jackson v. Dubois*, 4 Johns. 216; *Morris v. Mowatt*, 2 Paige Ch. 586, 22 Am. Dec. 661.

[a] Notwithstanding the mortgagee has obtained a judgment upon the mortgage, and caused a writ of possession to be issued, his interest is not subject to execution. *Glass v. Ellison*, 9 N. H. 69.

[b] *Not Before Entry.*—*Morris v. Barker*, 82 Ala. 272, 2 So. 335; *State v. Lawson*, 6 Ark. 269.

5. *Nicholson v. Walker*, 4 Ill. App. 404; *Buck v. Sanders*, 1 Dana (Ky.) 187.

[a] In *Kelly v. Burnham*, 9 N. H. 20, it is said: "There may, perhaps, be an exception to this rule, where the execution is for the joint debt of the mortgagor and mortgagee; and, on due notice being given, they concur in choosing an appraiser."

6. *Ketchum v. Johnson*, 4 N. J. Eq. 370.

7. Ga.—*Parker v. Home Mut. Bldg., etc. Assn.*, 114 Ga. 702, 40 S. E. 724. N. J.—*Williams v. Baker*, 62 N. J. Eq. 563, 51 Atl. 201. Ohio.—*Loring v. Melendy*, 11 Ohio 355; *Baird v. Kirtland*, 8 Ohio 21.

[b] The possessory interest of a

grantor which may be sold under execution, is a certain ascertained possession, for a definite period, and not a permissive possession which may be terminated at the pleasure of the grantee, whenever he considers it necessary for his security, and which is in fact terminated by the interposition of a claim. *Hawkins v. May*, 12 Ala. 673.

[c] The equitable right of a debtor to redeem from an absolute conveyance, made in good faith, but by way of security, cannot be taken on execution, unless the land is held "on a trust for him whereby he is entitled to a present conveyance," within the meaning of the statute. The debtor is not entitled to a present conveyance "until he pays the debt." *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722.

Interest of mortgagor in mortgaged property set *supra*, II, B, 3, g, (1).

Interest of grantor under a deed of trust, see *infra*, II, B, 3, k, (II), (A).

8. Miss.—*Trice v. Walker*, 71 Miss. 968, 15 So. 787; *Marlow v. Johnson*, 31 Miss. 128; *Thornhill v. Gilmer*, 4 Smed. & M. 153. N. Y.—*Wilkes v. Ferris*, 5 Johns. 335, 4 Am. Dec. 364; *Hendricks v. Robinson*, 2 Johns. Ch. 283, *followed* in *Hendricks v. Walden*, 17 Johns. 438. N. C.—*Griffin v. Richardson*, 33 N. C. 439; *Thompson v. Ford*, 29 N. C. 418; *Burgin v. Burgin*, 23 N. C. 160. Pa. *Early's Appeal*, 89 Pa. 411.

[a] A being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was not subject to seizure under an execution against A, without payment in the first place, of his indebtedness to B. *Swanston & Taylor v. Sublette*, 1 Cal. 123.

[b] If a person who advances the price of a slave, take the bill of sale in his own name for his security, he cannot be disturbed by the creditors of

is not subject to execution. In other states personal property so transferred,<sup>9</sup> or real estate so conveyed,<sup>10</sup> may be sold on execution against the transferor or grantor, his interest being regarded as that of a mortgagor. Where the grantor's interest is so regarded and is liable to execution, the grantee's interest is not leviable.<sup>11</sup>

i. *Joint and Several Interests.*—The interest in lands of one tenant in common before the time for division may be sold under execution,<sup>12</sup> as may the interest of a joint tenant.<sup>13</sup> These rules apply to personal property as well as realty,<sup>14</sup> and even though partition pro-

the person for whom the purchase was made till he be reimbursed. Villars v. Morgan, 3 Mart. N. S. (La.) 529.

9. *Ala.*—McConeghy v. McCaw, 31 Ala. 447. *Mich.*—Mueller v. Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525; McMillan v. Larned, 41 Mich. 521, 2 N. W. 662. *N. Y.*—Smith v. Beattie, 31 N. Y. 542.

10. *Ark.*—Turner v. Watkins, 31 Ark. 429; State v. Lawson, 6 Ark. 269. *Ill.*—Vallette v. Bennett, 69 Ill. 632. *Ind.*—Coe v. McBrown, 22 Ind. 252; Coe v. Johnson, 18 Ind. 218. *Ia.*—Clinton Nat. Bank v. Manwarring, 39 Iowa 281; Cook v. Dillon, 9 Iowa 407, 74 Am. Dec. 354. *Mo.*—Evans v. Wilder, 5 Mo. 313. *Pa.*—Eberly v. Shirk, 206 Pa. 414, 55 Atl. 1071; Fredericks v. Corcoran, 100 Pa. 413. *Wis.*—Second Ward Bank v. Upmann, 12 Wis. 499.

11. *Ark.*—Harman v. May, 40 Ark. 146. *Ia.*—Eherke v. Hecht, 96 Iowa 96, 64 N. W. 652. *Minn.*—Butman v. James, 34 Minn. 547, 27 N. W. 66.

[a] In Georgia land held by absolute deed as security for a debt still unpaid, is subject to levy and sale as the property of the vendee, under a judgment against him, no matter whether the judgment creditor gave credit on the faith of the property so held or not. Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068.

12. *Ala.*—Hill v. Jones, 65 Ala. 214. *Ill.*—Smith v. Crawford, 81 Ill. 296; Neary v. Cahill, 20 Ill. 214. *Mass.*—Melville v. Brown, 15 Mass. 82. *Mich.*—Michigan State Bank v. Kern, 155 N. W. 502. *N. H.*—Davis v. Barnard, 60 N. H. 550; Thompson v. Barber, 12 N. H. 563; Pettingill v. Bartlett, 1 N. H. 87. *N. Y.*—Mersereau v. Norton, 15 Johns. 179. *N. C.*—Blevins v. Baker, 33 N. C. 291. *Tex.*—Brown v. Renfro, 63 Tex. 600, 670; Aycock v. Kimbrough, 61 Tex. 543. *Vt.*—Galusha v. Sinclear, 3 Vt. 394.

[a] Mere authority given by one tenant in common to another to sell the joint property does not divest the former of the right to its possession, nor exempt it from levy and sale under execution against him. Thompson v. Mawhinney, 17 Ala. 362, 52 Am. Dec. 176.

[b] The levy does not affect the rights of the other tenants in common. Davis v. Barnard, 60 N. H. 550.

As subject to attachment, see 3 STANDARD PROC. 322.

13. *Cal.*—Waldman v. Broder, 10 Cal. 378. *Conn.*—Johnson v. Connecticut Bank, 21 Conn. 148. *Ill.*—James v. Stratton, 32 Ill. 202; White v. Jones, 38 Ill. 160. *Ind.*—Thornberg v. Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42. *Md.*—McElderry v. Flannagan, 1 Harr. & G. 308. *Mich.*—Midgeley v. Walker, 101 Mich. 583, 60 N. W. 296, 45 Am. St. Rep. 431. *N. H.*—Pettingill v. Bartlett, 1 N. H. 87. *N. C.*—Islay v. Stewart, 20 N. C. 160. *S. C.*—Riley v. Gaines, 14 S. C. 454. *Tenn.*—Rains v. McNairy, 4 Humph. 356, 40 Am. Dec. 651. *Tex.*—Schley v. Hale, 1 White & W. Civ. Cas., §930.

Garnishment of joint interests, see 10 STANDARD PROC. 412.

As subject to attachment, see 3 STANDARD PROC. 321.

14. *Ga.*—Leonard v. Scarborough, 2 Ga. 73. *Mass.*—Hayden v. Binney, 7 Gray 416. *N. Y.*—Firro v. Betts, 2 Barb. 633. *N. C.*—Islay v. Stewart, 20 N. C. 160. *Vt.*—Burton v. Kennedy, 63 Vt. 350, 21 Atl. 529, 25 Am. St. Rep. 769.

[a] But one who has no present interest in certain personalty until it is sold, but at the expiration of each year is to receive half the profits has no interest subject to levy on execution before division of profits. Barnett v. Totly, Dudley (Ga.) 175.



ceedings be pending, the lien of the execution, after partition, being transferred to the interest of the property assigned to him, or to the proceeds of the sale.<sup>15</sup>

The interest of a tenant by the entirety in lands is not subject to execution.<sup>16</sup>

j. *Partnership Property*.—The interest of a partner in the firm property is subject to seizure and sale under an execution against him individually,<sup>17</sup> but only the interest the individual partner would have

[b] In *Cloe & Sons v. Davis*, 15 Ky. L. Rep. 399, it is held that where an officer has levied an execution upon personal property jointly owned by the execution defendant with another, he has no right to sell the interest of the execution defendant, as the lien must be enforced by an action in equity.

15. *Me.*—*Argyle v. Dwinel*, 29 Me. 29. *S. C.*—*Riley v. Gaines*, 14 S. C. 454. *Tex.*—*Brown v. Renfro*, 63 Tex. 600.

16. *Thornberg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42.

17. *U. S.*—*United States v. Williams*, 4 McLean 236, 28 Fed. Cas. No. 16,719. *Ala.*—*Andrews v. Keith*, 34 Ala. 722; *Moore & Co. v. Sample*, 3 Ala. 319. *Ark.*—*Jones v. Fletcher*, 42 Ark. 422. *Cal.*—*Robinson v. Tevis*, 38 Cal. 611; *Jones v. Thompson*, 12 Cal. 191. *Conn.*—*Filley v. Phelps*, 18 Conn. 294. *Ill.*—*Weber v. Hertz*, 188 Ill. 68, 58 N. E. 676, *affirming* 87 Ill. App. 601; *White v. Jones*, 38 Ill. 159; *James v. Stratton*, 32 Ill. 202; *Newhall v. Buckingham*, 14 Ill. 405. *Ind.*—*Hardy v. Donellan*, 33 Ind. 501; *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. *La.*—*Choppin v. Wilson*, 27 La. Ann. 444; *Croft v. McKneely*, 1 La. 101; *Cucullu v. Manzenal*, 4 Mart. (N. S.) 183. *Me.*—*Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500; *Thompson v. Lewis*, 34 Me. 167. *Mass.*—*Peck v. Fisher*, 7 Cush. 386; *Fisk v. Herrick*, 6 Mass. 271. *Miss.*—*Sitler v. Walker*, 1 Freem. Ch. 77. *Mo.*—*Wiles v. Maddox*, 26 Mo. 77. *Neb.*—*Richards v. Leveille*, 44 Neb. 38, 62 N. W. 304. *N. H.*—*Dow v. Sayward*, 14 N. H. 9. *N. J.*—*Clements v. Jessup*, 36 N. J. Eq. 569. *N. Y.*—*Waddell v. Cook*, 2 Hill 47, 37 Am. Dec. 372; *Sterrett v. Third Nat. Bank*, 46 Hun 22, 10 N. Y. St. 818; *Mowbray v. Lawrence*, 13 Abb. Pr. 317, 22 How. Pr. 107. *N. C.*—*McPherson v. Pemberton*, 46 N. C. 378. *Ohio.*—*Nixon & Chatfield v. Nash*, 12

*Ohio St.* 647, 80 Am. Dec. 390; *Place v. Sweetzer*, 16 Ohio 142. *Pa.*—*Knerer v. Hoffman*, 65 Pa. 126; *Lothrop v. Wightman*, 41 Pa. 297. *S. C.*—*Knox v. Schepler*, 2 Hill 595. *Tenn.*—*Haskins v. Everett*, 4 Sneed 531; *Knight v. Ogden*, 2 Tenn. Ch. 473. *Tex.*—*Weaver v. Ashcroft*, 50 Tex. 427; *De Forrest v. Miller*, 42 Tex. 34; *Grant v. Williams*, 1 White & W. Civ. Cas., §363; *Schley v. Hale*, 1 White & W. Civ. Cas., §930. *Vt.*—*Russ v. Fay*, 29 Vt. 381. *Wash.*—*Graden v. Turner*, 15 Wash. 136, 45 Pac. 733.

[a] Until a failure or insolvency. *Croft v. McKneely*, 1 La. 101.

[b] Whether partnership be commercial or ordinary. *Cucullu v. Manzenal*, 4 Mart. N. S. (La.) 183.

[c] One may be a partner in the profits of a business without being partner in the property with which it is carried on, and in such case he has no interest in the property itself which is subject to execution. *Hankey v. Becht*, 25 Minn. 212.

[d] Interest of partner in the occupation license of the firm is not subject to execution as this license is essential to the carrying on of the business of the firm, and it could not be divided and a sale of such an interest would not affect the firm's right to carry on its business. *Nelson v. Cockrell*, 3 Wils. Civ. Cas., §448.

[e] In Georgia by statute partnership property can only be reached by garnishment. *Anderson & Co. v. Cheney*, 51 Ga. 372.

Garnishment of debts due partnership, see 10 STANDARD PROC. 413.

Attachment of partnership property, see 3 STANDARD PROC. 323.

[f] A judgment belonging to the partnership cannot be subjected to an execution against an individual partner. *Beauchamp v. Chachere*, 12 La. Ann. 851; *Smith v. McMicken*, 3 La. Ann. 319. *Compare, supra*, II, B, 3, b, (III), (B).

after the partnership accounts are settled is reached by such seizure.<sup>18</sup> Hence any sale is subject to the rights of the partnership creditors and the other members.<sup>19</sup> The whole property of the partnership cannot be sold on execution against one member and the entire proceeds thereof applied to the payment of his individual debt.<sup>20</sup>

k. *Equitable Estates and Interests*. — (I.) **General Statement**. — At common law and in the absence of statutory provision an equitable interest in personal property,<sup>21</sup> or real property, is held not subject to execution.<sup>22</sup> Such an interest must be reached by appropriate pro-

18. **U. S.**—Lyndon v. Gorham, 1 Gall. 367, 15 Fed. Cas. No. 8,640. **Mass.** Fisk v. Herrick, 6 Mass. 271. **Mo.** Wiles v. Maddox, 26 Mo. 77. **N. H.** Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson v. Stevens, 7 N. H. 352. **N. J.**—Clements v. Jessup, 36 N. J. Eq. 569. **N. Y.**—Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Mowbray v. Lawrence, 13 Abb. Pr. 317, 22 How. Pr. 107; Berry v. Kelly, 4 Robt. 106. **Pa.**—Bank v. Allen, 1 Del. Co. R. 277. **Tenn.**—Haskins v. Everett, 4 Sneed 531.

[a] "The interest of the partner is subject to the rights of the other partners, and also to the contingency that an accounting may show that such execution defendant has no beneficial or valuable interest." Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213.

[b] Neither a particular asset of the partnership, nor the interest of an individual partner in a particular partnership asset, can be seized on execution by an individual creditor of the partner. Smith v. McMicken, 3 La. Ann. 319.

19. **Cal.**—Jones v. Thompson, 12 Cal. 191. **Conn.**—Filley v. Phelps, 18 Conn. 294. **Ohio.**—Sutcliffe v. Dohrman, 18 Ohio 181, 51 Am. Dec. 450. **Pa.** Lothrop v. Wightman, 41 Pa. 297.

20. **Ind.**—Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213. **N. Y.**—Berry v. Kelly, 4 Robt. 106. **Pa.**—Bogue v. Steel, 1 Phila. 90, 7 Leg. Int. 162.

21. **Md.**—Martin v. Jewell, 37 Md. 530; Myers v. Amey, 21 Md. 302; Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Harris v. Aleock, 10 Gill & J. 226, 32 Am. Dec. 158. **Mass.**—Badlam v. Tucker, 1 Pick. 389, 11 Am. Dec. 202. **Mich.**—Van Norman v. Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796. **Miss.**—Commercial Bank v. Thompson, 7 Smed. & M. 443. **Mo.**—Boyce v. Smith's Admr., 16 Mo. 317; Yeldell v.

Stemmons, 15 Mo. 443. **N. J.**—Disborough v. Outcalt, 1 N. J. Eq. 298. **N. Y.**—Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364; Hendricks v. Robinson, 2 Johns. Ch. 283. **N. C.**—McKeithan & Sons v. Walker, 66 N. C. 95; Sprinkle v. Martin, 66 N. C. 55. **S. C.**—Dargan v. Richardson, Dudley 62; Wylie v. White, 10 Rich. Eq. 294; Brown v. Wood, 6 Rich. Eq. 155. **Tenn.** Benton v. Pope, 5 Humph. 392; McNairy v. Eastland, 10 Yerg. 310; Childs v. Derrick, 1 Yerg. 79; Wilson v. Carver, 4 Hayw. 90. **Eng.**—Scott v. Scholey, 8 East 467, 9 Rev. Rep. 487; Metcalf v. Scholey, 2 B. & P. N. R. 461.

[a] "A mere equitable interest cannot be taken and sold on execution; for where there is no legal right there is no legal remedy. . . . It is only by statute, that equities, or rights to redeem, are subject to attachment by ordinary process." Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

[b] The remaining trust, or residuary interest, remaining to the assignor, after the purposes of an assignment for the payment of debts, are satisfied, is not such an interest as can be taken and sold on execution. Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364.

[c] **Not Subject to Attachment.** Gypsum, etc. Co. v. Kent Cir. Judge, 97 Mich. 631, 57 N. W. 191. See 3 STANDARD PROC. 287, et seq.

22. **U. S.**—Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. ed. 721; Lenox v. Notrebe, 1 Hempst. 251, 15 Fed. Cas. No. 8,246c; Sawyer v. Morte, 3 Cranch C. C. 331, 21 Fed. Cas. No. 12,401. **Ark.**—Pettit v. Johnson, 15 Ark. 55. **Ga.**—Colvard v. Cox, Dudley 99. **Ill.**—Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600. **Ind.**—Hutehins v. Hanna, 8 Ind. 533. **Ky.**—Schmaus v. Wittemore, 155 Ky. 338, 159 S. W. 947; Goodwin v. Wilson, 114 Ky. 716, 71 S. W. 866; Newsom v. Kurtz, 86 Ky.

ceedings in a court of equity.<sup>23</sup> It has been held in some states where the distinctions between courts of law and equity are no longer observed, that apart from statute equitable interests are subject to execution,<sup>24</sup> and in many other states the same result has been reached

277, 5 S. W. 575; *Blight's Heirs v. Banks*, 6 Mon. 192, 17 Am. Dec. 136; *McDermid's Heirs v. Morrison*, 1 A. K. Marsh. 173; *January v. Bradford*, 4 Bibb 566; *Hancock v. Brinker*, 3 Bibb 249; *Allen v. Sanders*, 2 Bibb 94. Mass. *Russell v. Lewis*, 2 Pick. 508. Mich. *Gorham v. Arnold*, 22 Mich. 247 (*approving Gorham v. Wing*, 10 Mich. 486); *Trask v. Green*, 9 Mich. 358. Miss. *Hopkins v. Carey*, 23 Miss. 54; *Goodwin v. Anderson*, 5 Smed. & M. 730. Mo.—*Broadwell v. Yantis*, 10 Mo. 398. Neb.—*First Nat. Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490. N. J.—*Smith v. Collins*, 81 N. J. Eq. 348, 86 Atl. 957; *Cairns v. Hay*, 21 N. J. L. 174; *Halsted v. Davison*, 10 N. J. Eq. 290; *Ketchum v. Johnson*, 4 N. J. Eq. 370; *Vaneleve v. Groves*, 4 N. J. Eq. 330; *Disborough v. Outault*, 1 N. J. Eq. 298. N. Y. *Bates v. Ledgerwood Mfg. Co.*, 130 N. Y. 200, 29 N. E. 102 (*affirming* 4 N. Y. Supp. 524); *Wilkes v. Ferris*, 5 Johns. Ch. 335, 4 Am. Dec. 364; *Bogart v. Perry*, 1 Johns. Ch. 52. N. C.—*Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057. Ohio.—*Morris v. Way*, 16 Ohio 469; *Baird v. Kirtland*, 8 Ohio 21, 24; *Haynes v. Baker*, 5 Ohio St. 253; *McLeary v. Snider & Co.*, 2 Ohio Dec. 59; *Jackman v. Hallock*, 1 Ohio 318, 13 Am. Dec. 627; *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621; *Cutler v. Brinker*, Tapp. 343. Ore.—*Holmes v. Wolfard*, 47 Ore. 93, 81 Pac. 819; *Smith v. Ingles*, 2 Ore. 43. S. C.—*White v. Kavanagh*, 8 Rich. L. 377. Tenn.—*Pratt v. Phillips*, 1 Sneed 543, 60 Am. Dec. 162; *Henderson v. Hill*, 9 Lea 25; *McNairy v. Eastland*, 10 Yerg. 310; *Springer v. Smith*, 3 Lea 737; *Shute v. Harder*, 1 Yerg. 3, 24 Am. Dec. 427. Tex.—*Edwards v. Norton*, 55 Tex. 405; *Wallace & Co. v. Campbell & Maxey*, 53 Tex. 229; *Hendricks v. Snediker*, 30 Tex. 296.

[a] A contingent and uncertain equitable title cannot be sold under execution. *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600.

[b] "There must be an interest in land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and

execution," and "a mere equity unaccompanied with possession, is not such an interest." *Broadwell v. Yantis*, 10 Mo. 398, 403.

Attachment of, see 3 STANDARD PROC. 288.

23. U. S.—*Smith's Lessee v. McCann*, 24 How. 398, 16 L. ed. 714. Ala. *Davis v. McKinney*, 5 Ala. 719, by statute. Kan.—*Kiser v. Sawyer*, 4 Kan. 503, by appointment of a receiver under the code. Mass.—*Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202. Miss. *Hopkins v. Carey*, 23 Miss. 54. Neb. *First Nat. Bank v. Tighe*, 49 Neb. 299, 68 N. W. 490. N. Y.—*Edmeston v. Lyde*, 1 Paige 637, 19 Am. Dec. 454. N. C.—*McKeithan & Sons v. Walker*, 66 N. C. 95. S. C.—*Wylie v. White*, 10 Rich. Eq. 294. Tenn.—*Planter's Bank v. Henderson*, 4 Humph. 75.

See the titles "Bills To Enforce Decrees," 4 STANDARD PROC. 459; "Creditors' Suits," 6 STANDARD PROC. 164; "Receivers."

24. Del.—*Flanagin v. Daws*, 2 Houst. 476. Md.—See *Hopkins v. Stump*, 2 Harr. & J. 301. Minn.—*Atwater v. Manchester Savings Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741. Pa. *Drake v. Brown*, 68 Pa. 223; *Auwerter v. Mathiot*, 9 Serg. & R. 397; *Humphreys v. Humphreys*, 1 Yeates 427; *Burd v. Dansdale*, 2 Binn. 80, 91.

[a] The Minnesota rule is stated in *Atwater v. Manchester Savings Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741, where the court says: "In this state there is no express statute declaring that a judgment shall be a lien on an equitable estate; but when we consider that the common-law rule on the subject was purely technical, and arose out of the supposed inability of courts of law to deal with equitable estates, and that in this state all distinctions between courts of law and courts of equity has been done away with, and that the same court now administers both legal and equitable remedies in the same action, it must be evident that all reasons for the old rule have ceased to exist."

[b] The rule in Pennsylvania is explained in *Auwerter v. Mathiot*, 9 Serg.



by statute.<sup>25</sup> Some cases hold that an equitable title coupled with a lawful possession is liable to sale on execution.<sup>26</sup>

(II.) **Property Held in Trust.**<sup>27</sup> — (A.) **INTEREST OF GRANTOR.** — After the execution of a deed of trust, as no estate remains in the grantor,<sup>28</sup> he has no interest in the trust property subject to execution.<sup>29</sup> But where

& R. 397, where the court says: "At common law, an equitable estate is not bound by a judgment or subject to an execution. But the creditor may have relief in chancery. We have no court of chancery, and have therefore established it as a principle, that both judgments and execution have an immediate operation on equitable estates."

25. **U. S.**—*Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305, law of North Dakota. **Ark.**—*Pettit v. Johnson*, 15 Ark. 55. **Cal.**—*Fish v. Fowle*, 58 Cal. 373; *Kennedy v. Nunan*, 52 Cal. 326. **Colo.**—*Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444. **Conn.**—*Davenport v. Lacon*, 17 Conn. 278. **Ill.**—*Whiteford v. Hootman*, 104 Ill. App. 562. **Ind.**—*Pennington v. Clifton*, 11 Ind. 162. **Ia.**—*Crosby v. Elkader Lodge*, 16 Iowa 399; *Harrison v. Kramer*, 3 Iowa 543. **Kan.**—*Poole v. French*, 71 Kan. 391, 80 Pac. 997. **Md.**—*McMeehen v. Marman*, 8 Gill & J. 57, 67; *Coombs v. Jordan*, 3 Bland 284. **Miss.**—*Thompson v. Wheatley*, 5 Smed. & M. 499. **Mo.**—*Hammond v. Horton*, 137 Mo. 151, 37 S. W. 825; *Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664; *Hammond v. Johnson*, 93 Mo. 198, 6 S. W. 83 (appeal dismissed, 142 U. S. 73, 12 Sup. Ct. 141, 35 L. ed. 941); *Street v. Goss*, 62 Mo. 226; *Morgan v. Bouse*, 53 Mo. 219; *Bobb v. Woodward*, 50 Mo. 95. **Wash.**—*Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070.

[a] Equitable interest in shares of stock held subject to execution. *Midletown Sav. Bank v. Jarvis*, 33 Conn. 372.

[b] In Alabama (1) the statute provides that only "perfect equities" shall be liable to execution. *Smith's Exr. v. Cockrell*, 66 Ala. 64; *Shaw & Cox v. Lindsey*, 60 Ala. 344; *Wilson v. Beard*, 19 Ala. 629; *Elmore v. Harris*, 13 Ala. 360; *Davis v. McKinney*, 5 Ala. 719. (2) This "perfect equity" is of one class only—that of a vendee who has paid the purchase-money. *Shaw & Cox v. Lindsey*, 60 Ala. 344.

Also, *Smith's Exr. v. Cockrell*, 66 Ala. 64.

26. **First Nat. Bank v. Tighe**, 49 Neb. 299, 68 N. W. 490; *Dworak v. More*, 25 Neb. 735, 41 N. W. 777; *Rosenfield v. Chada*, 12 Neb. 25, 10 N. W. 465; *Miner v. Wallace*, 10 Ohio 403; *Haynes v. Baker*, 5 Ohio St. 253. But see *Davis v. McKinney*, 5 Ala. 719.

27. **Attachment of**, see 3 STANDARD PROC. 289.

**Garnishment of trustees**, see 10 STANDARD PROC. 458.

28. *Pope's Heirs v. Boyd's Admx.*, 22 Ark. 535.

29. **U. S.**—*King v. Tusculumbia*, etc. R. Co., 14 Fed. Cas. No. 7,808, overruling *Williams v. Jones*, 2 Ala. 314, 318. **Ark.**—*Pope v. Boyd*, 22 Ark. 535; *Pettit v. Johnson*, 15 Ark. 55; *Biscoe v. Royston*, 18 Ark. 508. **Mass.**—*Johnson v. Whiton*, 118 Mass. 340. **Miss.**—*Carpenter v. Bowen*, 42 Miss. 28; *McIntyre v. Agricultural Bank*, Freeman Ch. 105. **N. C.**—*Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612; *McKeithan & Sons v. Walker*, 66 N. C. 95; *Sprinkle v. Martin*, 66 N. C. 55; *Harrison v. Battle*, 16 N. C. 537; *Mordecai v. Parker*, 14 N. C. 425; *Brown v. Graves*, 11 N. C. 342. **Tenn.**—*Lipe v. Mitchell*, 2 Yerg. 400. **Va.**—*Clayton v. Anthony*, 6 Rand. 285.

[a] But see *Pool v. Glover*, 24 N. C. 129, holding that where a debtor has made a conveyance of his land to a trustee to be sold for the benefit of his creditors at a certain time, if the debts are not previously paid, and there is a resulting trust to himself, his equitable interest in the land may be sold under an execution, even before the day, when, by the terms of the deed, the trustee was authorized to sell his legal interest.

[b] In Alabama execution creditor has the right to pay off the debts secured by the trust and thus to be placed in the situation of, or substituted to the rights secured to, the beneficiaries under it. And in such event, the trustee would be compelled

the deed of trust leaves an interest in the property in the grantor, this interest has been held subject to an execution against him.<sup>30</sup>

(B.) INTEREST OF TRUSTEE. — The dry naked legal title held by a trustee cannot be sold under an execution against him,<sup>31</sup> as an interest in

to execute the trust for him in the same manner, thus tacking as it were, his execution debt to the trust deed. *O'Neal v. Wilson*, 21 Ala. 288.

[c] Where mortgaged property is foreclosed and the mortgagor on redeeming has the purchaser at the foreclosure sale convey the property to a trustee for the use and benefit of the wife of the redeeming mortgagor, the latter has no interest in the property subject to an execution at law, his interest can only be reached by a proceeding in equity. *Wilson v. Beard*, 19 Ala. 629.

[d] Interest of grantor in deed of trust not analogous to the interest of a mortgagor and is not subject to execution at law. *McIntyre v. Agricultural Bank, Freeman Ch. (Miss.)* 105.

30. Cal.—*Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Kennedy v. Nunan*, 52 Cal. 326. Minn.—*Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741. Tex.—*Wright v. Henderson*, 12 Tex. 43.

[a] *Warner v. Rice*, 66 Md. 436, 8 Atl. 84, where the grantor conveyed his property in trust for the use and benefit of himself and his immediate family, free from liability for any of his debts; and when if so by the trustee found requisite, by him deemed proper, to apply the uses, rents, income and profits to the support and maintenance of the grantor, and his said family during the grantor's life; and after his decease to go as he by last will directed. The court held this property liable to levy in satisfaction of the debts of the grantor, saying: "It is wholly against the policy of the law to allow property, whether legal or equitable, to be fettered by restraints upon alienation, and generally whenever property is subject to alienation by the owner it is subject to his debts."

31. Ga.—*Hurst v. De Kalb County*, 110 Ga. 33, 35 S. E. 294. Ill.—*Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600. Ind.—*Hollingsworth v. Trueblood*, 59 Ind. 542; *Elliott v. Armstrong*, 2 Blackf. 198. Kan.—*Harrison v. An-*

*draws*, 18 Kan. 535. Ky.—*Booker v. Carlile*, 14 Bush 154. Md.—*Cooke v. Brice*, 20 Md. 397. Me.—*Eastman v. Fletcher*, 45 Me. 302, one having actual notice of trust acquires no rights against beneficiary. Md.—*Houston v. Nowland*, 7 Gill & J. 480. Miss.—*Hancock v. Titus*, 39 Miss. 224. Mo.—*Morrison v. Herrington*, 120 Mo. 665, 25 S. W. 568. Mont.—*Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. 210; *Chumaseo v. Vial*, 3 Mont. 376. N. H.—*Cutting v. Pike*, 21 N. H. 347. N. J.—*Campfield v. Johnson*, 5 N. J. Eq. 245. N. Y.—*Sieman v. Schurek*, 29 N. Y. 598, *affirming* 33 Barb. 9; *Lounsbury v. Purdy*, 11 Barb. 490; *Mallory v. Clark*, 9 Abb. Pr. (N. Y.) 358. S. C.—*Giles v. Pratt, Dudley* 54. Tex.—*Hawkins v. Willard* (Tex. Civ. App.), 38 S. W. 365. Vt.—*Hart v. Farmers', etc. Bank*, 33 Vt. 252.

[a] If two persons receive a sum of money belonging to a minor and invest the same in land, taking title to themselves, they have no beneficial interest in the property, but hold it as trustees for the minor, and it is not subject to an execution against such persons as principal and surety on a bond, notwithstanding at the time of the execution of the bond the trustees were the apparent owners of the land. *Hurst v. Commissioners of De Kalb County*, 110 Ga. 33, 35 S. E. 294.

[b] The lien of a judgment attaches not to the naked legal title, but to the judgment debtor's interest in the land. If he has no interest then no lien attaches. *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740; *Harrison & Willis v. Andrews*, 18 Kan. 535.

[c] Property purchased by a trustee with trust funds will not be liable to a judgment against him, merely because he took the title in his own name, if he always treated it as trust property. *Hancock v. Titus*, 39 Miss. 224.

[d] A and B entered into a contract of purchase. After paying for the land to prevent it from being attached, instead of a deed, A took a written contract to convey and remained in possession. It was held that

property which is not a beneficial one is not proper subject-matter for the levy of an execution.<sup>32</sup> But if the trustee have a beneficial interest in the property a sale of that interest is proper.<sup>33</sup>

(C.) INTEREST OF BENEFICIARY OR CESTUI QUE TRUST.—The interest of the cestui que trust or beneficiary being an equitable one, would not, in the absence of statute and by the principles of the common law, be subject to execution,<sup>34</sup> though irrespective of statutory provision some courts hold such an interest subject to execution.<sup>35</sup> By the tenth section of the English statute of frauds trust estates were made liable to execution for the debts of the cestui que trust,<sup>36</sup> but this statute did not extend to the provinces.<sup>37</sup> The English courts construing this

in equity A was the owner and the land was not subject to an execution against B. *Cutting v. Pike*, 21 N. H. 347.

[e] A legacy to one in trust for another cannot be subjected to an execution against the trustee as an individual. *Jasper v. Howard*, 12 Ala. 652.

[f] Though Trustee Is in Possession.—*Cooke v. Brice*, 20 Md. 397.

[g] Leasehold estates held in trust for the benefit of another cannot be sold on execution against the trustee. *Hollingsworth v. Trueblood*, 59 Ind. 542. Leasehold estates generally, see II, B, 3, c, (V), (C).

[h] Injunction To Prevent.—A judgment creditor of a trustee may be restrained from selling his interest in the trust property by execution. *Campfield v. Johnson*, 5 N. J. Eq. 245; *Hawkins v. Willard* (Tex. Civ. App.), 38 S. W. 365. See *infra*, IV, as to relief against enforcement of judgment.

In case of resulting trust, see *infra*, II, B, 3, k, (II), (D).

32. *Houston v. Nowland*, 7 Gill & J. (Md.) 480; *Morrison v. Herrington*, 120 Mo. 665, 25 S. W. 568.

[a] "It is not, however, every legal interest that is made liable to sale on a *feri facias*. The debtor must have a beneficial interest in the property." *Smith's Lessee v. McCann*, 24 How. (U. S.) 398, 16 L. ed. 714.

33. U. S.—*French v. Edwards*, 5 Sawy. 266, 9 Fed. Cas. No. 5,098. D. C. See *Nelson v. Henry*, 2 Mackey 259. Ky.—*Booker v. Carlile*, 14 Bush 154. N. J.—*Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

[a] "Where there is a devise to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the

extent of such interest, . . . which may be seized and sold under execution." *Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

34. Mass.—*Russell v. Lewis*, 2 Pick. 508. Mich.—*Gorham v. Arnold*, 22 Mich. 247; *Gorham v. Wing*, 10 Mich. 486. Miss.—*Goodwin v. Anderson*, 5 Smed. & M. 730. N. J.—*Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644. Tenn.—*Ross v. Young*, 5 Sneed 627. Tex.—*Wallace & Co. v. Campbell & Maxey*, 53 Tex. 229. Va.—*Johnston v. Zane*, 11 Gratt. 552.

See *supra*, II, B, 3, k, (I).

35. Conn.—*Davenport v. Lacon*, 17 Conn. 278. Del.—*Doe v. Lank*, 4 Houst. 648; *Flanagin v. Daws*, 2 Houst. 476 (not if the trust be an active one). N. H.—*Hutchins v. Heywood*, 50 N. H. 491; *Upham v. Varney*, 15 N. H. 462; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431.

See *supra*, II, B, 3, k, (I).

[a] Where Beneficiary in Possession. The interest of one in possession of personal property may be sold under execution at law, though the legal title is outstanding in a trustee. *Clarke v. Windham*, 12 Ala. 798; *Cook v. Kennerly*, 12 Ala. 42; *O'Neil v. Teague*, 8 Ala. 345; *Bank v. Wilkins*, 7 Ala. 592; *Carleton & Co. v. Banks*, 7 Ala. 32.

36. *Russell v. Lewis*, 2 Pick. (Mass.) 508; *Doe v. Greenhill*, 4 Barn. & Ald. 684, 6 E. C. L. 653, 106 Eng. Reprint 1087; *Doe v. Evans*, 3 Tyrw. 339; *King v. Ballett*, 2 Vern. 248, 23 Eng. Reprint 760; *Forth v. Duke of Norfolk*, 4 Madd. 503, 53 Eng. Reprint 791. See 29 Car. II., c. 3.

[a] In Georgia, this statute has been expressly adopted. *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405.

37. Del.—*Flanagin v. Daws*, 2 Houst. 476. Mass.—*Russell v. Lewis*, 2 Pick.



statute have held that it only applied to bare and simple trusts not of a complicated nature and where the interests of no other party were mixed up with the debtor's title.<sup>35</sup> So American courts, in those jurisdictions where this or similar statutes are in force, adopt this construction of the English courts: thus where the trustee has nothing but the naked, dry, legal title, with the whole beneficial interest in the cestui que trust the trust property may be sold on execution against the latter,<sup>39</sup> but where the cestui que trust has not the entire

508. *Mich.*—*Trask v. Green*, 9 *Mich.* 358.

38. *Presley v. Rodgers*, 24 *Miss.* 520; *Goodwin v. Anderson*, 5 *Smed. & M. (Miss.)* 730; *Harris v. Pugh*, 4 *Bing.* 335, 13 *E. C. L.* 530, 130 *Eng. Reprint* 797; *Harris v. Booker*, 4 *Bing.* 96, 130 *Eng. Reprint* 705; *Hall v. Greenhill*, 4 *Barn. & Ald.* 684, 6 *E. C. L.* 656, 106 *Eng. Reprint* 1087.

[a] "It has uniformly been held not to apply where the lands in which the debtor had an equitable interest were encumbered with other unexecuted trusts." *Lynch v. Utica Ins. Co.*, 18 *Wend. (N. Y.)* 236.

[b] "The object of the statute, in the language of the late chief justice of England, was merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested, for the benefit of the debtor only." *Kellogg v. Wood*, 4 *Paige (N. Y.)* 578.

39. *Ga.*—*Rountree v. Williams*, 99 *Ga.* 222, 25 *S. E.* 323; *Pitts v. McWhorter*, 3 *Ga.* 5, 46 *Am. Dec.* 405. *Ind.*—*State Bank v. Macy*, 4 *Ind.* 362. And see *Zimmerman v. Makepeace*, 152 *Ind.* 199, 52 *N. E.* 992. *Ky.*—*Blanchard v. Taylor*, 7 *B. Mon.* 645; *Johnson v. Barnes*, 8 *Ky. L. Rep.* 956, 4 *S. W.* 176. *Mass.*—*Peterson v. Farnum*, 121 *Mass.* 476. *Miss.*—*Presley v. Rodgers*, 24 *Miss.* 520; *Hopkins v. Carey*, 23 *Miss.* 54; *Wolfe v. Dowell*, 13 *Smed. & M.* 103, 51 *Am. Dec.* 147; *Boarman v. Catlett*, 13 *Smed. & M.* 149; *Goodwin v. Anderson*, 5 *Smed. & M.* 730. *N. Y.*—*Lynch v. Utica Ins. Co.*, 18 *Wend.* 236; *Jackson v. Bateman*, 2 *Wend.* 570; *Kellogg v. Wood*, 4 *Paige* 578; *Ontario Bank v. Root*, 3 *Paige* 478; *Bogart v. Perry*, 1 *Johns. Ch. (N. Y.)* 52. *N. C.*—*Williams v. Council*, 49 *N. C.* 206; *Battle v. Petway*, 27 *N. C.* 576, 44 *Am. Dec.* 59. *S. C.*—*Rice v. Burnett*, *Speers Eq.* 579, 42 *Am. Dec.* 336. *Tenn.*—*Henderson v. Hill*, 9 *Lea* 25; *Russell v. Stinson*, 3 *Hayw.* 1.

[a] Lands conveyed to a trustee to be sold and the proceeds accounted for are subject to sale upon execution on a judgment against the cestui que trust. *State Bank v. Macy*, 4 *Ind.* 362.

[b] Property or funds cannot be vested in trustees for the use of another without subjecting them to the debts of the cestui que trust. *Samuel v. Salter*, 3 *Metc. (Ky.)* 259.

[c] The Statute of Uses (1) rendering lands liable to execution against the cestui que trust, applies only to those fraudulent and covinous trusts, in which the cestui que trust has the whole real beneficial interest in the land, and the trustee the mere naked, and formal legal title. *Bogart v. Perry*, 1 *Johns. Ch. (N. Y.)* 52. (2) It is not applicable to a case where one person enters into a contract for the sale and conveyance of land to another, and the vendee pays part of the consideration and enters into possession of the land, but neglects to pay the residue of the purchase money; for the vendor is not seized to the use of the vendee until the whole consideration is paid, and until then the vendee has a mere equitable interest which cannot be sold on execution. *Bogart v. Perry*, 17 *Johns. (N. Y.)* 351, 8 *Am. Dec.* 411.

[d] The North Carolina statute authorizing the sale of trust estates by execution only relates to trusts which would be enforced between the cestui que trust and trustee, an honest trust, and not one affected with fraud, in respect to which the court would not act at the instance of either party. *Page v. Goodman*, 43 *N. C.* 16.

[e] Under a devise in trust to permit the cestui que trust to occupy land and receive the income thereof, the trustees not being required to do any act, or exercise any control over the land, or the income, the property may be sold on execution against the cestui

beneficial interest, the trust being complicated,<sup>40</sup> or an active trust is created,<sup>41</sup> even though the cestui que trust be in possession,<sup>42</sup> the rule is otherwise. If the interest of the cestui que trust in such case can be reached at all it must be in a court of equity.<sup>43</sup> Though chattel interests held in trust were not within the purview of the English statute,<sup>44</sup> some American courts have applied the same principles to such trust interests.<sup>45</sup> A fund or property given to trustees for the

que trust. *Upham v. Varney*, 15 N. H. 462.

40. **U. S.**—*Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. ed. 721 (law of Illinois); *Brooks v. Raynolds*, 59 Fed. 923, 8 C. C. A. 370. **Ga.**—*Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405. **Mo.**—*McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295. **N. Y.**—*Lynch v. Utica Ins. Co.*, 18 Wend. 236; *Bogart v. Perry*, 17 Johns. 351, 8 Am. Dec. 411; *Bogart v. Perry*, 1 Johns. Ch. 52; *Ontario Bank v. Root*, 3 Paige 478. **N. C.**—*Love v. Smathers*, 82 N. C. 369; *Tally v. Reed*, 72 N. C. 336; *Melton v. Davidson*, 41 N. C. 194; *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59; *Gillis v. McKay*, 15 N. C. 172; *Hawkins v. Sneed*, 10 N. C. 149. **Pa.**—*Ashurst v. Given*, 5 Watts & S. 323. **S. C.**—*Bristow v. McCall*, 16 S. C. 545; *White v. Kavanagh*, 8 Rich. L. 377; *Rice v. Burnett*, Speers Eq. 579, 42 Am. Dec. 336. **Tenn.**—*Shute v. Harder*, 1 Yerg. 3, 24 Am. Dec. 427. **Va.**—*Coutts v. Walker*, 2 Leigh 268.

[a] When the cestui que trust has no seizin or possession of land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law and equity subject to an execution. *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295.

[b] **Remainder Over of Beneficial Interest.**—Where a trust is divided by giving a particular estate to A, with the remainder or reversion to B, the trust-estate of A cannot be sold by execution. *Williams v. Council*, 49 N. C. 206; *Freeman v. Perry*, 17 N. C. 243.

[c] "While a pure simple trust could be sold under execution, yet a mixed trust could not be. For if the purchaser of a mixed trust sued the trustee for the legal title, the land itself, the trustee could defend by saying, I am obliged to hold the legal

title in order to perform another trust." *Tally v. Reed*, 72 N. C. 336.

41. **Miss.**—*Presley v. Rodgers*, 24 Miss. 520. **N. C.**—*Rouse v. Rouse*, 167 N. C. 208, 83 S. E. 305; *Lummus v. Davidson*, 160 N. C. 484, 76 S. E. 474; *McGee v. Hussey*, 27 N. C. 255; *Davis v. Garrett*, 25 N. C. 459; *Den v. Rich*, 23 N. C. 553; *Freeman v. Perry*, 17 N. C. 243; *Harrison v. Battle*, 16 N. C. 537; *Gillis v. McKay*, 15 N. C. 172. **Pa.**—*Still v. Spear*, 3 Grant's Cas. 306.

[a] Where the legal title is devised to trustees for the support of a beneficiary until in their judgment the beneficiary is competent to hold the property when they may transfer it to him, the trust property is not liable to an execution against the beneficiary. *Meek v. Briggs*, 87 Iowa 610, 54 N. W. 456, 43 Am. St. Rep. 410.

42. *White v. Kavanagh*, 8 Rich. L. (S. C.) 377.

43. **Miss.**—*Presley v. Rodgers*, 24 Miss. 520; *Goodwin v. Anderson*, 5 Smed. & M. 730. **Tex.**—*Gamble v. Dabney*, 20 Tex. 69. **Va.**—*Coutts v. Walker*, 2 Leigh 268.

[a] The remedy of the creditor is in equity, but on a different principle, and that is, the right in equity to follow the funds of the debtor. *Den v. Rich*, 23 N. C. 553.

[b] **Active trust** cannot be subjected in equity. *Hooberry v. Harding*, 3 Tenn. Ch. 677.

44. *Rice v. Burnett*, Speers Eq. (S. C.) 579, 42 Am. Dec. 336; *Scott v. Scholey*, 8 East 467, 103 Eng. Reprint 423.

[a] **Trust of a term of years** not included. *King v. Ballett*, 2 Vern. 248, 23 Eng. Reprint 760.

45. *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405.

[a] Where the legal title of certain slaves is given to trustees for the use of the wife during her life with remainder to certain persons the trust is not a naked legal title in the trustee in which the sole beneficial interest is

benefit of one during his life cannot be subjected to the payment of the latter's debts,<sup>46</sup> even though the cestui que trust go into possession.<sup>47</sup> However, it is held that as a rule equitable estates cannot be effectually created with a proviso that they shall not be liable to the debts of the cestui que trust, except in the case of trusts created for the protection and benefit of married women.<sup>48</sup>

in the debtor, but is a trust in which the rights and interests of others are mixed up with the debtor's title and it is not subject to execution against the wife. *Presley v. Rodgers*, 24 Miss. 520.

[b] To same effect, *Gamble v. Dabney*, 20 Tex. 69.

[c] A conveyance of slaves to a trustee "to be kept, hired out, or otherwise disposed of," for the maintenance of C does not render the property liable to execution against C. The legal estate is not to be transferred or divested out of the trustee by an execution, unless that can be done without affecting any rightful purpose for which that was created or exists. *McGee v. Hussey*, 27 N. C. 255.

[d] The equity of a debtor in shares of stock may be levied on under execution, though such shares stood on the books of the corporation in the name of another. *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522; *Foster v. Potter*, 37 Mo. 525; *Appleman v. American Sporting Goods Co.*, 64 Mo. App. 71.

[e] In Kentucky, by statute where slaves were conveyed to trustees for the maintenance of a person during his life, the interest of the cestui que trust could be sold on execution. *Eastland v. Jordan*, 3 Bibb (Ky.) 186. See also *Strode v. Churchill*, 2 Litt. (Ky.) 75.

46. N. Y.—*Bogert v. Perry*, 17 Johns. 351, 8 Am. Dec. 411. N. J. See *Linn v. Davis*, 58 N. J. L. 29, 32 Atl. 129. N. C.—*Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612. Pa. *Ashurst v. Given*, 5 Watts & S. 323. S. C.—*Bristow v. McCall*, 16 S. C. 545. Tex.—*Gamble v. Dabney*, 20 Tex. 69.

[a] Property devised to trustees for the support of a person and his family during his life but giving him no estate or interest in his individual right cannot be taken on execution against him. *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992.

[b] Under a devise to the mother of use and income of property for life,

to be used for support of mother and son, the interest of the mother is not subject to execution. *Macomber v. Bank of Batavia*, 12 Hun (N. Y.) 294.

[c] Slaves conveyed to trustees in trust, out of the rents, issues and profits to maintain and support the grantor's daughter and her children during her life, remainder over to her children, is not subject to execution on judgment against her. *Gamble v. Dabney*, 20 Tex. 69.

[d] Where a trust gives the grantor and his wife a bare maintenance, for his life, and provides that the property shall not be subject to his debts thereafter contracted, the grantor has no interest which can be sold on execution to satisfy such after contracted debts. *Johnston v. Zane's Trustees*, 11 Gratt. (52 Va.) 552.

[e] *Contra*, where no provision against alienation and liability for debts. *Girard L. Ins., etc. Co. v. Chambers*, 46 Pa. 485, 86 Am. Dec. 513.

[f] Surplus.—"It would seem from the authorities upon this point that the surplus of such fund, above the amount necessary for the support of cestui que trust, may be reached by bill in equity, but not otherwise." *Hexter v. Clifford*, 5 Colo. 168; *Locke v. Mabbett*, 41 N. Y. 457, 3 Abb. Dec. 68; *Campbell v. Foster*, 35 N. Y. 361; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236.

47. *Bristow v. McCall*, 16 S. C. 545.

48. *Anderson v. Briscoe*, 12 Bush (Ky.) 344; *Warner v. Rice*, 66 Md. 436, 8 Atl. 84.

[a] A deed containing a clause, "Subject to his management and control, but not subject to any execution or executions, debts or liabilities in any manner whatever," does not prevent the estate of the life tenant from levy and sale under execution. *Franklin v. Blackshear Mfg. Co. (Ga.)*, 86 S. E. 536.

[b] "Though such be the general rule upon the subject, property may be so devised or conveyed for the special



(D.) **RESULTING TRUST.** — If an estate be purchased in the name of one person, and the price paid with money belonging to another, it will be subject to a trust for him by whom the money was advanced. Such resulting trust is liable to sale under execution against the beneficiary,<sup>49</sup> though a few courts hold to the contrary.<sup>50</sup> The property cannot be sold on execution against the trustee or the one in whom legal title is.<sup>51</sup>

(III.) **Where Legal and Equitable Estates Intermingled.** — When legal and equitable estates are intermingled the estates cannot be reached by an execution.<sup>52</sup>

1. *Life Estates.* — (I.) **In Real Property.** — (A.) **IN GENERAL.** — A life estate in lands is such an estate as to be subject to levy under an execution;<sup>53</sup> even, it has been held, though the instrument creating the estate

benefit of a party that it cannot be alienated by him and creditors and assignees in bankruptcy cannot seize and appropriate it to the payment of debts.<sup>77</sup> *Warner v. Rice*, 66 Md. 436, 8 Atl. 84.

[c] By the use of no terms or art can property be given to a man, or to another for him, so that he may continue to enjoy it, or derive any benefit from it, as the interest, or his maintenance thereout, and at the same time defy his creditors and deny them satisfaction. The only manner in which creditors can be excluded, is to exclude the debtor also from the benefit from, or interest in, the property, by such a limitation, upon the contingency of his bankruptcy or insolvency, as will determine his interest, and make it go to some other person. *Mebane v. Mebane*, 39 N. C. 131, 44 Am. Dec. 102.

See the title "**Fraudulent Conveyances.**"

49. *Colo.*—*Hexter v. Clifford*, 5 Colo. 168 (under statutory proceedings). *Ind.* *Tevis v. Doe*, 3 Ind. 129. *Mass.*—*Peterson v. Farnum*, 121 Mass. 476. *N. Y.* *Guthrie v. Gardner*, 19 Wend. 414; *Jackson v. Bateman*, 2 Wend. 570; *Jackson v. Walker*, 4 Wend. 462; *Foote v. Colvin*, 3 Johns. 216, 3 Am. Dec. 478. *Tenn.*—*Thomas v. Walker*, 6 Humph. 93; *Smitheal v. Gray*, 1 Humph. 491, 34 Am. Dec. 664; *Butler v. Rutledge*, 2 Coldw. (Tenn.) 4.

**Resulting trust fraudulently made**, see *infra*, II, B, 3, o.

50. *Trask v. Green*, 9 Mich. 358; *Mayer Bros. v. Wilkins*, 37 Fla. 244, 19 So. 632; *Robinson v. Springfield Co.*, 21 Fla. 203.

**May Be Reached in Equity.**—*Gray v.*

*Chase*, 57 Me. 558; *Low v. Marco*, 53 Me. 45.

**In New York** can only be reached in equity. *Garfield v. Hatmaker*, 15 N. Y. 475; *Donovan v. Sheridan*, 37 N. Y. Super. Ct. 256.

Under a *feri facias* a resulting trust cannot be sold. *White v. Kavanagh*, 8 Rich. L. (S. C.) 377.

51. *Anderson & Thompson v. Bidle*, 10 Mo. 23; *Baker v. Hardin*, 10 Heisk. 300; *Sandford v. Weeden*, 2 Heisk. 71. See *supra*, II, B, 3, k, (II), (B).

**Injunction** may be had to prevent such a sale. *Anderson & Thompson v. Biddle*, 10 Mo. 23. See *infra*, IV.

But if the trust was not disclosed, a bona fide purchaser at a sale under an execution against the trustee holding the legal title, would obtain a good title. *Emmons v. Moore*, 85 Ill. 304.

52. **A lease with the option to purchase** and providing that if the option is not exercised the lessee shall be paid one-half of the valuation of the improvements placed on the land, does not give the lessee such an interest in the leased premises as can be subjected to sale under an execution at law. This contemporaneous intermixture and mingling of legal and equitable interests creates an amalgam that can only be properly disposed of and sold under a decree in equity. *Thalheimer Bros. v. Tischler*, 55 Fla. 796, 46 So. 514, 131 Am. St. Rep. 179, 17 L. R. A. (N. S.) 841.

53. *Ala.*—*Montgomery Branch Bank v. Wilkins*, 7 Ala. 589; *Harkins v. Coalter*, 2 Port. 463; *Mendenhall v. Randon*, 3 Stew. & P. 251. *Conn.*—*Hitchcock v. Hotchkiss*, 1 Conn. 470. *Ga.*

provides that it shall not be subject to the payment of the life-tenant's debts.<sup>54</sup> But a provision that the tenant shall not have the power of alienating the estate renders it immune from execution.<sup>55</sup>

(B.) CURTESY. — The estate of the husband during the life of the wife, known as tenancy by the curtesy initiate, is held subject to levy under execution,<sup>56</sup> and a fortiori the life estate of the husband after the death of the wife, or tenancy by the curtesy consummate, is subject to levy.<sup>57</sup> Statutory provisions in several states have prevented the subjecting of any estate by curtesy to execution before the death of the wife.<sup>58</sup> The property taken by the husband by virtue of his right

Franklin v. Blackshear Mfg. Co., 144 Ga. 208, 86 S. E. 536; North Georgia Fertilizer Co. v. Leming, 138 Ga. 775, 76 S. E. 95; Hatcher v. Smith, 103 Ga. 843, 31 S. E. 447; Bozeman v. Bishop, 94 Ga. 459, 20 S. E. 11. Ill.—Henderson v. Harness, 176 Ill. 302, 52 N. E. 68; Newman v. Willetts, 52 Ill. 98. Ind.—Thompson v. Murphy, 10 Ind. App. 464, 37 N. E. 1094. Ky.—Boyce v. Waller, 2 B. Mon. 91. Me.—McKeen v. Gammon, 33 Me. 187. N. H. McClure v. Melendy, 44 N. H. 469. Pa. Du Four v. Bubb, 199 Pa. 107, 48 Atl. 900; Henry v. McClellan, 146 Pa. 34, 23 Atl. 385; Reigart v. Small, 2 Pa. 487; Parget v. Stambaugh, 2 Pa. 485; Near v. Watts, 8 Watts 319; Moyer v. Casper, 7 Pa. Dist. 720.

As to execution against real property, generally, see *supra*, II, B, 3, c.

[a] Where the life-tenant's interest was contingent upon, and subject to be diminished by after-born children whose rights would be the same as those in life when the levy was made the life estate was held too indefinite to be subject to levy under execution. Hatcher v. Smith 103 Ga. 843, 31 S. E. 447.

[b] In Illinois except by the intervention of trustees an estate cannot be devised for the benefit of the legatee in such a manner that it cannot be seized for the debts of one having a life estate therein. Henderson v. Harness, 176 Ill. 302, 52 N. E. 68.

54. Where the right of possession and control of the property is given directly to the life-tenant, no trust being created, a provision in the devise creating such estate that the same shall not be subject to payment of the life-tenant's debts does not prevent the estate from being subjected to execution. Thompson v. Murphy, 10 Ind. App. 464, 37 N. E. 1094.

55. Emerson v. Marks, 24 Ill. App. 642. See also Bunch v. Hardy, 3 Lea (Tenn.) 543.

56. D. C.—National Metropolitan Bank v. Hitz, 1 Mackey 111. Ill. Shortall v. Hinckley, 31 Ill. 219. Md. See Rice v. Hoffman, 35 Md. 344. Mass. Mechanics' Bank v. Williams, 17 Pick. 438. Miss.—Day v. Cochran, 24 Miss. 261. N. Y.—Schermerhorn v. Miller, 2 Cow. 439; *In re* Winne, 1 Lans. 508, 514; Sleight v. Reed, 18 Barb. 159; Ellsworth v. Cook, 8 Paige 643; Van Duzer v. Van Duzer, 6 Paige 366. Ohio. Canby's Lessee v. Porter, 12 Ohio 79. Vt.—Mattocks v. Stearns, 9 Vt. 326.

[a] Where an estate by the curtesy initiate vested in the husband before the passage of an act exempting the property of the wife from liability for the debts of the husband, such estate is liable for the husband's debts, whether the credit was given before or after the passage of the act. National Metropolitan Bank v. Hitz, 1 Mackey (D. C.) 111.

Attachment of, see 3 STANDARD PROC. 207.

57. Ark.—Stanley v. Bonham, 52 Ark. 354, 12 S. W. 706. Mass.—Litchfield v. Cudworth, 15 Pick. 23. N. Y. See *In re* Winne, 1 Lans. 508, 514. N. C.—McCaskill v. McCormac, 99 N. C. 548, 6 S. E. 423. Va.—Campbell v. McBee, 92 Va. 68, 22 S. E. 807.

[a] A statute providing that no interest of the husband in the wife's realty shall be subject to execution does not prevent the interest of a tenant by the curtesy consummate from being taken on execution. McCaskill v. McCormac, 99 N. C. 548, 6 S. E. 423.

58. Md.—Rice v. Hoffman, 35 Md. 344; Schindel v. Schindel, 12 Md. 294, 299; Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708. Mo.—Ball v. Wool-

to curtesy is not subject to an execution in favor of the creditors of the widow.<sup>59</sup>

(C.) DOWER. — A mere right of dower before assignment thereof is not such property as to be subject to levy under execution,<sup>60</sup> though a statute may change this rule.<sup>61</sup> After dower is assigned, however, it becomes subject to execution.<sup>62</sup> If the dower be but an equitable interest it cannot be reached by an execution at law against the widow.<sup>63</sup> The widow's dower estate cannot be subjected to execution in satisfaction of the debts of the deceased husband.<sup>64</sup>

(II.) In Chattels. — An estate for life in a chattel is subject to sale under execution.<sup>65</sup>

folk, 175 Mo. 278, 75 S. W. 410; *White v. Dorris*, 35 Mo. 181. N. C.—*Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; *McCaskill v. McCormac*, 99 N. C. 548, 6 S. E. 423. Va. *Campbell v. McBee*, 92 Va. 68, 22 S. E. 807, the court saying: "The husband has no interest, during the wife's lifetime, in the estate of the wife . . . and judgments against him cannot attach to what does not exist."

[a] But a statute exempting the separate property of the wife from liability for debts of the husband does not prevent his estate by the curtesy from being sold under execution. *Uhler v. Adams*, 1 App. Cas. (D. C.) 392.

59. *Hampton v. Cook*, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194.

60. Ark.—*Pennington's Exrs. v. Yell*, 11 Ark. 212, 52 Am. Dec. 262. Del.—*Graham v. Moore*, 5 Harr. 318. Ill.—*Newman v. Willetts*, 48 Ill. 534; *Summers v. Babb*, 13 Ill. 483; *Blain v. Harrison*, 11 Ill. 384; *Petefish v. Buck*, 56 Ill. App. 149. Ky.—*Shields' Heirs v. Batts*, 5 J. J. Marsh. 12; *Petty v. Malier*, 15 B. Mon. 591. Me.—*Nason v. Allen*, 5 Greenl. 479. Md.—See *Harper v. Clayton*, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211. Mass.—*McMahon v. Gray*, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; *Gooch v. Atkins*, 14 Mass. 378. Miss.—*Falkner v. Thurmond*, 23 So. 877; *Ligon v. Spencer*, 58 Miss. 37; *Wallis v. Doe*, 2 Smed. & M. 220; *Torrey v. Minor*, Smed. & M. Ch. 489. Mo.—*Waller v. Mardus*, 29 Mo. 25; *Stokes v. McAllister*, 2 Mo. 163. N. Y.—*Tompkins v. Fonda*, 4 Paige 448. Ore.—*Baer v. Ballingall*, 37 Ore. 416, 61 Pac. 852. Can.—*Canadian Bank v. Rolston*, 4 Ont. L. Rep. 106.

[a] This rule is not changed by a statute giving a married woman one-third part for life of all the lands of which her husband died seized and allows her to retain possession of the plantation, dwelling house, etc., of the deceased husband, until her dower is assigned. *Ligon v. Spencer*, 58 Miss. 37.

Attachment of, see 3 STANDARD PROC. 307.

61. Statute subjecting any interest in any claim or chose in action, due or to become due to execution, includes unassigned dower interest. *Gildehaus v. Fidelity Bldg. & Sav. Co.*, 24 Ohio C. C. 110. See also *Peebles v. Bunting*, 103 Iowa 489, 73 N. W. 882.

[a] Though the statute permit a voluntary transfer by the widow of her unassigned right this does not authorize an involuntary assignment under execution. *Young v. Thrasher*, 61 Mo. App. 413.

62. *Petefish v. Buck*, 56 Ill. App. 149.

[a] "The estate in dower is therefore simply a life estate, and subject to be dealt with as any other life estate. The interest of the life-tenant, or dowress, is subject to levy and sale at the instance of her creditors." *Pitts v. Hendrix*, 6 Ga. 452. See also *Rusk v. Hill*, 121 Ga. 378, 49 S. E. 261.

63. As where the husband at the time of his death has an equitable title only to the land. *Garretson v. Brien*, 3 Heisk. (Tenn.) 534.

64. *Combs v. Young*, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

65. Estate for life in a slave. *Sale v. Saunders*, 24 Miss. 24, 57 Am. Dec. 157; *De Miller v. McAlliley*, 2 McMull (S. C.) 499.



m. *Future Estates*.—(I.) *In Real Property*.—(A.) *GENERALLY*.—A bare possibility or expectation,<sup>66</sup> such as that of an heir apparent,<sup>67</sup> cannot be sold under execution, neither may a purely contingent interest,<sup>68</sup> unless the statute permits it.<sup>69</sup> Yet any estate in real property, if there be a real interest in the execution defendant, may be taken on execution even though the possession and enjoyment of that estate be postponed.<sup>70</sup>

(B.) *REMAINDERS*.—(1.) *Vested Remainder*.—A vested remainder is subject to execution against the remainderman,<sup>71</sup> and the interests of

66. *Brown v. Gale*, 5 N. H. 416.

[a] *Conditional limitation not liable to be sold on execution*. *Watson v. Dodd*, 68 N. C. 528.

67. *Brown v. Gale*, 5 N. H. 416.

68. *Watson v. Dodd*, 68 N. C. 528.

*Contingent executory devise*, see *infra*, II, B, 3, n, (I), (D).

*Contingent remainder*, see *infra*, II, B, 3, m, (1), (B), (2).

69. See *Holland v. Cruft*, 3 Gray (Mass.) 162 (estate tail); *Cohalan v. Parker*, 138 App. Div. 847, 123 N. Y. Supp. 343 (expectant estate is subject).

[a] But a remainder in tail is not subject to execution against remainder man under statute making estates tail "subject to the payment of the debts of the tenant in tail, in the same manner as other real estates." *Holland v. Cruft*, 3 Gray (Mass.) 162.

70. *Drake v. Brown*, 68 Pa. 223; *Rickert v. Madeira*, 1 Rawle (Pa.) 325; *Hurst v. Lithgrow*, 2 Yeates (Pa.) 24, 1 Am. Dec. 326; *Roe v. Humphreys*, 1 Yeates (Pa.) 427. See *Patterson v. Caldwell*, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598, where it is said: "That which has a present and certain existence although its possession and enjoyment may be postponed for a time, may be seized, but not expectancies or contingent interests."

*Attachment of*, see 3 STANDARD PROC. 360.

71. *U. S.*—*Humphreys v. Humphreys*, 2 Dall. 223, 1 L. ed. 357. *Cal.* *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. *Ga.*—*Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196; *Lufburrow v. Koch*, 75 Ga. 448; *Wilkinson & Wilson v. Chew*, 54 Ga. 602. *Ill.*—*Deadman v. Yantis*, 230 Ill. 243, 82 N. E. 592, 120 Am. St. Rep. 291; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504. *Ky.*—*Pedigo's Exrs. v. Botts*, 28 Ky. L. Rep. 196, 89

S. W. 164; *Roach v. Dance*, 26 Ky. L. Rep. 157, 80 S. W. 1097; *Ernst's Exrs. v. Northern Bank*, 20 Ky. L. Rep. 1334, 49 S. W. 333. *Md.*—*Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990. *Mass.* *Atkins v. Bean*, 14 Mass. 404; *Williams v. Amory*, 14 Mass. 20; *Penniman v. Hollis*, 13 Mass. 429. *Mo.*—*Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58; *White v. McPheeters*, 75 Mo. 286. *N. H.* *Brown v. Gale*, 5 N. H. 416. *N. J.* *Den ex dem. Rickey v. Hillman*, 7 N. J. L. 180. *N. Y.*—*Sheridan v. House*, 4 Abb. Dec. 218. See also *Moore v. Littel*, 41 N. Y. 66. *N. C.*—*Stern v. Lee*, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814; *Ellwood v. Plummer*, 78 N. C. 392. *Ohio*.—See *National Bank of Columbus v. Tennessee Coal, Iron & Railroad Co.*, 62 Ohio St. 564, 57 N. E. 450, holding all vested interests subject to execution. *S. C.*—*Walker v. Alverson*, 87 S. C. 55, 68 S. E. 966; *Bonham v. Bishop*, 23 S. C. 96; *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611. *Tenn.*—*Brett v. Williamson*, 12 Lea 659; *Wiley v. Bridgeman*, 1 Head 68; *Davis v. Goforth*, 1 Lea 31; *Puryear v. Edmondson*, 4 Heisk. 43; *Lockwood v. Nye*, 2 Swan 515, 58 Am. Dec. 73; *Kissom v. Nelson*, 2 Heisk. 4; *Kelly v. Morgan*, 3 Yerg. 437. *Tex.* *Caples v. Ward*, 179 S. W. 856. *Va.* *Roanes v. Archer*, 4 Leigh (31 Va.) 550.

[a] *Interest of remainderman encumbered by a homestead right* may be sold on execution subject to the homestead right. *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394.

[b] *Although liable to be defeated by a subsequent event*, a vested remainder is a legal estate, assignable and subject to sale on execution. *Sheridan v. House*, 4 Abb. Dec. (N. Y.) 218.

[c] *It may be levied on and sold during the continuance of a life estate*, and while the tenant for life is in possession. *Harrison v. Maxwell*, 2

remaindermen are subject to levy even though undivided.<sup>72</sup>

(2.) *Contingent Remainder*.—The rule is that a contingent remainder is not subject to levy and sale under execution,<sup>73</sup> though under some statutes the rule is otherwise.<sup>74</sup>

(C.) REVERSIONS.—A reversionary interest in lands is subject to sale under execution.<sup>75</sup>

Nott & McC. (S. C.) 347, 10 Am. Dec. 611.

[d] **A devise of real property to executors in trust** for the benefit of the testator's son until he arrive at the age of fifty years and in case of the son's prior death to be subject to disposition by his will, is an expectant estate in remainder which may be sold under execution against the son. *Higgins v. Douns*, 101 App. Div. 119, 91 N. Y. Supp. 937.

[e] **Equitable vested remainder** created by a trust deed is subject to execution. *Dunkerson v. Goldberg*, 162 Fed. 120, 89 C. C. A. 120.

[f] **Vested remainder in tail** may be taken. *Humphreys v. Humphreys*, 2 Dall. (U. S.) 223, 1 Yeates 427, 1 L. ed. 357.

[g] **"A remainder is vested where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate. It is an immediate right of present enjoyment, or a present right of future enjoyment, a fixed interest, with only the right of possession postponed until the ending of a particular estate."** *Caples v. Ward* (Tex.), 179 S. W. 857.

**Attachment of remainders**, see 3 STANDARD PROC. 300.

72. Ill.—*Deadman v. Yantis*, 230 Ill. 243, 82 N. E. 592, 120 Am. St. Rep. 291. Ky.—*Pedigo's Exrx. v. Botts*, 28 Ky. L. Rep. 196, 89 S. W. 164. Mass.—*Atkins v. Bean*, 14 Mass. 404. Mo.—*Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58.

**Levy on joint interest**, see *supra*, II, B, 3, i.

[a] Where land is devised to O in trust for two of the testatrix's daughters during their natural life, to be equally divided, and after the death of either, in trust in part for her three grand-children, until the death of the other daughter, "at which time" said land is to be "equally divided" between the said three grand-children, of whom the defendant P was one; the

interest of P is a vested remainder and liable to sale under an execution during the term of the life-tenants. *Ellwood v. Plummer*, 78 N. C. 392.

73. Ark.—*Plumlee v. Bounds*, 118 Ark. 274, 176 S. W. 140. Ill.—*Hull v. Ensinger*, 257 Ill. 160, 100 N. E. 513; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Haward v. Peavy*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120. Ia.—*Taylor v. Taylor*, 118 Iowa 407, 92 N. W. 71. Ky.—*Mudd v. Durham*, 17 Ky. L. Rep. 1202, 33 S. W. 1116, though the statute provides that any land to which the debtor has a legal title, whether in possession, reversion or remainder, is subject to execution. N. Y.—*Jackson v. Middleton*, 52 Barb. 9. But see *Sheridan v. House*, 4 Abb. Dec. 218. N. C.—*Watson v. Dodd*, 68 N. C. 528, *affirmed*, 72 N. C. 240. Pa.—*Patterson v. Caldwell*, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598. S. C.—*Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474; *Allston v. State Bank*, 2 Hill Eq. 235. Tenn.—*Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. 107; *Henderson v. Hill*, 9 Lea 25.

[a] As a contingent remainder could not, before the happening of the contingency, be conveyed, it is not subject to execution. *Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. 107.

[b] Not subject to attachment, see *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642. And 3 STANDARD PROC. 216.

74. *White v. McPheeters*, 75 Mo. 286, 292 (under a statute providing that all real estate of a defendant whereof he is seized either in law or equity shall be subject to seizure and sale under execution); *Cohalan v. Parker*, 138 App. Div. 849, 123 N. Y. Supp. 343, the statute providing that an expectant estate is descendible, devisible and alienable in the same manner as an estate in possession. See also *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

75. Ga.—*Rusk v. Hill*, 121 Ga. 378,

(D.) EXECUTORY DEVISE. — An executory devise is subject to execution,<sup>76</sup> though the contrary has been held where the executory devise is contingent.<sup>77</sup>

(II.) In Personal Property. — An interest in personal property must be a vested one at the time of levy to be subject to execution.<sup>78</sup> A remainder<sup>79</sup> or a reversionary interest<sup>80</sup> in chattels may be subjected to execution, unless it is purely contingent.<sup>81</sup>

n. *Estates of Deceased Persons and Interests Therein.* — (I.) For Debts of Deceased.<sup>82</sup> — At common law and in many jurisdictions only the goods and chattels of the deceased in the hands of the personal representative could be reached by execution, lands,<sup>83</sup> unless the per-

49 S. E. 261; *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196; *Wilkinson & Wilson v. Chew*, 54 Ga. 602. Mass.—*Williams v. Amory*, 14 Mass. 20; *Atkins v. Bean*, 14 Mass. 404; *Penniman v. Hollis*, 13 Mass. 429. N. Y.—*Woodgate v. Fleet*, 44 N. Y. 1, 11 Abb. Pr. (N. S.) 41. N. C.—*Murrell v. Roberts*, 33 N. C. 424, 53 Am. Dec. 419. Pa. *Roe v. Humphreys*, 1 Yeates 427. Tenn. *Wiley v. Bridgman*, 1 Head 68.

[a] In *Wilkinson & Wilson v. Chew*, 54 Ga. 602, it is said: "Upon principle as well as authority, subjection to levy and sale should rest on two questions only. Is there a vested interest and is it so definite as to be susceptible of description in terms of legal certainty?" Accordingly the reversionary interest of an heir held subject to execution.

[b] In *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13, here the reversioner died before reversion took effect in possession and it was held that his heirs took his interest subject to execution for the payment of his debts.

[c] Though the extent of the interest cannot be ascertained at the time of the sale, and the whole reversion is contingent upon the happening of events which may never occur, the reversionary interest is subject to execution. *Woodgate v. Fleet*, 44 N. Y. 1, 11 Abb. Pr. (N. S.) 41.

Attachment of reversion, see 3 STANDARD PROC. 300.

76. *De Haas v. Bunn*, 2 Pa. 335, 44 Am. Dec. 201.

Vested remainders, see *supra*, II, B, 3, m, (I), (B), (1).

77. *Watson v. Dodd*, 68 N. C. 528. *Contra, De Haas v. Bunn*, 2 Pa. 335, 44 Am. Dec. 201.

Contingent remainders, see *supra*, II, B, 3, m, (I), (B), (2).

78. *Lemmon v. Beattie*, 41 Colo. 68, 91 Pac. 1102.

79. *Burns v. Ray*, 18 B. Mon. (Ky.) 392; *Carter v. Spencer*, 29 N. C. 14; *Knight v. Leak*, 19 N. C. 133.

80. *Carter v. Spencer*, 29 N. H. 14. 81. *Dargan v. Richardson*, *Dudley* (S. C.) 62; *State Bank v. Nelson*, 3 Head (Tenn.) 634; *Lockwood v. Nye*, 2 Swan (Tenn.) 515, 58 Am. Dec. 73; *Allen v. Scurry*, 1 Yerg. (Tenn.) 36, 24 Am. Dec. 436.

[a] Live Chattel.—The remainder or reversion of a live chattel "is a pure contingency, a bare possibility, whether it will ever exist or not; on the part of the purchaser it is a perfect hazard; the thing acquired may be of some value, or it may be of no value, for the data by which this may be discovered is not given to men to know, . . . a sale would in its principle, be quite a gaming transaction, subversive of good morals, and ruinous in its consequences." *Allen v. Scurry*, 1 Yerg. (Tenn.) 36, 24 Am. Dec. 436. But see cases under preceding note holding that a remainder or reversion in slaves is not a contingent interest.

Garnishment of contingent debts and interests, see 10 STANDARD PROC. 418.

82. Attachment of, see 3 STANDARD PROC. 297.

Garnishment of executors, administrators, and estate debtors, see 10 STANDARD PROC. 460.

83. Conn.—*Flynn v. Morgan*, 55 Conn. 130, 10 Atl. 466. Ill.—*Greenwood v. Spiller*, 3 Ill. 502. Mass.—*Thayer v. Hollis*, 3 Mete. 369; *Clarke v. Tufts*, 5 Pick. 337; *Ex parte Allen*, 15 Mass. 58. Miss.—*Buckingham v. Nelson*, 42 Miss. 417; *Foster v. Sumner*, 3 Smed. & M. 606. N. Y.—*In re Hesdra*, 4 Misc. 37, 23 N. Y. Supp. 842, 846, 54 N. Y.



sonal assets be exhausted or insufficient,<sup>84</sup> or credits of the deceased,<sup>85</sup> not being subject. In other states the real property is subject to levy equally with the personality.<sup>86</sup> Where the testator directs his realty to be sold it is held that until the actual sale is made the property cannot be levied upon either as land or as personality.<sup>87</sup>

A judgment *quando acciderint* only binds the property of the defendant's testator or intestate, which is not in the hands of the representative at the time of the judgment, or has not been previously administered,<sup>88</sup> so an execution under such a judgment cannot be levied on land which has been in possession of the administrator ever since the death of the intestate.<sup>89</sup>

(II.) **Execution Against Devisee or Legatee.**—(A.) **GENERALLY.**—The interest of a devisee or legatee being the subject of transfer is subject to execution,<sup>90</sup> though it is held by some courts that until the legacy

St. 275. **Ohio.**—Gray's Lessee *v.* As-kew, 3 Ohio 466. **Tenn.**—Saunders *v.* Wilder, 2 Head 577.

As to whether execution may issue against the estate of the deceased judgment debtor and the rules governing its issuance, see *supra*, II, B, 1, h, (IV).

What property subject to execution when judgment is against personal representative as such, see *infra*, II, B, 3, r.

Real property in general, see *supra*, II, B, 3, c.

84. **Ky.**—Litsey *v.* Smith, 10 B. Mon. 74. **N. J.**—See Warwick *v.* Hunt, 11 N. J. L. 1. **N. C.**—Cardwell *v.* Brodie, 5 N. C. 97.

[a] In Indiana there is a statutory proceeding by which the real property may be reached in such event. See Pauley *v.* Langdon, 83 Ind. 353; Allen *v.* Vestal, 60 Ind. 245; Berry *v.* Bullard, 8 Blackf. 399; Brownfield *v.* Vail, 7 Blackf. 203; Williams *v.* Morehouse, 6 Blackf. 215.

[b] In Pennsylvania prior to 1834 judgment against administrator bound lands of deceased without notice to heirs. Since that time unless heirs, etc., are made parties or the judgment is revived against them by scire facias, land is not bound. Leiper *v.* Thompson, 60 Pa. 177; Payne *v.* Craft, 7 Watts & S. 458.

[c] In Tennessee where there has been a plea of fully administered by the administrator, the land of the intestate may be reached to satisfy the judgment. Brown *v.* Rocco, 9 Heisk. 187; Peck *v.* Wheaton, Mart. & Y. 353; Woolridge *v.* Page, 1 Lea 135; Henry

*v.* Mills, 1 Lea 144. This rule applies to domestic judgments only. Gilman *v.* Tilsdale, 1 Yerg. 285.

85. Greenwood *v.* Spiller, 3 Ill. 502; Hartshorne *v.* Henderson, 3 Clark (Pa.) 511.

86. **Me.**—Nowell *v.* Bragdon, 14 Me. 320. **Md.**—Beall *v.* Osbourn, 30 Md. 8. **S. C.**—Brock *v.* Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847; D'Urphay *v.* Nelson, 1 Brev. 289.

87. Clifton *v.* Owens, 70 N. C. 607, 87 S. E. 502, because of the distinction between a levy on realty and one upon personality, and also because of the peculiar and intangible nature of the property; when considered merely as converted without being actually so.

Interest of legatee where will directs conversion of property, see *infra*, II, B, 3, n, (II), (B).

88. Allen *v.* Matthews, 7 Ga. 149.

89. Smith *v.* Smith, 59 Ga. 550.

90. **Ala.**—McIntosh *v.* Walker, 17 Ala. 20. **Ga.**—Du Bose *v.* Cleghorn, 65 Ga. 302. **La.**—Brown *v.* Cougot, 8 Rob. 14. **Mass.**—Procter *v.* Newhall, 17 Mass. 81. **Mich.**—Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318. **N. J.**—Hardenburgh *v.* Blair, 30 N. J. Eq. 645. **Pa.**—Thomas *v.* Simpson, 3 Pa. 60. **W. Va.**—Park *v.* McCauley, 67 W. Va. 104, 67 S. E. 174.

[a] A legacy may be seized on execution before any settlement of the estate of the decedent. Lorenz's Admr. *v.* King, 38 Pa. 93.

[b] A creditor of one of several co-heirs attached the purparty of such co-heir immediately upon the death of the ancestor, and within thirty days from the rendition of judgment, ex-

has vested in the legatee, that is after the executor has assented to it,<sup>91</sup> or at least until all claims against the estate of a higher rank have been paid,<sup>92</sup> or pending the settlement of the estate, a legacy, whatever its character,<sup>93</sup> is not subject to execution. In some jurisdictions the undivided interest of a legatee or devisee in any one portion of the estate cannot be subjected to the levy of an execution.<sup>94</sup>

(B.) WHERE WILL DIRECTS CONVERSION OF PROPERTY. — Where the will directs that land be sold and the proceeds given to certain legatees the latter have no interest in the land which can be subjected to execution.<sup>95</sup>

(III.) Execution Against Heir. — The interest of one of several heirs before distribution is subject to levy and sale under execution,<sup>96</sup> but

tended his execution; and his title was held good against a co-heir, to whom the debtor's purparty had been regularly assigned by due proceedings in the probate court. *Procter v. Newhall*, 17 Mass. 81.

[c] **Testator's Real Property.** Where the testator does not leave sufficient personalty to satisfy legacies, and designates no realty out of which they are to be paid, the designation must be made by the court and before such designation has been made the testator's realty cannot be subjected to execution against the legatee. *Hiscock v. Fulton*, 63 Hun 624, 17 N. Y. Supp. 408, 43 N. Y. St. 738.

Execution for debts of deceased cannot be levied on property in hands of legatees of distributees after distribution. See II, B, 3, r.

91. *Suggs v. Sapp*, 20 Ga. 100. See also *Wilkinson & Wilson v. Chew*, 54 Ga. 602; *Mayo v. Merriitt*, 107 Mass. 505.

[a] **Until the time for division** among the devisees has arrived the interest of one devisee in property devised to several cannot be taken on execution. *Johnson v. Culbreath*, 19 Ala. 348.

[b] **Legacy chargeable upon real estate**, where the real estate has been devised to others, cannot be reached on execution against the legatee until after judgment of a competent court adjudicating that the legacy is chargeable upon the real estate. *Hiscock v. Fulton*, 63 Hun 624, 17 N. Y. Supp. 408, 43 N. Y. St. 738.

92. *Suggs v. Sapp*, 20 Ga. 100.

93. *Stout v. La Follette*, 64 Ind. 365; *Morrow v. Brenizer*, 2 Rawle 185. See also *Donovan v. Finn*, *Hopk. Ch.* (N. Y.) 59, 14 Am. Dec. 531.

[a] **Estate Need Not Be Fully**

**Closed.**—It is not necessary that the executor shall have fully closed up the administration, if he has assented to the legacy and the interest of the legatee in the particular property is clearly defined. *Wilkinson & Wilson v. Chew*, 54 Ga. 602.

94. To permit this would defeat, without any fault on the part of the other legatees or devisees, the right which they have to a distribution in kind. *Clarke v. Harker*, 48 Ga. 596, criticised in *Wilkinson & Wilson v. Chew*, 54 Ga. 602.

95. **Ky.**—*Cropper v. Gaar's Exr.*, 151 Ky. 376, 151 S. W. 913; *Mudd v. Durham*, 17 Ky. L. Rep. 1202, 33 S. W. 1116. **Md.**—*Paisley v. Holzshu*, 83 Md. 325, 34 Atl. 832. **N. Y.**—*Sayles v. Best*, 66 Hun 628, 20 N. Y. Supp. 951, 49 N. Y. St. 460. **Pa.**—*Roland v. Miller*, 100 Pa. 47; *Jones v. Caldwell*, 97 Pa. 42; *Evans' Appeal*, 63 Pa. 183; *Brolosky v. Gally*, 51 Pa. 509; *Stuck v. Mackey*, 4 Watts & S. 196; *Allison v. Wilson*, 13 Serg. & R. 330; *Morrow v. Brenizer*, 2 Rawle 185. **S. C.**—See *Walker v. Killian*, 62 S. C. 482, 40 S. E. 887.

*Contra*, *Brett v. Williamson*, 12 Lea (Tenn.) 659.

[a] Land devised to executors to be sold and the proceeds to be divided amongst the legatee, is not the subject of a lien or execution against the legatees, but they may elect to take the land instead of the proceeds of the sale of it, and after such election it becomes the subject of lien, and may be sold upon a judgment and execution against the legatee. *Stuck v. Mackey*, 4 Watts & S. (Pa.) 196.

96. **Ga.**—*Pitts v. Hendrix*, 6 Ga. 452. **Ill.**—*Dinsmoor v. Rowse*, 200 Ill. 555, 65 N. E. 1079; *Hardy v. Wallis*, 103 Ill. App. 141. **Kan.**—*Trowbridge v.*

the right of the heir to a specific part of the property inherited by him cannot be seized, the whole of his right in the succession must be taken.<sup>97</sup> Such sale is subject to the rights of the administrator in case the property is needed for the payment of the ancestor's debts.<sup>98</sup> In some jurisdictions the rule is that until the distributive share is set aside or admeasured execution cannot be levied thereon.<sup>99</sup>

*o. Property Fraudulently Conveyed.*—(I.) General Statement. When property has been fraudulently conveyed so that the conveyance is void as to creditors of the grantor, it may be levied on and sold under execution against the fraudulent grantor without attempting to vacate the conveyance.<sup>1</sup> This is an express statutory rule in some

Cunningham, 63 Kan. 847, 66 Pac. 1015. **La.**—Fly's Heirs *v.* Noble, 37 La. Ann. 667; Noble *v.* Nettles, 3 Rob. 152; Mayo *v.* Stroud, 12 Rob. 105. This was formerly prohibited by statute. Phillips *v.* Flint, 3 La. 146; Flower *v.* Griffith, 6 Mart. (N. S.) 89; Beon *v.* Morgan, 5 Mart. (N. S.) 701. **Mass.** Procter *v.* Newhall, 17 Mass. 81; Peabody *v.* Minot, 24 Pick. 329; Wheeler *v.* Bowen, 20 Pick. 563. **Mich.**—Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218. **Ohio.**—Douglas's Lessee *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375. **Pa.**—Thomas *v.* Simpson, 3 Pa. 60. **S. C.**—Black *v.* Steel, 1 Bailey 307.

[a] The fact that upon partition among the heirs, to which the execution purchasers are not made parties, the property sold be set off to others of the heirs than him whose interest has been so sold, cannot prejudice the rights of such purchasers. Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218.

[b] Sale at execution is subject to the right of the co-distributees to have the land sold for partition, and if a sale be made for partition before a sale under execution, the lien of the judgment is lost. Black *v.* Steel, 1 Bailey (S. C.) 307.

[c] After distribution, a fortiori, the interest of the heir is subject to execution. Du Bose *v.* Cleghorn, 65 Ga. 302.

97. Miller *v.* Jones, 29 Ala. 174 (declaring this to be the rule in Louisiana); Mayo *v.* Stroud, 12 Rob. (La.) 105.

98. **Ill.**—Hardy *v.* Wallis, 103 Ill. App. 141. **La.**—Mayo *v.* Stroud, 12 Rob. 105. **Ohio.**—Douglas's Lessee *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

99. Brightman *v.* Morgan, 111 Iowa 481, 82 N. W. 954; Penn's Admrs. *v.*

Spencer, 17 Gratt. (58 Va.) 85, 91 Am. Dec. 375.

[a] And see Hancock *v.* Titus, 39 Miss. 224, where it is held that pending distribution a judgment creditor of a distributee cannot levy his execution upon a portion of the undistributed personalty of the estate, merely because the interest of his debtor in the estate is of greater value than the property seized.

1. **U. S.**—Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305. **Ala.**—Howard *v.* Corey, 126 Ala. 283, 28 So. 682; Gilliland *v.* Tenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Reed *v.* Smith, 14 Ala. 380; High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103, 48 Ala. 555; Carville *v.* Stout, 10 Ala. 796. **Ariz.** Rountree *v.* Marshall, 6 Ariz. 413, 59 Pac. 109. **Ark.**—Hershy *v.* Latham, 42 Ark. 305. **Cal.**—Judson *v.* Lyford, 84 Cal. 505, 24 Pac. 286; Bull *v.* Ford, 66 Cal. 176, 4 Pac. 1175. **Conn.**—Price *v.* Heubler, 63 Conn. 374, 28 Atl. 524; Owen *v.* Dixon, 17 Conn. 492. **D. C.** Hayes *v.* Johnson, 6 D. C. 174. **Ga.** Gormerly *v.* Chapman, 51 Ga. 421; Feagan *v.* Cureton, 19 Ga. 404. **Ill.** Willard *v.* Masterson, 160 Ill. 443, 43 N. E. 771; Gould *v.* Steinburg, 84 Ill. 170; Dobson *v.* More, 70 Ill. App. 89. **Ind.**—Hanna *v.* Aebker, 84 Ind. 411; Stevens *v.* Works, 81 Ind. 445; Eve *v.* Louis, 91 Ind. 457. **Ia.**—McCaffrey *v.* Rickey, 48 Iowa 711. **Ky.**—Smith *v.* Scanlan, 106 Ky. 572, 51 S. W. 152; Scott's Exr. *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423; Worland *v.* Outten, 3 Dana 477; Howard *v.* Duke, 19 Ky. L. Rep. 2008, 45 S. W. 69; Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333; Snapp *v.* Orr, 4 Ky. L. Rep. 355. **La.**—Vickers *v.* Block, 31 La. Ann. 672; Mora *v.* Avery, 22 La. Ann. 417; Southern Bank *v.* Wood, 14 La. Ann. 554, 74



states.<sup>2</sup> A few courts have held that where the fraudulent conveyance was made before the rendition of the judgment under which the execution against the grantor issued,<sup>3</sup> the property is not subject to

Am. Dec. 446; *Emswiler v. Barham*, 6 La. Ann. 710; *Verges v. Cier*, 2 Me. Glain 93; *Hughes v. Wiafrey*, 5 La. Ann. 668; *Maxwell v. Mallard*, 5 La. Ann. 702; *Kimble v. Kimble*, 1 Mart. N. S. 633. Me.—*Wyman v. Richardson*, 62 Me. 293; *Wyman v. Fox*, 59 Me. 100; *Low v. Marco*, 53 Me. 45; *Brown v. Snell*, 46 Me. 490. Md.—*Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755. Mass.—*Sherman v. Davis*, 137 Mass. 132. Mich.—*Pierce v. Hill*, 35 Mich. 194, 24 Am. Rep. 541. Minn.—*Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865; *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; *Campbell v. Jones*, 25 Minn. 155. Miss.—*Johnson v. Ingram*, 9 So. 822. Mo.—*Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308; *Ryland v. Callison*, 54 Mo. 513; *Peyton v. Rose*, 41 Mo. 257; *Kinealy v. Macklin*, 2 Mo. App. 241. Neb.—*Hall v. Hart*, 52 Neb. 4, 71 N. W. 1009. N. Y.—*Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Bergen v. Carman*, 79 N. Y. 146, 8 Abb. N. C. 50, reversing 18 Hun 355. N. C.—*Burgin v. Burgin*, 23 N. C. 160. N. D.—*Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320. Ohio.—*Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95. Pa.—*Heath v. Page*, 63 Pa. 108, 3 Am. Rep. 533; *Stewart v. Coder*, 11 Pa. 90; *Hays v. Heidelberg*, 9 Pa. 203; *Irwin v. Hess*, 12 Pa. Super. 163. S. C.—*Paris v. Du Pre*, 17 S. C. 282; *Jones v. Crawford*, 1 McMull. 373. Tenn.—*Tubb v. Williams*, 7 Humph. 367; *Russell v. Stinson*, 3 Hayw. 1. See also *Richards v. Ewing*, 11 Humph. 327. Tex.—*Lynn v. Le Gierse*, 48 Tex. 138. Utah.—*McKibbin v. Brigham*, 18 Utah 78, 55 Pac. 66. Va.—*Wilson v. Buchanan*, 7 Gratt. (48 Va.) 334. Wis.—See *Eastman v. Schettler*, 13 Wis. 324.

[a] "This is the common-law remedy, which has existed since the statute of 13 Eliz., chap. 5." *Scoville v. Halladay*, 16 Abb. N. C. (N. Y.) 43.

[b] "As to purchasers at a sale under execution against a grantor who has made a fraudulent conveyance, the rule is clear and well established. The title thus acquired under legal proceedings instituted by a creditor is un-

questionably good, although the purchaser may have had notice of the fraud; for his knowledge of the fraud likewise imports a knowledge that it was the precise thing that rendered the conveyance void as to creditors and purchasers." *Gilliland v. Fenn*, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413.

[c] "Where a sale is made to delay, hinder, and defraud creditors, the proper manner to test the validity of the transaction is by a judicial sale at the suit of one or more of the creditors. This does justice to the rights of all." *Stewart v. Coder*, 11 Pa. 90.

Remedies available to judgment creditor, see 10 STANDARD PROC. 95, et seq., and particularly note 28, p. 97.

[d] **Fraudulent conveyance of a leasehold** interest does not prevent its sale under execution against the tenant. *Smith v. Scanlan*, 106 Ky. 572, 51 S. W. 152.

[e] The fact that benefit will accrue to debtor does not prevent the creditor from condemning property fraudulently conveyed by the debtor. *Feagan v. Cureton*, 19 Ga. 404.

[f] **Fraudulent transfer of a stock in trade** does not prevent levy under execution against the debtor. *Aspinall v. Jones*, 17 Mo. 209.

[g] **Against Personal Representative.**—A creditor having a judgment against the administrator of a fraudulent grantor, may levy upon and sell the land without notice to the widow and heirs. *Drum v. Painter*, 27 Pa. 148.

**Attachment of property fraudulently conveyed or proceeds of resale thereof**, see 3 STANDARD PROC. 286; 10 STANDARD PROC. 100.

**Garnishment of**, see 10 STANDARD PROC. 100, 448.

2. **Ind.**—*Pennington v. Clifton*, 11 Ind. 162. Mass.—*Berry v. Gates*, 175 Mass. 373, 56 N. E. 581. Mich.—*Trask v. Green*, 9 Mich. 358.

[a] Statute must be strictly complied with. *Jenison v. Rankin*, 57 Mich. 49, 23 N. W. 482.

3. **U. S.**—*United States v. Eisenbeis*, 88 Fed. 4 (rule in Washington); *In re Estes & Carter*, 3 Fed. 134, 6 Sawy. 459, where the lien of judgment

the execution, though such qualification is not generally made.<sup>4</sup> The fact that the sale was effected through judicial processes or proceedings does not change the rule,<sup>5</sup> and it is immaterial whether the fraudulent grantor has other property sufficient to satisfy and liable to the judgment.<sup>6</sup> But, according to the weight of authority, the grantor must have had the legal title to the property before the conveyance,<sup>7</sup> and in some jurisdictions the courts do not regard with favor the practice of subjecting property fraudulently conveyed to execution.<sup>8</sup>

**Position of Purchaser.**—The title acquired by the purchaser at the execution sale is the legal title itself, not a mere equity or right to

is limited to all property of defendant "from the date of the docketing of the judgment." **Ark.**—*Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334. **Ind. Ter.**—*Parrott v. Crawford*, 5 Ind. Ter. 103, 82 S. W. 688.

[a] In *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334, the court saying: "All the authorities which hold that a judgment creditor has a judgment lien upon land which has been fraudulently conveyed by the debtor prior to the rendition of the judgment are grounded upon the egregious fallacy that a fraudulent conveyance is not voidable merely, but absolutely void. *Slattery v. Jones*, 96 Mo. 216; *Jackson v. Holbrook*, 36 Minn. 494."

[b] A fraudulent conveyance of lands is good as between the parties and passes title, so that a subsequent judgment creditor acquires no lien on the lands thus fraudulently conveyed, for the reason that no interest in such lands remains in the grantor upon which a judgment lien can attach. *Preston-Parton Milling Co. v. Dexter, Horton & Co.*, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

4. See cases in preceding notes, and *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Gilbert v. Stockman*, 81 Wis. 602, 51 N. W. 1076, 29 Am. St. Rep. 922; *Eastman v. Schettler*, 13 Wis. 324.

[a] It is not necessary to seek an equitable remedy instead of a legal one because the fraudulent conveyance was made prior to the entry of judgment. *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082.

5. *Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305. Compare, 10 STANDARD PROC. 95, note 24.

6. **Ga.**—*Gormerly v. Chapman*, 51

**Ga.** 421. **Miss.**—*Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351. **S. C.** *Paris v. Du Pre*, 17 S. C. 282.

7. See *infra*, II, B, 3, o, (III).

[a] Where legal title has once vested in a person and he subsequently conveys it in fraud of creditors the latter may subject it to execution, but if the legal title never vests in the debtor the property must be reached in equity. *Goodbar v. Daniel*, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; *Low v. Marco*, 53 Me. 45.

8. See 10 STANDARD PROC. 97, note 27.

[a] "We do not hesitate . . . to say that the method of attacking a fraudulent conveyance of land by levying an execution on same, and then proceeding to sell the same under the writ, leaving the purchaser to contest the validity of the conveyance in an action of ejectment against the fraudulent vendee, is not to be encouraged. It is circuitous and cumbersome, and at last leaves a cloud upon the record title; for a court of law can never cancel and set aside a fraudulent conveyance." *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334.

[b] **Proceedings in Equity Give Better Title.**—A judgment creditor who by a suit in equity has a deed by his judgment debtor to another set aside as fraudulent against himself as a creditor, and obtains a decree subjecting the property to sale under his judgment, and bids it in under such sale, obtains thereby a title superior to that of a prior judgment creditor who treats the fraudulent conveyance as void and purchases the property at a sale under execution upon his prior judgment. *Preston-Parton Mill Co. v. Dexter, Horton & Co.*, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

have the fraudulent conveyance vacated by appropriate proceedings,<sup>9</sup> so if title be withheld from the purchaser he may recover the property in replevin or ejectment, according to the nature of the property,<sup>10</sup> though in some jurisdictions it would seem to be necessary for him to institute proceedings in equity to clear his title.<sup>11</sup>

(II.) *Property Purchased in Name of Another.* — When one purchases property causing title to be vested in a third person with a view to defraud his creditors, there is a resulting trust to himself for the benefit of his creditors, which, according to some courts, renders the property subject to an execution in favor of the creditors.<sup>12</sup>

But, by the weight of authority,<sup>13</sup> property so held is not liable to

9. **Cal.**—*Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286. **Ill.**—*Gould v. Steinburg*, 84 Ill. 170. **Ky.**—*Scott's Exr. v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423. **Me.**—*Wyman v. Richardson*, 62 Me. 293. **Md.**—*Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755.

10. **Minn.**—*Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865; *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683. **Mo.**—*Potter v. Adams*, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478. **N. Y.** *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Scoville v. Halladay*, 16 Abb. N. C. 43.

See also 10 STANDARD PROC. 95, et seq.

11. See *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; *Lynn v. La Gierse*, 48 Tex. 138; and 10 STANDARD PROC. 97, note 27.

12. **Ind.**—*Eve v. Louis*, 91 Ind. 457; *Tevis v. Doe*, 3 Ind. 129. **Mass.**—*Clark v. Chamberlain*, 13 Allen 257. Rule *contra*, prior to statute of 1844. *Howe v. Bishop*, 3 Mete. 26; *Hamilton v. Cone*, 99 Mass. 478. **Mo.**—*Dunnica v. Coy*, 28 Mo. 525, 75 Am. Dec. 133; *Herrington v. Herrington*, 27 Mo. 560; *Dunnica v. Coy*, 24 Mo. 167, 69 Am. Dec. 420; *Eddy v. Baldwin*, 23 Mo. 588; *Rankin v. Harper*, 23 Mo. 579.

Resulting trust in general, see *supra*, II, B, 3, k, (II), (D).

[a] "A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance." *Mellvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295.

13. **Ark.**—*Doster v. Manistee Nat. Bank*, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334, the court saying: "Where a conveyance is made

to defraud creditors, a resulting trust never arises in favor of the fraudulent debtor." **Miss.**—*Carlisle v. Tindall*, 49 Miss. 229; *Ferguson v. Bobo*, 54 Miss. 121. **N. J.**—*Haggerty v. Nixon*, 26 N. J. Eq. 42. **N. Y.**—*Brewster v. Power*, 10 Paige 562. But an earlier case under a different statute holds that if the object of the husband in purchasing land and having the title in the name of the wife is to defraud creditors, he will be deemed to have a resulting interest in the premises, which may be sold by execution. *Guthrie v. Gardner*, 19 Wend. 414. **N. C.**—*Everett v. Raby*, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; *Gentry v. Harper*, 55 N. C. 177; *Gowing v. Rich*, 23 N. C. 553. **S. C.**—*Bauskett v. Holsonback*, 2 Rich. L. 624. **Tenn.**—*Smith v. Hinson*, 4 Heisk. 250. **Vt.**—*Buck v. Gilson*, 37 Vt. 653.

[a] Only the equitable title would be conveyed by such a sale under execution. *Dewey v. Long*, 25 Vt. 564.

[b] Where A contracts for land and pays for the same, but has the title made to B with a fraudulent intent to hinder and delay his creditors, and afterwards, with the same intent on the part of A, by his direction, conveys the land to C, who sells and conveys the same for a chattel, this chattel cannot be taken by execution for the debt of A. *Parris v. Thompson*, 46 N. C. 57.

[c] A statute permitting execution against property fraudulently conveyed has no application to lands purchased by the debtor in the name of a third person although the purpose was to prevent creditors from reaching it. *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 485.

[d] But where the judgment debtor purchases the property at the execution



an execution at law, the creditors proper remedy being in equity.<sup>14</sup>

(III.) **Transfer by Grantee or Assignee.** — Though the property be in the possession of a subsequent purchaser from the fraudulent grantee, it will be subject to execution against the fraudulent grantor,<sup>15</sup> except when in the possession of a bona fide purchaser from the fraudulent grantee.<sup>16</sup> Property conveyed by the fraudulent grantee to another with a resulting trust in favor of such grantee is subject to execution against the grantor.<sup>17</sup> Where, however, the grantee has converted the property into money,<sup>18</sup> or the conveyed property has been sold by the grantee and its identity lost,<sup>19</sup> the property received by the grantee in exchange,<sup>20</sup> or the proceeds of the property fraudulently conveyed,<sup>21</sup> are not subject to execution against the fraudulent grantor.

p. **Property Purchased at Judicial Sale.** — (I.) **Interest of Purchaser.** The interest of the purchaser at a judicial sale until the period for redemption has expired is merely equitable and is for that reason not subject to levy on execution before the expiration of that period,<sup>22</sup>

sale through or in the name of a third person, to defraud his other creditors, it is nevertheless subject to execution against him. *Dobson v. Erwin*, 18 N. C. 569; *Richardson v. Mounce*, 19 S. C. 477.

14. **N. C.**—*Gentry v. Harper*, 55 N. C. 177. **Ore.**—*Silver v. Lee*, 38 Ore. 508, 63 Pac. 882. **Vt.**—*Dewey v. Long*, 25 Vt. 564.

[a] In *McCartney v. Bostwick*, 32 N. Y. 53, reversing 31 Barb. 390, the courts hold that under the New York statute where consideration is paid by one and title taken in name of another an independent resulting trust is declared in favor of creditors, which may be enforced in the first instance in a court of equity, where the design and effect of the transaction is to defraud them.

[b] **Action in nature of a creditor's bill** to subject property to payment of debts. *Everett v. Raby*, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685. See titles "**Creditors' Suits**," "**Bills To Enforce Decrees**."

15. *Reed v. Smith*, 14 Ala. 380; *Mt. Vernon Banking Co. v. Henderson Hominy Mills*, 15 Ky. L. Rep. 333.

[a] One who purchases the property from the fraudulent purchaser between the date at which the writ goes into the officer's hands and the date of the levy takes subject to the execution lien and it is immaterial whether the last purchaser had notice of the fraud. *Mt. Vernon Banking Co. v. Henderson Hominy Mills*, 15 Ky. L. Rep. 333.

16. *Anderson v. Roberts & Boyd*, 18

*Johns. (N. Y.)* 515, 9 Am. Dec. 235.

17. If property be fraudulently conveyed by a debtor to his wife, who makes a similar conveyance thereof to her brother in trust for herself, the creditor thus defrauded may extend his execution issued upon the judgment recovered upon his debt upon the land thus fraudulently conveyed and protect his title by a bill in equity against the wife and her grantee. *Wyman v. Fox*, 59 Me. 100.

18. In *Lanning v. Streeter*, 57 Barb. (N. Y.) 33, it is held that where property fraudulently assigned has been converted into money by the assignee, or the money has been converted into other property which is claimed by the assignee to belong to him, before an attachment in an action by the creditor is issued, the attachment cannot be levied upon the money or property so held as the proceeds of that assigned.

19. *Post v. Bird*, 28 Fla. 1, 9 So. 888.

20. *Rutledge v. Evans*, 11 Iowa 287; *Henderson v. Hoke*, 21 N. C. 119. *Contra*, *Carville v. Stout*, 10 Ala. 796; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491.

21. *Post v. Bird*, 28 Fla. 1, 9 So. 888; *Richards v. Ewing*, 11 Humph. (Tenn.) 327; *Tubb v. Williams*, 7 Humph. (Tenn.) 367.

**Attachment of proceeds of re-sale by fraudulent assignee**, see 3 STANDARD PROC. 287.

22. **Ill.**—*Strauss v. Tuckhorn*, 200 Ill. 75, 65 N. E. 683; *Bowman v. People*, 82

and until the delivery of the deed to the purchaser.<sup>23</sup> though it has been held that after the period for redemption has expired the fact that the sheriff's deed has not been executed or delivered does not prevent execution.<sup>24</sup> Obviously these rules would not apply where equitable interests are subject to execution.<sup>25</sup>

(II.) Interest of Debtor. — Where the debtor has no interest in the property after it is sold the fact that the purchaser permits him to retain possession of the property sold will not, in the absence of fraud, give the debtor any interest therein subject to execution,<sup>26</sup> though under certain circumstances he may have.<sup>27</sup> The equity of redemption of a judgment debtor in lands sold by execution has been held subject to execution.<sup>28</sup> Where the debtor has a right to redeem but it is re-

Ill. 246, 25 Am. Rep. 316. Ky.—*Torian v. Caldwell*, 167 Ky. 670, 181 S. W. 373. Me.—*Kidder v. Orcutt*, 40 Me. 589.

[a] An execution levied on such an interest will be unavailing though the land is never redeemed. *Kidder v. Orcutt*, 40 Me. 589.

Equitable interests in general, see *supra*, II, B, 3, j.

23. Ky.—*Goodin v. Wilson*, 114 Ky. 716, 71 S. W. 866. N. J.—*Den ex dem. Green v. Steelman*, 10 N. J. L. 193. Ohio.—*Gorrell v. Kelsey*, 40 Ohio St. 117.

[a] Deed takes effect only from date of delivery. *Den ex dem. Green v. Steelman*, 10 N. J. L. 193.

[b] Where deed executed but not delivered, interest of purchaser held subject to execution where purchaser had possession of the property. *Hartman v. Stahl*, 2 Penr. & W. (Pa.) 223.

24. *Page v. Rogers*, 31 Cal. 293; *Pogue v. Simon*, 47 Ore. 6, 81 Pac. 566.

25. See *supra*, II, B, 3, k, and *Page v. Rogers*, 31 Cal. 293.

26. In the following case the property in question was personality. Cal. *Matteucci v. Whelan*, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 60. N. Y. *Masten v. Webb*, 60 How. Pr. 302. N. C.—*Smith v. Fore*, 46 N. C. 488. Pa.—*Stoddart v. Price*, 143 Pa. 537, 22 Atl. 811; *Bisbing v. Third Nat. Bank*, 93 Pa. 79, 39 Am. Rep. 726; *Miller v. Irvine*, 94 Pa. 405; *Dick v. Lindsay*, 2 Grant's Cas. 431; *Lippincott v. Longbottom*, 6 Pa. Co. Ct. 503. Eng.—*Latimer v. Batsen*, 4 B. & C. 652, 7 D. & R. 106, 4 L. J. K. B. (O. S.) 25, 10 E. C. L. 742; *Woodham v. Baldoek*, Gw. L. 5 note, 3 Moore C. P. 11, 5 E. C. L. 859.

27. Where a chattel capable of consumption is left with the defendant by a purchaser at a judicial sale, for his own use and consumption, or the same chattel is not to be returned to the lender, it will be liable to execution as the property of the defendant; but if left without any agreement that the defendant is to have it for his own use and consumption, it will not be so liable. *Heitzman v. Divil*, 11 Pa. 264. To same effect *Dick v. Cooper*, 24 Pa. 217, 64 Am. Dec. 655. See also *Schott v. Chancellor*, 20 Pa. 195.

28. *Davenport v. Lacon*, 17 Conn. 278, where the court says: "So too an equity of redemption, as well after as before the law day, has also been considered as subject to attachment and execution. So far as we are informed, it was practiced from time immemorial, notwithstanding the sage dictum, that an equity of redemption is a thing of no value in the eye of the law, and not to be regarded. The question in 1802, came directly before this court; and it was said, that such an interest was real estate, and often of great value. It descends to heirs, and does not go to executors. It passes by words in a devise, as real estate; and it would operate great injustice to give this statute a construction, by which equities of redemption should be exempt from the payment of debts. . . . *Punderson v. Brown*, 1 Day 93."

[a] *Contra*, it being but an equitable interest. *Smith v. Taylor*, 11 Lea (Tenn.) 738.

As to when equitable estates are subject, see *supra*, III, B, 3, k.

Right of mortgagor, see *supra*, III, B, 3, g.

Attachment of equity of redemption, see 3 STANDARD PROC. 291.

garded as a personal privilege and not a property right, it cannot be sold on execution.<sup>29</sup>

q. *Property Held Adversely*.—According to the weight of authority the debtor's interest in land held adversely to him may be sold on execution,<sup>30</sup> though in some jurisdictions a contrary rule is recognized.<sup>31</sup> The right of property in chattels where the possession is held adversely, being a mere chose in action, cannot be sold on execution.<sup>32</sup>

r. *Property of One Other Than Execution Debtor*.—(I.) Generally. Only the property of the execution debtor or in which he has a leviable interest is subject to execution against him.<sup>33</sup> For example the individual property of a personal representative cannot be taken on execution against the goods in his hands to be administered,<sup>34</sup> nothing but the assets of the decedent being subject to levy under execution against the representative in his administrative capacity.<sup>35</sup> Property of the estate cannot be reached by an execution against the executor

29. *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717.

Privilege, see *supra*, II, B, 3, d.

30. Mo.—*Rogers v. Brown*, 61 Mo. 187. N. Y.—See *Tuttle v. Jackson ex dem. Hills*, 6 Wend. 213, 21 Am. Dec. 306, reversing 9 Cowan 233. N. C. *Carson's Heirs v. Smart*, 34 N. C. 369. Pa.—*Jarrett v. Tomlinson*, 3 Watts & S. 114. Tenn.—*Park's Lessee v. Larkin*, 1 Overt. 101.

31. Ky.—*Ring v. Gray*, 6 B. Mon. 368; *Myers v. Sanders*, 7 Dana 506; *Griffith v. Huston*, 7 J. J. Marsh. 385; *Shepherd v. McIntire*, 4 J. J. Marsh. 110; *McConnell v. Brown*, 5 Mon. 478; *Dubois v. Marshall*, 3 Dana 336; *Violett v. Violett*, 2 Dana 323; *Frizzle v. Veach*, 1 Dana 211; *Farmers' Bank v. Pryse*, 25 Ky. L. Rep. 807, 76 S. W. 358 (by statute); *Carlisle v. Cassady*, 20 Ky. L. Rep. 562, 46 S. W. 490; *Arnold v. Stephens*, 13 Ky. L. Rep. 622, 17 S. W. 859; *Kenton Furnace R. Co. v. Lowder*, 1 Ky. L. Rep. 399. R. I.—*Campbell v. Point St. Iron Works*, 12 R. I. 452, the reason being that at common law a conveyance of land of which the grantor was not in possession was void, and the same rule was applied to a sale under an execution.

[a] Objection on this ground cannot be made by the defendant in execution to defeat a seizure of his property in the adverse possession of another. *State ex rel. Presbry v. Judge*, 48 La. Ann. 667, 19 So. 666.

32. *Carlos v. Ansley*, 8 Ala. 900; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628; *Wier v. Davis*, 4 Ala. 442;

*Com. v. Abell*, 6 J. J. Marsh. (Ky.) 476; *Thomas v. Thomas*, 2 A. K. Marsh. (Ky.) 430.

Where a chose in action is subject it would seem that personalty held adversely would be subject to execution. As to when chose in action is subject, see *supra*, II, B, 3, b, (III).

33. Property of citizen on execution against public corporation, see *infra*, II, B, 3, f.

Joint and several interests, see *infra*, II, B, 3, i.

Partnership property, see *infra*, II, B, 3, j.

Property consigned for sale, see *infra*, II, B, 3, b, (IV), (C).

Intermingled goods, see *infra*, II, B, 3, b, (XV).

Property fraudulently conveyed, see *infra*, II, B, 3, o.

Interest of debtor in property sold at judicial sale, see *infra*, II, B, 3, p, (II).

Property held adversely, see *infra*, II, B, 3, q.

Wife's property for debts of husband, see 11 STANDARD PROC. 805, et seq.

Execution against infant's property on judgment against guardian, see 12 STANDARD PROC. 791.

Necessity for ownership or possession of property by debtor in attachment, see 3 STANDARD PROC. 300.

34. *Jones v. Miles*, 1 How. (Miss.) 50.

35. *Mead v. Kilday*, 2 Watts (Pa.) 110.



de bonis propriis," only the interest of the executor as an individual and not the interests of other devisees being subject to such a writ.<sup>37</sup> After the executor has assented to a specific legacy or distribution among the legatees the property so acquired by the legatees cannot be subjected to an execution against the executor.<sup>38</sup>

(II.) **Property Conveyed Prior to Judgment or Levy.**—Property which has been sold and possession given to the vendee before the rendition of judgment against the vendor,<sup>39</sup> or prior to the issuance and levy of the execution,<sup>40</sup> cannot be subjected to an execution on such judgment against the vendor. The rule would be otherwise if the sale was merely simulated.<sup>41</sup>

s. **Interests Under Contracts.**—(I.) **Generally.**—Whether an interest under a contract is subject to levy depends entirely upon the character of the interest, that is, whether it is merely a personal

36. *Thomas v. Tanner*, 6 Mon. (Ky.) 52.

37. *Small v. Small*, 16 S. C. 64.

38. *Miss.*—*Turner v. Chambers*, 10 Smed. & M. 308, 48 Am. Dec. 751. *N. C.*—*Hostler v. Smith*, 3 N. C. 305. *Va.*—*Randolph v. Randolph*, 6 Rand. (27 Va.) 194; *Burnley v. Lambert*, 1 Wash. (1 Va.) 308.

[a] But see *Brooks v. Lewis*, 1 How. (Miss.) 207, holding the personal property of a deceased debtor in the hands of a distributee, after distribution made, to be liable in satisfaction of a judgment against the administrator.

[b] Remedy is in equity to compel legatees to refund. *Turner v. Chambers*, 10 Smed. & M. (Miss.) 308, 48 Am. Dec. 751.

39. *U. S.*—*Stockton v. Ford*, 11 How. 232, 13 L. ed. 676. *Ala.*—*Downing v. Mann*, 43 Ala. 266. *Ga.*—*Hirsch v. Fleming*, 77 Ga. 594, 3 S. E. 9. See also *Rawson v. Coffin*, 55 Ga. 348. *La.* *Boisse v. Dickson*, 31 La. Ann. 741, 753; *Edwards v. Fairbanks*, 27 La. Ann. 449; *Chidester v. Simonds*, 22 La. Ann. 374; *Weld v. Peters*, 1 La. Ann. 432. *Mich.*—*Keeler v. Ullrich*, 32 Mich. 88. *Miss.*—*Goodman v. Burford*, 10 Smed. & M. 385.

[a] Where a judgment has been recorded and thus made equivalent to a mortgage on property of the debtor, and the plaintiff assigns this judgment, his rights under this judgment cannot be subjected to an execution issued in an action subsequently commenced. *Stockton v. Ford*, 11 How. (U. S.) 232, 13 L. ed. 676.

[b] The seizure of the interest of an heir in a succession cannot embrace

that portion of her interest which the heir has previously received and disposed of. *Boisse v. Dickson*, 31 La. Ann. 741, 753.

[c] Though a corporation have no power to purchase the property this does not make the property liable to an execution for the vendor's debts, the purchase money having been paid before institution of suit in which execution is issued. *Edwards v. Fairbanks & Gilman*, 27 La. Ann. 449.

[d] Where invalid preference has been made another creditor cannot sell the property under execution for this is but an attempt to substitute an enforced preference for the previous voluntary preference made by the debtor. *Butler v. Harrison Land & Min. Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464.

[e] Property conveyed by mutual mistake may be reached on execution according to *Fallen v. Weatherford* (Tex. Civ. App.), 158 S. W. 1174.

[f] Injunction will lie to prevent sale under the execution in such a case. *Chidester v. Simonds*, 22 La. Ann. 374; *Goodman v. Burford*, 10 Smed. & M. (Miss.) 385.

Attachment of, see 3 STANDARD PROC. 313.

40. *Mo.*—See *Houck v. Patty*, 100 Mo. App. 302, 73 S. W. 389. *N. Y.* *Hyde v. Lathrop*, 2 Abb. Dec. 436, 24 N. Y. 597. *Pa.*—*Bayer v. Walsh*, 166 Pa. 38, 30 Atl. 1039; *Rundle v. Ettwein*, 2 Yeates 23; *Keil v. Harris*, 1 Pa. Co. Ct. 171.

41. *Chidester v. Simonds*, 22 La. Ann. 374; *Weld v. Peters*, 1 La. Ann. 432.

privilege not transferable,<sup>42</sup> whether it is wholly contingent and uncertain,<sup>43</sup> whether it is an intangible or incorporeal, right,<sup>44</sup> and whether the interest created is legal or equitable.<sup>45</sup>

(II.) **Contracts for Services.** — Before the completion of a contract for personal services, an inchoate contingent claim or right of a party to compensation is not subject to execution.<sup>46</sup>

(III.) **Insurance Contracts.** — The right of an insured to surrender a policy for cash is a chose in action, and therefore not subject to execution where choses in action cannot be levied on.<sup>47</sup> The mere contingent right of the insured under a fire policy, to compensation in the event of a loss or to the return of unearned premium in the event of cancellation, is not subject to execution.<sup>48</sup> Nor is the contingent interest of one in a policy taken out on the life of another subject.<sup>49</sup>

(IV.) **Unaccepted Offer.** — An unaccepted offer creates no interest which may be levied on.<sup>50</sup>

(V.) **Option To Purchase Land.** — An option to purchase real property does not vest in the holder of such option any interest in the property which can be sold under execution.<sup>51</sup>

Execution on property fraudulently conveyed, see II, B, 3, o.

42. **License**, see *supra*, II, B, 3, d.

**Personal privilege**, see *supra*, II, B, 3, d.

**Seat on stock exchange**, see *supra*, II, B, 3, b, (XII).

**Trade marks**, see *infra*, II, B, 3, b, (VII).

43. **Cropper's interest**, see *infra*, II, B, 3, t, (VI).

**Contingent remainder**, see *supra*, II, B, 3, m, (1), (B), (2).

**Inchoate right to compensation under contract for personal services**, see the following section.

44. **Choses in action**, see *supra*, II, B, 3, b, (III).

**Patent rights and copyrights**, see *supra*, II, B, 3, b, (VI).

45. **Equitable estates generally**, see *supra*, II, B, 3, k.

**Interests under trust deeds**, see *supra*, II, B, 3, k, (II).

**Interests under mortgages**, see *infra*, II, B, 3, g.

46. **Minn.**—Paine v. Gunniss, 60 Minn. 257, 62 N. W. 280. **N. Y.**—Hastbrouck v. Bouton, 60 Barb. 413. **N. C.** Griffin v. Williams, 44 N. C. 292. See however, Weaver v. Darby, 42 Barb. (N. Y.) 411.

See the title "Garnishment."

[a] In Case v. Taylor, 23 La. Ann. 497, a contract whereby a person was to be compensated for his services in keeping up certain roads, by tolls

which he collected, was held to create no interest which could be levied on.

[5] But in Weaver v. Darby, 42 Barb. (N. Y.) 411, where an agreement was made between B and D by which B was to furnish the money to purchase certain lumber to be selected by D and cut, hewn, rafted and delivered by him to B at a certain place for which he was to receive a certain sum per cubic foot, it was held that D's interest under the contract was the subject of levy and sale under execution against him.

47. Kratzenstein v. Lehman, 18 Misc. 590, 42 N. Y. Supp. 237.

**Choses in action in general**, see *supra*, II, B, 3, b, (III).

**Garnishment of interest under insurance contracts**, see 10 STANDARD PROC. 435.

**Attachment of interests under insurance contracts**, see 3 STANDARD PROC. 296.

48. **Tradesmen's Bldg. & L. Assn. v. Maher**, 9 Pa. Super. 340, 43 W. N. C. 422.

49. **Settle v. Hill**, 5 Ky. L. Rep. 691.

50. An offer to sell land upon the fulfillment of certain conditions where such offer is never accepted nor the conditions performed gives no interest in the land which is liable to execution. Chadbourne v. Stockton Sav. & Loan Soc., 101 Cal. xvii, 36 Pac. 127.

51. **Provident Life & Trust Co. v.**

(VI.) Contract of Sale. — (A.) VENDOR'S INTEREST. — (1.) *Real Property.* (a.) *Generally.* — The interest of a vendor under a contract for the sale of lands where the vendee has been put in possession is subject to execution,<sup>52</sup> though a sale under such execution is subordinate to the right of the vendee to a conveyance on completion of payment.<sup>53</sup> But after payment of the purchase price, though a conveyance has not been executed,<sup>54</sup> or after a deed has been delivered, although the purchase money has not been paid,<sup>55</sup> an execution against the vendor cannot be levied on the property.

(b.) *Oral Contract.* — The vendor under an unenforceable oral contract for the sale of land has an interest subject to execution.<sup>56</sup>

(c.) *Where Bond for Title Given.* — Where a bond for title has been given, according to some courts, the interest of a vendor of land is not subject to sale under execution against him.<sup>57</sup> In other jurisdictions, however, until the whole of the purchase price is paid, title still remains in the vendor whose interest in the land is subject to levy and sale under execution.<sup>58</sup>

(d.) *Vendor's Lien.* — The lien of a vendor after conveyance of real property is not, nor does it give an interest in the property which is, subject to execution against him.<sup>59</sup>

(e.) *Right of Re-Entry.* — The right of re-entry for a breach of con-

Mills, 91 Fed. 435, distinguishing such a unilateral contract from a contract by which the vendee binds himself to purchase.

**Lease with option to purchase,** see *supra*, II, B, 3, j.

**52. U. S.**—Green *v.* Daniels, 115 Fed. 449, 53 C. C. A. 379, under Colorado statute subjecting "every interest in land legal and equitable." **III.**—McLaurie *v.* Barnes, 72 Ill. 73. **Ky.**—Doe *v.* Million, 4 J. J. Marsh. 395. **Mich.**—Doak *v.* Runyan, 33 Mich. 75. **N. C.**—Linch *v.* Gibson, 4 N. C. 676. **Pa.**—Leiper's Exrs. *v.* Irvine, 26 Pa. 54.

[a] **Vendee in Possession.**—But in Tally *v.* Reed, 72 N. C. 336, it was held that where A contracted in writing to convey a tract of land to B, who paid part of the purchase money, entered upon the land and then conveyed his interest to C, the land was not liable to execution against A.

**Attachment of,** see 3 STANDARD PROC. 303.

**Garnishment of vendor and vendee,** see 10 STANDARD PROC. 465.

**53. Ky.**—Russell's Exr. *v.* Moore's Heirs, 3 Met. 436. **Mich.**—Doak *v.* Runyan, 33 Mich. 75. **N. C.**—Linch *v.* Gibson, 4 N. C. 676.

**54. N. H.**—Cutting *v.* Pike, 21 N. H. 347. **Ohio.**—Manley *v.* Hunt, 1 Ohio

**257. S. C.**—Massey *v.* McIlwain, 2 Hill Eq. 421. **Tex.**—Brotherton *v.* Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682.

**55. Remedy of creditor is to reach money owing, by attachment or other proper proceeding.** Pryor *v.* Warford, 21 Ky. L. Rep. 1311, 54 S. W. 838.

**56. Ashley v. Millett,** 8 Ky. L. Rep. 536.

**57. Ark.**—Strauss *v.* White, 66 Ark. 167, 51 S. W. 64. **Ky.**—Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811. **Miss.**—Chisholm *v.* Andrews, 57 Miss. 636; Money *v.* Dorsey, 7 Smed. & M. 15. **N. C.**—Folger *v.* Bowles, 72 N. C. 603; Edney *v.* Wilson, 27 N. C. 233. **S. C.**—Adickes *v.* Lowry, 15 S. C. 128.

**58. Brown v. Hardee,** 75 Ga. 457; Bell *v.* McDuffie, 71 Ga. 264; Hardee *v.* McMichael, 68 Ga. 678; Welles *v.* Baldwin, 28 Minn. 408, 10 N. W. 427; Minneapolis & St. L. Ry. Co. *v.* Wilson, 25 Minn. 382.

**59. Ark.**—State Bank *v.* Sanders, 114 Ark. 440, 170 S. W. 86. **Cal.**—Ross *v.* Heintzen, 36 Cal. 313. **Colo.**—Fallon *v.* Worthington, 13 Colo. 559, 22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708. **Tex.**—P. J. Willis & Bro. *v.* Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781.



dition in a conveyance of land pertains only to the grantor and his legal representatives and cannot be taken on execution.<sup>60</sup>

(2.) *Personal Property*.—The vendor under an executory contract for the sale of personalty, where the vendee takes possession, until a neglect or refusal of the vendee to complete the purchase has not such an interest in the property as to render it subject to an execution against him,<sup>61</sup> unless the contract be in fraud of creditors.<sup>62</sup>

(B.) VENDEE'S INTEREST.—(1.) *Real Property*.—(a.) *Generally*.—According to many authorities the equitable right of a vendee under a contract to purchase land, before the purchase money has been fully paid and the conditions of the contract performed, cannot be subjected to execution against him,<sup>63</sup> even though, it has been held, a portion of the purchase money be paid and the vendee has gone into possession.<sup>64</sup>

60. *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657.

[a] After breach of condition subsequent the estate is not subject to execution against the vendor unless there be entry by him. *Edmondson v. Leach*, 56 Ga. 461.

61. *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Vickery v. Ward*, 2 Tex. 212.

[a] *Creditor's remedy* is by injunction and petition enjoining vendee from paying the balance of the purchase money to the vendor and praying that the vendee be decreed to pay the money to, or that the property be sold for the benefit of the plaintiff in execution. *Vickery v. Ward*, 2 Tex. 212.

[b] In *Spicks v. Prospect Brewing Co.*, 19 Pa. Super. 399, where the defendant in an execution had agreed to sell personal property to another, but had not delivered it until after the hour at which a writ of fieri facias was placed in the hands of the sheriff and indorsed by him, it was held that the plaintiff in execution acquired a lien upon the property, the levy being made before the return day of the writ.

*Attachment of*, see 3 STANDARD PROC. 304.

*Garnishment*, see 10 STANDARD PROC. 465.

62. See *supra*, II, B, 3, o.

[a] As where property is not delivered or vendor afterwards comes into possession of it. *Taylor v. Plunkett*, 4 Penne. (Del.) 467, 56 Atl. 384.

63. *N. J.*—*Dodge v. Brokaw*, 32 N. J. Eq. 154; *Van Cleve v. Groves*, 4 N. J. Eq. 330; *Disborough v. Outcalt*, 1 N. J. Eq. 298. *N. Y.*—*Sage v. Cartwright*,

9 N. Y. 49; *Bigelow v. Finch*, 17 Barb. 394; *Griffin v. Spencer*, 6 Hill 525; *Bogert v. Perry*, 17 Johns. 351, 8 Am. Dec. 411; *Boughton v. Bank of Orleans*, 2 Barb. Ch. 458; *Brewster v. Power*, 10 Paige 562; *Talbot v. Chamberlin*, 3 Paige 219; *Bogart v. Perry*, 1 Johns. Ch. 52. *N. C.*—*Hinsdale v. Thornton*, 74 N. C. 167; *Frost v. Reynolds*, 39 N. C. 494; *Badham v. Cox*, 33 N. C. 456. *Pa.* *Deitzler v. Mishler*, 37 Pa. 82. *Tenn.* *Kissom v. Nelson*, 2 Heisk. 4.

[a] Where the vendee does not go into possession. *Haynes v. Baker*, 5 Ohio St. 253.

[b] *Assignee of vendee* under such a contract has no interest liable on execution. *Bogart v. Perry*, 1 Johns. Ch. (N. Y.) 52.

*Attachment of*, see 3 STANDARD PROC. 303.

*Garnishment of vendor and vendee*, see 10 STANDARD PROC. 465.

*Equitable interests and estates in general*, see *supra*, II, B, 3, j.

64. *Ala.*—*Opelika Bank v. Kiser*, 119 Ala. 194, 24 So. 11. *Ind.*—*Hutchins v. Hanna*, 8 Ind. 533. *N. Y.*—*Bates v. Lidgerwood Mfg. Co.*, 51 Hun 644, 4 N. Y. Supp. 524. But see *Jackson v. Scott*, 18 Johns. (N. Y.) 94, holding that a person in the possession of land under a contract for the purchase and sale of it, has an interest in the land which may be sold on execution. *N. C.* *Hinsdale v. Thornton*, 75 N. C. 381; *Frost v. Reynolds*, 39 N. C. 494; *Badham v. Cox*, 33 N. C. 456.

[a] *Assignee of the vendee* who assumes purchase, goes into possession and pays on the price, has no interest subject to execution. *Bates v. Lidgerwood Mfg. Co.*, 51 Hun 644, 4 N. Y. Supp. 524, 22 N. Y. St. 395.

So if a vendee who has paid no part of the purchase-money, with the consent of the vendor cancels and destroys the contract, he has thereafter no estate in the land subject to execution.<sup>65</sup> In other states the equitable interest or right of the vendee under a contract for sale of lands,<sup>66</sup> especially where the vendee has gone into possession,<sup>67</sup> made improvements, and paid part of the purchase-money,<sup>68</sup> is subject to levy and sale under execution. When the purchaser has paid the entire purchase price,<sup>69</sup> taken possession,<sup>70</sup> and made improvements,<sup>71</sup> or the land has been actually conveyed to the vendee, the vendor reserving a lien for the unpaid purchase price,<sup>72</sup> the vendee's interest is liable on execution.

(b.) *Under Oral Contract.* — It has been held that the vendee under

65. *Raffensberger v. Cullison*, 28 Pa. 426. See also *Davis v. Inscoc*, 84 N. C. 396.

[a] **If contract be rescinded** vendee has no interest in property subject to execution. *Mount v. Harris*, 1 Smed. & M. (Miss.) 185, 40 Am. Dec. 89; *Lanyon v. Toogood*, 13 L. J. Exch. 273, 13 M. & W. 27.

66. **U. S.**—*McWilliams v. Withington*, 7 Sawy. 205, 7 Fed. 326. **Cal.** *Fish v. Fowlie*, 58 Cal. 373; *Logan v. Hale*, 42 Cal. 645. **Colo.**—*Salisbury v. La Fitte*, 57 Colo. 358, 141 Pac. 484, *affirming* 21 Colo. App. 13, 121 Pac. 952. **Ia.**—*Twogood v. Stephens*, 19 Iowa 405. **Ky.**—*Hinton v. Mitchell*, 1 Duvall 382. **La.**—*Prater v. Pritchard*, 6 La. Ann. 729. **Mo.**—*Brant v. Robertson*, 16 Mo. 129. **Ohio.**—*First Nat. Bank v. Logue*, 89 Ohio 288, 106 N. E. 21, under Gen. Code, §11,655. **Pa.**—*Catlin v. Robinson*, 2 Watts 373. **Tex.** *Mooring v. McBride*, 62 Tex. 309.

[a] **Contract With State.**—The interest which a person has under a time purchase from the state, while the contract remains in force, is property subject to sale upon execution. *McWilliams v. Withington*, 7 Sawy. 205, 7 Fed. 326.

[b] **Where Vendee Has Right to the Use and Possession.**—*Ivey v. Coston*, 134 Ala. 259, 32 So. 664.

[c] **Vendor Is Trustee for Vendee.** Where there is a contract for the sale of land the vendor becomes the trustee of the land for the vendee whose interest in the land may be sold under execution. *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340; *Morgan v. Bouse*, 53 Mo. 219; *Hart v. Logan*, 49 Mo. 47; *Papin v. Massey*, 27 Mo. 445.

67. *Logan v. Hale*, 42 Cal. 645;

*Rosenfield v. Chada*, 12 Neb. 25, 10 N. W. 465.

68. *Hook v. N. W. Thresher Co.*, 91 Minn. 482, 98 N. W. 463; *Reynolds v. Fleming*, 43 Minn. 513, 45 N. W. 1099; *Forrester v. Hanaway*, 82 Pa. 218; *Vierheller's Appeal*, 24 Pa. 105, 62 Am. Dec. 365; *Russell's Appeal*, 15 Pa. 319.

69. **Ala.**—*Shaw & Cox v. Lindsey*, 60 Ala. 344; *Fawcetts v. Kimmey*, 33 Ala. 261 (rule was contra prior to adoption of code). See *Hogan v. Smith*, 16 Ala. 600; *Elmore & Willis v. Harris*, 13 Ala. 360. **Conn.**—See *Bunnell v. Read*, 21 Conn. 586. **Ga.**—*Adams v. Cauthen*, 113 Ga. 1166, 39 S. E. 479; *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405. **Miss.**—*Moody v. Farr*, 6 Smed. & M. 100; *Thompson v. Wheatley*, 5 Smed. & M. 499. **Mo.**—*Neef v. Seely*, 49 Mo. 209. **N. C.**—*Davis v. Inscoc*, 84 N. C. 396; *Hinsdale v. Thornton*, 75 N. C. 381; *Phillips v. Davis*, 69 N. C. 117; *Frost v. Reynolds*, 39 N. C. 494.

[a] **Transfer of Note Given for Purchase Price.**—Where land is sold and three promissory notes, payable to bearer given for purchase price, vendee receiving bond for titles, vendor reserving title in himself, and two of the notes are paid off and the other transferred without indorsement or guaranty this operates as payment of the purchase money and vendee's equity becomes complete, and land is subject to levy and sale under execution against him. *Adams v. Cauthen*, 113 Ga. 1166, 39 S. E. 479.

70. *Morgan v. Bouse*, 53 Mo. 219; *Neef v. Seely*, 49 Mo. 209.

71. *Neef v. Seely*, 49 Mo. 209.

72. *Ament v. Brennan*, 1 Tenn. Ch. 431; *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78.

an unenforceable oral contract for the purchase of lands has no interest subject to execution.<sup>73</sup>

(c.) *Where Bond for Title Given.*—In some states where bond for title has been given until the vendee is invested with title the land is not subject to execution against him.<sup>74</sup> In other jurisdictions the interest of the vendee,<sup>75</sup> or his assignee,<sup>76</sup> where a bond for title has been given may be taken on execution.

(2.) *Personal Property.*—Personal property held by the vendee under contract, by which title remains in the vendor until the purchase money is paid, is not liable to an execution against the vendee.<sup>77</sup>

73. *Patterson v. Bodehamer*, 31 N. C. 96; *Le Gierse v. Getzendaner*, 2 Posey Unrep. Cas. (Tex.) 380.

74. *Ala.*—*Collins v. Robinson*, 33 Ala. 91; *Hogan v. Smith*, 16 Ala. 600; *Driver v. Clark*, 13 Ala. 192; *Elmore & Willis v. Harris*, 13 Ala. 360. *Ga.* *Bradwell v. Bainbridge Bank*, 103 Ga. 242, 29 S. E. 756; *Green & Colwell v. Hill*, 101 Ga. 258, 28 S. E. 692; *Goldman v. Dent*, 102 Ga. 9, 29 S. E. 138. But see *McEntire v. Berry*, 85 Ga. 474, 11 S. E. 799; *Rawson v. Coffin*, 55 Ga. 348; *Estes v. Ivey*, 53 Ga. 52. *Ind.* *State Bank v. Macy*, 4 Ind. 362; *Modisett v. Johnson*, 2 Blackf. 431. *Ky.* *Allen v. Sanders*, 2 Bibb 94; *Buford v. Buford*, 1 Bibb 305. *N. C.*—*Ledbetter v. Anderson*, 62 N. C. 323; *Justice v. Carroll*, 57 N. C. 429; *Melton v. Davidson*, 41 N. C. 194. *S. C.*—*Barton v. Rushton*, 4 Desaus. 373. *Tenn.*—*Norris v. Ellis*, 7 Humph. 463; *Shute v. Harder*, 1 Yerg. 3, 24 Am. Dec. 427. *Tex.*—*Daugherty v. Cox's Admr.*, 13 Tex. 209.

75. *Ark.*—*Young v. Mitchell*, 33 Ark. 222; *Hardy v. Heard*, 15 Ark. 184. *Del.*—*Flanagin & Sons v. Daws*, 2 Houst. 476. *Me.*—*Houston v. Jordan*, 35 Me. 520; *Stevens v. Legrow*, 19 Me. 95; *Jameson v. Head*, 14 Me. 34. *Miss.* *Adams v. Harris*, 47 Miss. 144, though rule was contra previous to statute subjecting equitable interests; *Ellis v. Ward*, 7 Smed. & M. 651; *Delafield v. Anderson*, 5 Smed. & M. 630; *Goodwin v. Anderson*, 5 Smed. & M. 730; *Thompson v. McGill*, *Freeman Ch.* 401. *Mo.* *Hammond v. Johnston*, 93 Mo. 198, 6 S. W. 83; *Lumley v. Robinson*, 26 Mo. 364. See also *Bartlett v. Glascock*, 4 Mo. 62. *Vt.*—*Woods v. Scott*, 14 Vt. 518.

[a] Where a debtor takes a bond to a third person, for a deed of certain lands, on his paying a sum therein

mentioned, and erects buildings thereon. The interest of the debtor in the land may be levied on, unless such third person shows legal or equitable claim thereto. *Woods v. Scott*, 14 Vt. 518.

[b] "In some . . . cases the vendee has been put in possession, and in others the whole or a part of the purchase money has been paid; these circumstances may make out a stronger case, but the principle still stands that the vendee in a title bond has an interest in the land . . . which is subject to sale under execution." *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340.

[c] *Payment of the interest on purchase money notes is not payment of any of the purchase price so as to render land held under bond for title subject to execution as the property of the holder.* *McEntire v. Berry*, 85 Ga. 474, 11 S. E. 799.

76. *Houston v. Jordan*, 35 Me. 520.

77. *U. S.*—*Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. ed. 285. *Cal.*—*Rodgers v. Backman*, 109 Cal. 552, 42 Pac. 448; *Stokes v. Balaam*, 73 Cal. 154, 14 Pac. 574. *Ind.*—*McGirr v. Sell*, 60 Ind. 249; *Bradshaw v. Warner*, 54 Ind. 58; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 899. *Mass.*—*Barrett v. Pritchard*, 2 Pick. 512, 13 Am. Dec. 449. *N. Y.*—*Herring v. Hoppock*, 15 N. Y. 409; *Strong v. Taylor*, 2 Hill 326; *Burchell v. Green*, 6 Misc. 236, 27 N. Y. Supp. 82. *Ohio.*—*Sage v. Sleutz*, 23 Ohio St. 1. *Pa.*—*Edwards' Appeal*, 105 Pa. 103.

[a] When personal property is sold on time the vendor retaining the title until the purchase-money is paid, but delivering possession to the purchaser; if the money is not paid on the day appointed, the purchaser afterwards holds as the bailee of the vendor, and



A fortiori if the vendor resume possession of property so sold the vendee has no interest which can be reached on execution.<sup>78</sup>

t. *Crops, Plants, Trees, etc.*—(I.) **In General.**—The manner as well as purpose of planting is to be considered in determining whether crops are realty or personalty, and so subject to execution as such.<sup>79</sup>

(II.) *Fructus Industriales.*—Generally annual produce and crops raised by industry, fructus industriales, are subject to levy and sale under execution as personal property:<sup>80</sup> where a growing crop of peaches or other fruit requiring periodical cultivation is regarded as

has no interest in the property subject to levy and sale under execution. *Fields v. Williams*, 91 Ala. 502, 8 So. 808.

**Attachment of**, see 3 STANDARD PROC. 304.

78. *Sage v. Slentz*, 23 Ohio St. 1.

79. *Sparrow v. Pond*, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

80. **Ala.**—Booker *v. Jones*, 55 Ala. 266; McKenzie & Son *v. Lampley*, 31 Ala. 526. See Evans *v. Lamar*, 21 Ala. 333; Adams *v. Tanner*, 5 Ala. 740. **Ga.** Crine *v. Tifts*, 65 Ga. 644. **Ind.**—Favorite *v. Deardorff*, 84 Ind. 555; Lindley *v. Kelley*, 42 Ind. 294; Matlock *v. Fry*, 15 Ind. 483; Northern *v. State*, 1 Ind. 113. **Kan.**—Polley *v. Johnson*, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Throop *v. Maiden*, 52 Kan. 258, 34 Pac. 801; Coughlin *v. Coughlin*, 26 Kan. 116; Voils *v. Battin*, 6 Kan. App. 742, 50 Pac. 940. **Ky.**—Thompson *v. Craigmyle*, 4 B. Mon. 391, 41 Am. Dec. 240; Craddock *v. Riddlesbarger*, 2 Dana 205; Parkham *v. Thompson*, 2 J. J. Marsh. 159. **La.**—Pickens *v. Webster*, 31 La. Ann. 870; Porche *v. Bodin*, 28 La. Ann. 761. **Md.**—Coombs *v. Jordan*, 3 Bland 284, 22 Am. Dec. 236. **Mass.**—Penhalow *v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21. **Mich.**—Preston *v. Ryan*, 45 Mich. 174, 7 N. W. 819. **Minn.**—Sparrow *v. Pond*, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Erickson *v. Paterson*, 47 Minn. 525, 50 N. W. 699; Gillitt *v. Truax*, 27 Minn. 528, 8 N. W. 767. **Miss.**—Cayee *v. Stovall*, 50 Miss. 396. **Mo.**—Selecman *v. Kinnard*, 55 Mo. App. 635. **Neb.**—Johns *v. Kamarad*, 96 N. W. 118; Sims *v. Jones*, 54 Neb. 769, 75 N. W. 150, 69 Am. St. Rep. 749; Johnson *v. Walker*, 23 Neb. 736, 37 N. W. 639. **N. H.** Howe *v. Batchelder*, 49 N. H. 204; Kingsley *v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173. **N. J.**—Bloom *v. Welch*, 27 N. J. L. 177; Westbrook *v. Eager*, 16 N. J. L. 81. **N. Y.**—Frank *v. Har-*

rington, 36 Barb. 415; Bank of Lanesburgh *v. Crary*, 1 Barb. 542; Shepard *v. Philbrick*, 2 Denio 174; Green *v. Armstrong*, 1 Denio (N. Y.) 550; Hartwell *v. Bissell*, 17 Johns. 128; Stewart *v. Doughty*, 9 Johns. 108; Whipple *v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; Newcomb *v. Raynor*, 21 Wend. 108, 34 Am. Dec. 219; Austin *v. Sawyer*, 9 Cow. 39; Harder *v. Plass*, 57 Hun 540, 11 N. Y. Supp. 226, 33 N. Y. St. 186. **N. C.** Bond *v. Coke*, 71 N. C. 97, 100; Flynt *v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; Shannon *v. Jones*, 34 N. C. 206; Brittain *v. McKay*, 23 N. C. 265, 35 Am. Dec. 738; Smith *v. Tritt*, 18 N. C. 241, 28 Am. Dec. 565. **Pa.**—Long *v. Seavers*, 103 Pa. 517; Hershey *v. Metzgar*, 90 Pa. 217; Pattison's Appeal, 61 Pa. 294, 100 Am. Dec. 637; Stambaugh *v. Yeates*, 2 Rawle 161; Gordon *v. Gordon*, 45 Pa. Super. 95. **S. C.**—Devore *v. Kemp*, 3 Hill 259. **Tenn.**—Edwards *v. Thompson*, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807. **Tex.**—Willis *v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; Cook *v. Steel*, etc. Co., 42 Tex. 53; Ellis *v. Bingham* (Tex. Civ. App.), 150 S. W. 602; Horne *v. Gambrell*, White & W. Civ. Cas., §996. **Vt.**—Hamblet *v. Bliss*, 55 Vt. 535. **Eng.**—Jones *v. Flint*, 10 Ad. & El. 753, 37 E. C. L. 396, 113 Eng. Reprint 285.

[a] "A growing crop, however immature its state, and whatever of labor may be required for its cultivation to maturity, and its severance from the soil, is a personal chattel, subject at common law to execution against the tenant." Booker *v. Jones*, 55 Ala. 266.

[b] Manure on a farm is part of the annual produce and subject to execution. Staples *v. Emery*, 7 Greenl. (Me.) 201.

[c] Hops growing on vines being raised by manual cultivation are personalty and subject to execution as

fructus industriales, it is subject to levy,<sup>81</sup> though the weight of authority places fruit trees and their fruit in the class known as "fructus naturales," which are not leviable.<sup>82</sup> By statute in some states a crop is not subject to execution until it has matured.<sup>83</sup> And in other jurisdictions, independent of statute, it is held that immature crops are not subject to levy under execution as personalty.<sup>84</sup>

(III.) **Fructus Naturales** — Trees, fruit of trees, bushes and grasses growing from perennial roots, are generally regarded as "fructus naturales," and while unsevered from the soil are part of the realty and not subject to execution.<sup>85</sup> But where fruit is regarded as fructus industriales because annual labor is necessary for its production, it is subject to levy.<sup>86</sup>

**Standing Timber.** — The interest of a grantee in a deed to standing timber to be cut and removed during a certain period is subject to execution.<sup>87</sup>

(IV.) **Crops on Leased Lands.** — (A.) **LESSOR'S INTEREST.** — As a rule unless the parties are tenants in common the lessor's interest in a crop grown on leased lands is not subject to execution even though the rent is to be paid by a share of the crop.<sup>88</sup>

such. *Frank v. Harrington*, 36 Barb. (N. Y.) 415.

[d] **A crop of mature and ungathered cotton** is not, by reason of its status, exempt from execution or other forcible seizure for debt. *Ellis v. Bingham* (Tex. Civ. App.), 150 S. W. 602.

81. *State v. Fowler*, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L. R. A. 849. See also *Smock v. Smock*, 37 Mo. App. 56.

82. See *infra*, II, B, 3, t, (III).

83. *Scolley v. Pollock*, 65 Ga. 339; *Edwards v. Thompson*, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807.

[a] Formerly in Alabama, see *Evans v. Lamar*, 21 Ala. 333.

[b] **Where the statute exempts "growing" crops**, a standing crop which has matured is subject to execution. *Shannon v. Jones*, 34 N. C. 206. See also *Wooten v. Hill*, 98 N. C. 48, 52, 3 S. E. 846.

84. *Ellithorpe v. Reidesil*, 71 Iowa 315, 32 N. W. 238; *Burleigh v. Piper*, 51 Iowa 649, 2 N. W. 520; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21. See also *Tipton v. Martzell*, 21 Wash. 273, 57 Pac. 806, 75 Am. St. Rep. 838.

85. **Del.**—*State v. Gemmill*, 1 Houst. 9. **Ill.**—*Adams v. Smith*, 1 Ill. 283. **Ky.**—*Craddock v. Riddlesbarger*, 2 Dana 205. **Minn.**—*Sparrow v. Pond*, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103. **N. H.**—*Rogers v. Elliott*, 59 N. H. 201, 47 Am. Rep.

192; *Norris v. Watson*, 22 N. H. 364, 55 Am. Dec. 160. **N. J.**—*Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432. **N. J.**—*Lansingburgh Bank v. Cray*, 1 Barb. 542; *Smith v. Jenks*, 1 Denio 580; *Green v. Armstrong*, 1 Denio 550. **Eng.**—*Rodwell v. Phillips*, 9 Mees. & W. 501.

[a] **Unpicked blackberries** cannot be taken as personal property. *Sparrow v. Pond*, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103. 86. See *supra*, II, B, 3, t, (I).

87. *Williams v. Parsons*, 167 N. C. 529, 83 S. E. 914. See also *Caldwell v. Fified*, 24 N. J. L. 150.

**License to remove trees and minerals**, see *infra*, II, B, 3, d.

88. **Ill.**—*Hansen v. Dennison*, 7 Ill. App. 73. **Ind.**—*Williams v. Smith*, 7 Ind. 559. **N. C.**—*Waltson v. Bryan*, 64 N. C. 764; *Gordon v. Armstrong*, 27 N. C. 409; *Deaver v. Rice*, 20 N. C. 567, 34 Am. Dec. 388.

[a] But in *Lindley v. Kelley*, 42 Ind. 294, it was held that where it was contracted that the lessor was to receive a portion of the crop when it matured, but each party was to save and take care of his own share, the lessor's interest was subject to an execution against him.

**Cropper's Contract.**—See *infra*, II, B, 3, t, (VI).

**Where Parties Are Tenants in Common.**—See *infra*, II, B, 3, t, (V).

(B.) **LESSEE'S INTEREST.** — Where the relation of landlord and tenant exists, although the rent is to be paid by a portion of the crop, the parties are not tenants in common. The title to the whole is in the tenant until division is made, and is subject to an execution against him.<sup>89</sup> If by statute the landlord has a lien on the crop for rent the interest of the tenant cannot be levied on while the crop is still immature,<sup>90</sup> but it has been held that a levy upon the tenant's interest, where the crop is not removed from the premises, is valid.<sup>91</sup> After the share of the landlord has been delivered to him that portion is no longer subject to an execution against the tenant.<sup>92</sup>

(V.) **Tenants in Common.** — The undivided interest of one tenant in common in a crop may be sold under execution against him,<sup>93</sup> before division,<sup>94</sup> and the sheriff for the purpose of such sale may take possession of the entire quantity.<sup>95</sup>

(VI.) **Cropper's Interest.** — A mere cropper is regarded not as a lessee or tenant, but as a mere servant of the owner, and, while the crop remains en masse, his interest is not liable to execution;<sup>96</sup> but

89. *Del.* — *Truitt v. Warrington* (Del.), 84 Atl. 9. *Ill.* — *Sargent v. Courier*, 66 Ill. 245. *La.* — *Pickens v. Webster*, 31 La. Ann. '870, 875; *Porche v. Bodin*, 28 La. Ann. 761. *Me.* — *Staples v. Emery*, 7 Greenl. 201. *N. Y.* — *Hawkins v. Giles*, 45 Hun 318, 12 N. Y. St. 426; *McCombs v. Becker*, 3 Hun 342; *Johnson v. Crofoot*, 53 Barb. 574, 37 How. Pr. 59. *Tex.* — See *Pace v. Sparks*, 1 Posey Unrep. Cas. 402.

[a] An agreement between the tenant and the landlord, after the levy of an execution against the tenant, that the latter shall receive his share in the field will not be allowed to defeat the levy. *Sargent v. Courier*, 66 Ill. 245.

[b] Where there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a parol contract with the tenant by which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid. *Almand v. Scott & Company*, 80 Ga. 95, 4 S. E. 92.

90. *Selecman v. Kinnard*, 55 Mo. App. 635. Also, *Case v. Hart*, 11 Ohio 364. But see *Pace v. Sparks*, 1 Posey Unrep. Cas. (Tex.) 402.

91. *Groesbeck v. Evans*, 40 Tex. Civ. App. 216, 83 S. W. 430, 88 S. W. 889.

92. *Durbin v. Hill*, 75 Ga. 228, 58 Am. Rep. 467.

93. *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176; *Bernal v.*

*Hovious*, 17 Cal. 541, 79 Am. Dec. 147. *Del.* — *Currey v. Davis*, 1 Houst. 598. *Ill.* — *Hansen v. Dennison*, 7 Ill. App. 73. *Neb.* — *Sims v. Jones*, 54 Neb. 769, 75 N. W. 150, 69 Am. St. Rep. 749.

94. *Hansen v. Dennison*, 7 Ill. App. 73.

95. *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147. See more fully *infra*, II, B, 5.

96. *Ariz.* — *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712. *N. C.* — *Brazier v. Ansley*, 33 N. C. 12, 51 Am. Dec. 408. *S. C.* — See *Rogers v. Collier*, 2 Bailey 581, 23 Am. Dec. 153.

[a] But see *Truitt v. Warrington* (Del.), 84 Atl. 9, where it is held that a person growing a crop on shares, has such a property in his share of the crop, as may be bought, and may be sold, under due process of law or otherwise. The nature of the contract does not appear, however, and it may have created the relation of landlord and tenant.

[b] **Title in Owner of Land.** — Until a division is made the whole is the property of the landlord or owner. *Brazier v. Ansley*, 33 N. C. 12, 51 Am. Dec. 408.

[c] Where an owner of land furnishes it with supplies and other like necessities, keeping general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for his work, the laborer is a cropper, and judgments or liens cannot see his part of the crop until the landlord is



after the crop is divided the share of the cropper is liable to be sold on execution against him though it was levied on before the division.<sup>97</sup>

u. *Property in Custodia Legis or in Possession of Public Officer.* (I.) Generally. — As a general rule property which is in the custody of officers of the court or government cannot be reached on execution.<sup>98</sup> However, the officer must hold the property in his official capacity.<sup>99</sup> Whiskey held in bond under the control of federal officers as security for taxes thereon,<sup>1</sup> a note which has been filed in a court of justice by a party litigant in a suit,<sup>2</sup> personal property,<sup>3</sup> or real estate in the custody of a receiver,<sup>4</sup> cannot be subjected to execution. Where a comptroller of the currency has put an examiner in charge of a bank but no receiver has been appointed the tangible assets of the bank are liable to execution.<sup>5</sup>

(II.) *Property Held Under Prior Writ.* — (A.) PERSONAL PROPERTY. Personal property once levied on is in the custody of the law and cannot be subjected to execution,<sup>6</sup> though in the possession of the de-

fully paid. *Almand v. Scott & Company*, 80 Ga. 95, 4 S. E. 892.

[d] The mere fact, however, that rent is payable by a share of the crop does not make the tenant a mere cropper. *Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224; *Reeves v. Hannan*, 65 N. J. L. 249, 48 Atl. 1018.

97. *Hare v. Pearson*, 26 N. C. 76.

98. U. S.—*Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322; *McCullough v. Large*, 20 Fed. 309. Ala.—*Kemp & Buckley v. Porter*, 7 Ala. 138; *Lindsay v. King*, 3 Port. 406. Ga.—*Latham & Sons v. Stringer*, 17 Ga. App. 585, 87 S. E. 840. Ky.—*May v. Hoaglan*, 9 Bush 171; *Fletcher v. Ferrel*, 9 Dana 372, 35 Am. Dec. 143. La.—*Stanborough v. McCall*, 8 La. Ann. 9; *Price v. Emerson*, 7 La. Ann. 237. Me.—*Hardy v. Tilton*, 68 Me. 195, 28 Am. Rep. 34. Mich.—*Campau v. Detroit Driving Club*, 130 Mich. 417, 90 N. W. 49. Pa.—*Robinson v. Atlantic, etc. R. Co.*, 66 Pa. 160. Tex.—*Taylor v. Gillean*, 23 Tex. 508. Eng.—*Masters v. Stanley*, 8 Dowl. P. C. 169, 4 Jur. 28; *France v. Campbell*, 6 Jur. 105.

Attachment of, see 3 STANDARD PROC. 280.

Garnishment of, see 10 STANDARD PROC. 450.

99. Where an execution is levied on property and a third party claims them, but by an agreement between the plaintiff in execution and the claimant the execution of a bond by the claimant is dispensed with and the property left in the hands of the marshal; a levy on property while thus in

the hands of the marshal, by a sheriff, creates no conflict of jurisdiction. The marshal held the property not as an officer but as agent of the parties. *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 43.

1. *McCullough v. Large*, 20 Fed. 309; *May v. Hoaglan*, 9 Bush (Ky.) 171.

2. *Stanborough v. McCall*, 8 La. Ann. 9; *Price v. Emerson*, 7 La. Ann. 237.

3. U. S.—*Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322. Mich.—*Campau v. Detroit Driving Club*, 130 Mich. 417, 90 N. W. 49. N. Y.—*Gouverneur v. Warren*, 2 Sandf. 624; *Fox v. Union Turnpike Co.*, 37 Misc. 308, 75 N. Y. Supp. 464; *Albany City Bank v. Schermerhorn*, 9 Paige 372, 37, 38 Am. Dec. 551. Pa.—*Robinson v. Atlantic, etc. R. Co.*, 66 Pa. 160. S. D.—*Hundley Dry Goods Co. v. Albien*, 32 S. D. 60, 142 N. W. 49. Tex.—*Edwards v. Norton*, 55 Tex. 405; *Taylor v. Gillean*, 23 Tex. 508.

Garnishment of receiver, see 10 STANDARD PROC. 457.

4. *Wiswall v. Sampson*, 14 How. (U. S.) 52, 14 L. ed. 322.

5. *Kimball v. Dunn*, 89 Fed. 782.

6. U. S.—*Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Brown v. Clarke*, 4 How. 4, 11 L. ed. 850; *Hagan v. Lucas*, 35 U. S. 400, 9 L. ed. 470. Cal.—*Yuba County v. Adams*, 7 Cal. 35. Ga.—*Camp v. Williams*, 119 Ga. 152, 46 S. E. 66; *Brown v. Warren*, 57 Ga. 214. Kan.—*Overton v. Warner*, 68 Kan. 96, 74 Pac. 651; *J. M. W. Jones Stationery Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310.

fendant in the first execution.<sup>7</sup> But in some jurisdictions by reason of statutory enactment property in custodia legis may be taken on execution, while in other states the property may be levied upon subject to the first levy," at least if the levy is made by the same officer

**Ky.**—*Kane v. Pileher*, 7 B. Mon. (Ky.) 651; *Hackley's Exrs. v. Swigert*, 5 B. Mon. 86, 41 Am. Dec. 256; *Oldham v. Scrivener*, 3 B. Mon. 579. **La.**—*Bayly & Pond v. Weil*, 28 La. Ann. 264. **Me.**—*Fuller v. Field*, 39 Me. 297. **Mo.**—*Metzner v. Graham*, 57 Mo. 404. **Neb.**—*Beagle v. Smith*, 50 Neb. 446, 69 N. W. 956. **N. Y.**—*Oswego First Nat. Bank v. Dunn*, 97 N. Y. 149, 49 Am. Rep. 517; *Tremaine v. Mortimer*, 25 Jones & S. 340, 7 N. Y. Supp. 681; *Seymour v. Newton*, 17 Hun 30; *Dubois v. Harcourt*, 20 Wend. 41. **Ohio.**—*Smead v. Diss*, 1 Ohio Dec. (Reprint) 200, 4 West. L. J. 4. **Pa.**—*Winegardner v. Hafer*, 15 Pa. 144; *Nealon v. Flynn*, 1 Kulp 149; *Ward v. Whitney*, 13 Phila. 7. **Tenn.**—*Bradley v. Kesee*, 5 Coldw. 223, 94 Am. Dec. 246. **Wis.**—*Knapp v. White*, 40 Wis. 143. **Eng.** *Wood v. Wood*, 4 Q. B. 397, 3 G. & D. 532, 7 Jur. 325, 12 L. J. Q. B. 141, 45 E. C. L. 397; *Collingridge v. Paxton*, 11 C. B. 683, 16 Jur. 18, 21 L. J. C. P. 39, 2 L. M. & P. 654, 73 E. C. L. 683.

[a] By garnishment of a mortgagee in possession of mortgaged chattels such chattels are placed in custody of the law and thenceforward are no more subject to actual seizure and appropriation to the satisfaction of another execution than if they had actually been levied upon when the garnishment took place. *Grand Island Banking Co. v. Costello*, 45 Neb. 119, 63 N. W. 376.

[b] Where a sheriff levied an execution in favor of A on goods as property of X he has no authority while the goods are in his possession under the first levy to levy the execution of K upon the same goods as the property of Y. *Knapp v. White*, 40 Wis. 143.

[c] **Pendency of foreclosure suit of mortgagee on property in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, does not withdraw the property from pursuit by creditors of the mortgagor in another court by means of execution. In such case the property is not in the custody of the law,**

but the principles applicable are those of the doctrine of lis pendens. *Ryan v. Donley*, 2 Neb. (Unof.) 6, 96 N. W. 49.

[d] **Injunction will lie to prevent sale of property in custodia legis under execution.** *Overton v. Warner*, 68 Kan. 96, 74 Pac. 651.

[e] **Remedy of Creditor.**—Where property replevied was sought to be reached by execution the court said: "The creditor . . . must pursue a remedy consistent with the sheriff's duty under the replevin, and with the hold which the law has upon the property. . . . We see no reason why he may not proceed in equity, making all the rival claimants parties, preventing if need be a transfer of the property by the plaintiff in replevin, avoiding a multiplicity of suits, and so determining in one action the whole controversy. *First Nat. Bank v. Dunn*, 97 N. Y. 149, 49 Am. Rep. 517.

**Attachment of**, see 3 STANDARD PROC. 282.

**Garnishment of**, see 10 STANDARD PROC. 450.

7. *Acker v. White*, 25 Wend. (N. Y.) 614. Property levied upon and seized by virtue of an execution, and then delivered upon a writ of replevin to a third person, cannot subsequently be levied upon by virtue of another execution against the defendant in the first execution, although the property be permitted by the plaintiff in replevin to continue in his possession and occupation; until the claim under the first execution is disposed of, a second levy cannot be made.

8. *White v. Culter*, 12 Ill. App. 38; *Patterson v. Pratt*, 19 Iowa 358.

9. **Ky.**—See *Darnaby v. Rogers*, 4 B. Mon. 238, holding that an officer is not bound to levy upon property already levied on by a valid execution. **La.**—See *Henry v. Tricou*, 36 La. Ann. 519. **Ohio.**—*Davidson & Co. v. Kuhn*, 1 Disn. 405, 12 Ohio Dec. 699. **Pa.** *Battersby v. Haubert*, 14 Phila. 112; *Taylor v. Bonaffon*, 17 W. N. C. 425. See *McGinnis v. Prieson*, 85 Pa. 111; *Croman's Case*, 11 Pa. Co. Ct. 44.

or with his consent.<sup>10</sup> And goods permitted to remain in possession of the defendant an unreasonable length of time are subject to a subsequent execution.<sup>11</sup> It is only where the property is lawfully taken by legal process that it is considered in the custody of the law;<sup>12</sup> so a levy under a void judgment will not prevent a subsequent levy of execution on the property.<sup>13</sup>

(B.) REAL ESTATE. -- Real estate taken under one writ may be subsequently levied on under execution but not so as to defeat the prior levy.<sup>14</sup>

(III.) When Released Under Bond. -- Where after an officer has levied on property and taken possession, a bond to try title, or forthcoming bond, is given, the property is still regarded, in some jurisdictions, as in the custody of the law and not subject to execution,<sup>15</sup> unless some new title has been acquired by the defendant.<sup>16</sup> In other jurisdictions the property is regarded as no longer subject to the previous execution and may be taken under a second levy.<sup>17</sup>

10. The rule that property in the hands of an officer, under judicial process, is in the custody of the law, and not subject to further seizure under process by another officer, is only adopted for the protection of the officer making the first seizure, and to avoid collisions of authority and conflicts of title. The same goods may be taken on a second writ by the same officer, and where, having the goods in his possession, he consents or submits to a levy upon other writs by other officers, and to hold the goods as trustee or bailee for them, after the satisfaction of his own writs, the rule does not apply, and the subsequent levies are valid, binding the proceeds of a sale in his hands. *Tyler, Davidson & Co. v. Kuhn*, 1 *Disn.* (Ohio) 405.

[a] A constable cannot levy upon goods subject to prior levy of a sheriff, if the creditor who obtains judgment before justice of the peace desires to reach the property levied on by the sheriff he should file a transcript in the court of common pleas and have a fieri facias issued to the sheriff before the sale. He will then be in a position to order the money into court and to participate in the distribution. *Croman's Case*, 11 *Pa. Co. Ct.* 44.

[b] Where there is no other property available and the first levying officer consents to the levy of the second execution. *Tyler v. Dunton*, 1 *Tenn. Ch.* 361.

11. *United States v. Conyngham*, 4 *Dall.* (U. S.) 358, 1 *L. ed.* 865. See

also *Gilbert v. Moody*, 17 *Wend.* (N. Y.) 354.

12. *Burr v. Mathers*, 51 *Mo. App.* 471; *Gilman v. Williams*, 7 *Wis.* 329, 76 *Am. Dec.* 219.

13. *Burr v. Mathers*, 51 *Mo. App.* 471.

14. *Ky.*—*Husbands v. Jones*, 9 *Bush* 218; *Oldham v. Scrivener*, 3 *B. Mon.* 579. *La.*—*Henry v. Tricou*, 36 *La. Ann.* 519; *Denton v. Woods*, 19 *La. Ann.* 356. *Vt.*—*Jewett v. Guyer*, 38 *Vt.* 209, subject to attachment.

Real estate in custody of a receiver not subject, see *supra*, II, B, 3, u, (I).

15. *Ala.*—*McLemore v. Benbow*, 19 *Ala.* 76; *Hobson v. Kissam*, 8 *Ala.* 357. *Ill.*—*Roberts v. Dunn*, 71 *Ill.* 46; *Rhines v. Phelps*, 8 *Ill.* 455; *Goodheart v. Bowen*, 2 *Ill. App.* 578. *Ind.*—*Pipher v. Fordyce*, 88 *Ind.* 436. *Kan.*—*Overton v. Warner*, 68 *Kan.* 96, 74 *Pac.* 651; *McKinney v. Purcell*, 28 *Kan.* 446. *Mo.* *Bates County Nat. Bank v. Owen*, 79 *Mo.* 429; *Fleming v. Clark*, 22 *Mo. App.* 218. *Neb.*—*Beagle v. Smith*, 50 *Neb.* 446, 69 *N. W.* 956. *Pa.*—*Ware v. Deacon*, 7 *Pa. Co. Ct.* 368; *Ward v. Whitney*, 7 *W. N. C.* 95; *Moore v. Whitney*, 10 *Lanc. Bar* 122. *Tex.*—*Le Gierse & Co. v. Pierce*, 2 *Wills. Civ. Cas.*, §89; *Bailey v. Miears*, *White & W. Civ. Cas.*, §84.

See 10 *STANDARD PROC.* 15.

Attachment of, see 3 *STANDARD PROC.* 285.

16. *Rhines v. Phelps*, 8 *Ill.* 455.

17. See 10 *STANDARD PROC.* 15, and *Frey v. Leeper*, 2 *Dall.* 131, 1 *L. ed.* 319.



(IV.) **Money in Hands of Court or Officer.** — Money which is in the possession of an officer received by virtue of an execution is not subject to an execution against the creditor in the first execution,<sup>18</sup> though it has been held to the contrary;<sup>19</sup> nor, according to some authorities, can such money be reached on execution against the debtor in the first execution,<sup>20</sup> though in other jurisdictions a contrary rule prevails

18. **U. S.**—*Reno v. Wilson*, Hempst. 91, 20 Fed. Cas. No. 11,700a; *Ross v. Clarke*, 1 Dall. 354, 1 L. ed. 173. **Ala.** *Zurcher v. Magee*, 2 Ala. 253, not subject to garnishment. **Cal.**—*Clymer v. Willis*, 3 Cal. 363, 58 Am. Dec. 414, not subject to attachment or garnishment. **Conn.**—*Willes v. Pitkin*, 1 Root 47. **Ill.**—*Campbell v. Hasbrook*, 24 Ill. 243; *Reddick v. Smith*, 4 Ill. 451. **Ind.** *Hooks v. York*, 4 Ind. 636; *Sibert v. Humphries*, 4 Ind. 481. **Kan.**—*Eaton v. McElhone*, 6 Kan. App. 225, 49 Pac. 695. **Ky.**—*First v. Miller*, 4 Bibb 311. **Me.**—*Hardy v. Tilton*, 68 Me. 195, 28 Am. Rep. 34. **Md.**—*Farmers' Bank v. Beaton*, 7 Gill & J. 421, 28 Am. Dec. 226 (cannot be attached); *Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. **Mass.**—*Thompson v. Brown*, 17 Pick. 462; *Wilder v. Bailey*, 3 Mass. 289. **Minn.**—*Davis v. Seymour*, 16 Minn. 210. **Mo.**—*State v. Boothe*, 68 Mo. 546; *Ex parte Fearle*, 13 Mo. 467, 53 Am. Dec. 155. **N. J.**—*Crane v. Freese*, 16 N. J. L. 305; *Manly v. McCarty*, 5 N. J. L. J. 218. **N. Y.**—*Baker v. Kenworthy*, 41 N. Y. 215; *Betts v. Hoyt*, 19 Barb. 412; *Adams v. Welsh*, 11 Jones & S. 52; *Muscott v. Woolworth*, 14 How. Pr. 477; *Dubois v. Dubois*, 6 Cow. 494. **N. C.** *Smith v. McMillan*, 84 N. C. 593; *State v. Lea*, 30 N. C. 94. **Ohio.**—*Dawson v. Holcomb*, 1 Ohio 275, 13 Am. Dec. 618. **Contra**, *Renner v. Burke*, 11 Ohio Cir. Ct. 268, 5 Ohio Cir. Dec. 361. **Pa.** *Hooke v. Freeman*, 12 Pa. Co. Ct. 310; *Worrell v. Van Dusen Oil Co.*, 1 Leg. Gaz. 53. But see *Monongahela Navigation Co. v. Ledlie*, 1 Clark 490, 3 Pa. L. G. 179, holding a sheriff has returned to a fieri facias "money made" if application be made to the court for leave to the sheriff to apply the plaintiff's money, to an execution held by the sheriff against him, it will be granted of course, unless some bona fide assignee interferes with a prior claim. Also *Bayard v. Bayard*, 5 Pa. L. J. 160, 3 Clark 261. **S. C.**—*Burrell v. Letson*, 1 Strob. 239 (cannot be attached); *Blair v. Cantey*, 2 Spears 34, 42 Am. Dec. 360 (not subject to attachment);

*Adams v. Crimager*, 1 McMullen 309; *Johnston v. Shubert*, 2 Hill 502; *Southern Western R. Co. v. Watkins*, 2 Rich. 328. See also *Reid v. Ramey*, 2 Rich. L. 4. But see *Summers v. Caldwell*, 2 Nott. & McC. 341, holding that where the sheriff has collected money on execution for a plaintiff, the court can order it to be paid over on an execution in the sheriff's hands against the plaintiff. **Vt.**—*Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631; *Conant v. Bicknell*, 1 D. Chip. 50. **Eng.**—*Wood v. Wood*, 4 Q. B. 397, 3 G. & D. 532, 7 Jur. 325, 12 L. J. Q. B. 141, 45 E. C. L. 397.

[a] **Money bona fide lent to a sheriff**, and applied by him to his own use, prior to his receiving a writ of execution against the lender is not liable to satisfy such execution, either at law or in equity, notwithstanding the same money was originally deposited in his hands as a pledge for certain purposes. *Price v. Crump*, 2 Hen. & M. (Va.) 89.

19. **Ga.**—*Rogers v. Bullen*, Charl. 196, holding that money received by the sheriff under one execution will be paid over to an execution creditor of the first creditor, there being no interfering or conflicting claims and this second execution being the eldest against the first creditor). See also *Columbus Factory v. Herndon*, 59 Ga. 209. **La.**—See *Goubeau v. New Orleans & N. R. Co.*, 6 Rob. 345. **Tenn.**—*Dolby v. Mullins*, 3 Humph. 437, 39 Am. Dec. 180. **Tex.** *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; *Hamilton v. Ward*, 4 Tex. 356.

[a] In *Dolby v. Mullins*, 3 Humph. (Tenn.) 435, 39 Am. Dec. 180, the court says: "We understand the uniform practice has been to appropriate money in the hands of an officer, in discharge of an execution against the plaintiff, and we think it is supported by principle, and the opinion under review admits that it is wise and just that such a remedy should exist."

20. **U. S.**—*Turner v. Fendall*, 1 Cranch 117, 2 L. ed. 53, affirming 8

as to any surplus remaining in the hands of the officer.<sup>21</sup> Money deposited with the sheriff or coming into his hands in his official capacity, is not subject to seizure under an execution against him.<sup>22</sup> A sheriff having levied on the defendant's real estate cannot, while that levy remains undisposed of, seize in execution of the same writ a sum of money voluntarily paid to him by the defendant with directions to apply it on a junior writ.<sup>23</sup>

**Money Deposited as Bail.** — Where one person deposits money as bail for another, the money does not thereby become the property of the latter so as to be subject to an execution against him not connected in any way with the criminal proceedings.<sup>24</sup>

v. *Wife's Property for Debts of Husband.* — The liability of the wife's property for the debts of the husband is treated elsewhere in this work.<sup>25</sup>

w. *Church Property.* — According to some courts church property may not be subjected to execution,<sup>26</sup> though there is authority to the

Fed. Cas. No. 4,727, 1 Cranch C. C. 35. Ind.—*Winton v. State*, 4 Ind. 321. La. *Marini v. Mourain*, 5 La. Ann. 133. Pa.—*Bosset v. Miller*, 2 Woodw. 40. Eng.—*Fieldhouse v. Croft*, 4 East 510, 102 Eng. Reprint 926.

[a] Unless the sheriff who has sold property under the first execution has appropriated and set apart specific money from such sale for the payment of the balance to be paid under the first execution. *Wood v. Wood*, 4 Q. B. 397, 7 Jur. 325, 3 G. & D. 532, 12 L. J. Q. B. 141, 45 E. C. L. 397.

[b] In *Carhart & Bro. v. Grier*, 56 Ga. 383, where property offered for sale by the sheriff was withdrawn on the promise of the defendant that he would pay off the execution levied thereon, and this payment was voluntarily made, the court held the money in the hands of the sheriff not subject to an older execution against such defendant, stating that if the money in the hands of the sheriff had been raised by a sale of the defendant's property that would have presented a different question.

21. Ala.—*Langdon v. Lockett*, 6 Ala. 727, 41 Am. Dec. 78; *King v. Moore*, 6 Ala. 160, 41 Am. Dec. 44. Ill.—*Larsen v. Ditto*, 90 Ill. App. 384. Tex. *Turner v. Gibson* (Tex. Civ. App.), 152 S. W. 839.

[a] The right of a former owner to excess of proceeds of sale of land forfeited is property which is liable to execution against him. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

[b] **Surplus From Mortgage Fore-**

**closure.**—Where a sheriff foreclosed a mortgage and after the satisfaction of the mortgage debt retained a balance in his hands belonging to the mortgagor, it was held that under the statute such overplus could be legally applied on executions against the mortgagor, then in the hands of the sheriff. *Payne v. Billingham*, 10 Iowa 360.

22. *Folger v. Marigney*, 11 La. Ann. 727.

**Levy on property of one other than debtor**, see *supra*, II, B, 3, r.

23. *Rudy v. Com.*, 35 Pa. 166, 78 Am. Dec. 330.

24. *People v. Gould*, 75 App. Div. 524, 78 N. Y. Supp. 279; *McShane v. Pinkham*, 22 Civ. Proc. 173, 19 N. Y. Supp. 969, 46 N. Y. St. 65.

**Garnishment of money or property taken from prisoners**, see 10 STANDARD PROC. 464.

25. See title "**Husband and Wife**," 11 STANDARD PROC. 808.

26. *Bigelow v. Middletown Cong. Soc.*, 11 Vt. 283.

[a] Where a corporation has built a meetinghouse, and sold the pews to individuals, an execution against the corporation cannot be levied on the pulpit. *Revere v. Gannett*, 1 Pick. (Mass.) 169.

[b] **The communion service of a church** is not subject to execution on a judgment recovered by the pastor against the trustees of the church for an amount due on his salary. *Lord v. Hardie*, 82 N. C. 241, 33 Am. Rep. 682.

contrary.<sup>27</sup> The right of a person to a pew may be levied on under execution as real estate.<sup>28</sup>

x. *Fixtures*.—Fixtures which the owner may rightfully remove from the realty to which they are annexed may be taken on execution as personalty,<sup>29</sup> but those articles which are considered part of the realty cannot be so taken as personalty.<sup>30</sup> Those fixtures which are regarded as part of the realty will of course pass with an execution against the realty.<sup>31</sup>

*Trade Fixtures*.—Fixtures erected by a tenant for trade purposes are subject to an execution against him.<sup>32</sup>

27. *Presbyterian Congregation of Erie v. Colt's Exrs.*, 2 Grant's Cas. (Pa.) 75.

28. *Barnard v. Whipple*, 29 Vt. 401, 70 Am. Dec. 422. See also *Perrin v. Leverett*, 13 Mass. 128.

29. *Conn.*—*Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. *Ill.* *Titus v. Mabee*, 25 Ill. 232. *Ind.*—*Test v. Robinson*, 20 Ind. 251; *State v. Bonham*, 18 Ind. 231. *Me.*—*Fifield v. Maine Cent. R. Co.*, 62 Me. 77. *Mass.*—*Doty v. Gorham*, 5 Pick. 487, 16 Am. Dec. 417. *N. Y.*—*Cresson v. Stout*, 17 Johns. 116, 8 Am. Dec. 373. *Pa.*—*Heffner v. Lewis*, 73 Pa. 302.

[a] *Side tracks* fastened to main tracks and used temporarily by a railroad company with consent of the owners are subject to execution against the latter. *Fifield v. Maine Cent. R. Co.*, 62 Me. 77.

[b] *Potash kettles*, set in arches in the usual way for use, are liable to be levied upon and sold as personal property. *Wetherby v. Foster*, 5 Vt. 136.

30. *Del.*—*Rice v. Adams*, 4 Harr. 332. *Ill.*—*Titus v. Ginheimer*, 27 Ill. 462; *Titus v. Mabee*, 25 Ill. 232; *Moore v. Cunningham*, 23 Ill. 268, 328. *Ia.* *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa 533, 79 Am. Dec. 511. *La.*—*Poche v. Theriot*, 23 La. Ann. 137. *Mont.*—*Switzer v. Allen*, 11 Mont. 160, 27 Pac. 408. *Neb.*—*Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. *N. C.*—*Pemberton v. King*, 13 N. C. 376. *Pa.*—*Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490; *Hillard Live Stock Co. v. Amity Coal Co.*, 2 Lane. L. Rev. 241. *Vt.*—*Newhall v. Kinney*, 56 Vt. 591.

[a] An owner of a steam-mill property and land, encumbered to an amount greater than their value by dower and by judgment liens, cannot sever and remove the steam-engine or

other constituent parts of the machinery, so that as personalty, they may be levied upon and sold upon the execution of a subsequent judgment creditor. *Appeal of Witmer*, 45 Pa. 455, 84 Am. Dec. 505.

[b] *Church Bell*.—*Congregational Soc. of Dubuque v. Fleming*, 11 Iowa 533, 79 Am. Dec. 511, though not yet placed in tower, it being the intention so to do.

[c] *Bricks in the wall of a building* cannot be taken on execution against the contractor placing them there. *Moore v. Cunningham*, 23 Ill. 268, 328.

*Materials of contractor* generally, see *supra*, II, B, 3, b, (XI).

[d] *Locomotive or Freight Car on the Tracks*.—*Titus v. Ginheimer*, 27 Ill. 462; *Titus v. Mabee*, 25 Ill. 232. But as to the right to levy on rolling stock of a corporation being subject, see 5 STANDARD PROC. 675.

[e] *Injunction* will lie to prevent removal of such fixtures by purchaser at execution sale. *Poche v. Theriot*, 23 La. Ann. 137.

31. *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320; *Goddard v. Chase*, 7 Mass. 432 (stoves which are part of a house).

[a] *An execution against the interest of the lessees* in a lot of land and the premises leased, includes fixtures erected thereon by the lessees even though there was an agreement between the lessor and the lessees that the latter could remove such fixtures at the expiration of the lease. *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320.

[b] *After conveyance of real property*, fixtures which have become part of it cannot be taken on execution against the grantor. *Taylor v. Plunkett*, 4 Penne. (Del.) 467, 56 Atl. 384.

32. *Ind.*—*Taffe v. Warnick*, 3 Blackf. 111, 23 Am. Dec. 383, a carding ma-



4. **Levy.**—a. *Definition. Object and Distinctions.*—The levy of an execution is such action by a proper officer as sets apart and appropriates, for the purpose of satisfying the writ, a part or the whole of the property of a judgment debtor.<sup>33</sup> The delivery of the writ to an officer with instructions to levy upon certain property does not constitute a levy.<sup>34</sup>

A levy of an execution is something different from service<sup>35</sup> of an

chine erected for the purpose of carrying on carding. **N. Y.**—*Ombony v. Jones*, 19 N. Y. 234 (dance hall adjoining an inn). Also *Cresson v. Stout*, 17 Johns. 116, 8 Am. Dec. 373. **Pa.**—*Iley v. Bruner*, 61 Pa. 87; *Lemar v. Miles*, 4 Watts 330. **Tenn.**—*Pillow v. Love*, 5 Hayw. 109. **Eng.**—*Poole's Case*, 1 Salk. 368, 91 Eng. Reprint 320.

[a] The fact that by an agreement between the landlord and tenant, the fixtures, in a certain event, is to become the property of the landlord, unless that event has actually happened, does not affect the rule. *Lemar v. Miles*, 4 Watts (Pa.) 330.

[b] A still set upon the lands of the lessor by the lessee may be seized on execution and sold as property of the lessee. *Pillow v. Love*, 5 Hayw. (Tenn.) 109.

33. **Cal.**—*Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195; *Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. **Mass.**—See *Hall v. Crocker*, 3 Mete. 245. **Minn.**—*Horgan v. Lyons*, 59 Minn. 217, 60 N. W. 1099. **Mo.**—*Butler v. Imhoff*, 238 Mo. 584, 142 S. W. 287. **Neb.**—*Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218. **N. C.**—*Bland v. Whitfield*, 46 N. C. 122. **Va.**—*Humphrey v. Hitt*, 6 Gratt. (47 Va.) 509, 526, 52 Am. Dec. 133.

[a] **Other Definitions.**—A levy means nothing more than the taking possession of property by an officer. *Pracht v. Pister*, 30 Kan. 568, 573, 1 Pac. 638.

[b] "The levy is the assertion of title by the sheriff." *Duncan's Appeal*, 37 Pa. 500; *Samuel v. Knight & Co.*, 9 Pa. Super. 352.

[c] **A Levy (1) Is a Seizure.**—*Ayers v. State*, 3 Ga. App. 305, 59 S. E. 924; *Weidensaul v. Reynolds*, 49 Pa. 73; *Welsh v. Bell*, 32 Pa. 12; *Schuykill County's Appeal*, 30 Pa. 358. (2) The

word levy means actual seizure, that is, the officer must take actual possession of the goods. *Douglas v. Orr*, 58 Mo. 473; *Hobbs v. Williams*, 175 Mo. App. 409, 162 S. W. 334.

[d] The essence of a levy is the sheriff's getting power over the property such as will enable him to sell at the proper time and place. *Roebuck v. Thornton*, 19 Ga. 149; *Pugh v. Callo-way*, 10 Ohio St. 488.

[e] Possession is the essence of a seizure. *Goubeau v. New Orleans & N. R. Co.*, 6 Rob. (La.) 345.

[f] **A levy of a general execution** "is but a seizure or designation, by the sheriff, of so much of the property of the defendant in the execution as is intended to be applied, by a sale, to the liquidation of the judgment debt." *Karnes v. Alexander*, 92 Mo. 660, 672, 4 S. W. 518.

[g] The taking may be by laying hold of, grasping, seizing or by gaining control or possession in any way. *Butler v. Imhoff*, 238 Mo. 584, 142 S. W. 287.

[h] "Any act on the part of the officer showing an intent to sell the specific land, and subject it to the satisfaction of the judgment, followed by a sale, constitutes a levying of the execution as against the defendant." *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

[i] "Any act by which the sheriff, acting under the fieri facias gets the defendant's property into his own hands, or any act by which he gets the defendant's property into the hands of any other, not excepting the defendant himself, as his, the sheriff's, agent, amounts to a levy." *Roebuck v. Thornton*, 19 Ga. 149.

34. *Henderson v. Henderson*, 133 Pa. 399, 410, 19 Atl. 424, 25 W. N. C. 557.

35. *Terrell v. State*, 66 Ind. 570.

[a] The service of an execution may be said to be the communication of its contents to the execution de-

execution, from an indorsement of levy,<sup>36</sup> from a selling<sup>37</sup> and return,<sup>38</sup> and from service of a garnishment.<sup>39</sup>

The object of a levy is to bring the property within the custody of the law and prevent the judgment debtor from disposing of it to the prejudice of the creditor before sale can be made, so as to make out of it the amount recovered by the judgment.<sup>40</sup>

b. *Necessity for Levy.* — (I.) *In General.* — It is a general rule that a previous valid levy is essential to the validity of a sale of property by the officer under an execution, whether the property be real<sup>41</sup> or

fendant, accompanied by, or followed with, a demand for its satisfaction, and in its natural order precedes the levy of an execution. *Terrell v. State*, 66 Ind. 570.

[b] "Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money, and includes a sale of the property when necessary." *Peek v. City Nat. Bank*, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577, *quoted in In re Tengwall Co.*, 201 Fed. 82, 119 C. C. A. 420.

36. *Duncan's Appeal*, 37 Pa. 500.

[a] *An indorsement of a levy upon* (1) personal (*Duncan's Appeal*, 37 Pa. 500), or (2) real (*Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70), property is in itself no levy; it is but evidence of it. (3) But it has been held that in the case of a levy upon real estate the indorsement is the levy itself. *Keaton v. Farkas*, 136 Ga. 188, 70 S. E. 1110; *Scolly & Co. v. Butler*, 59 Ga. 849; *Anderson v. Lee*, 53 Ga. 189; *Ansley v. Wilson*, 50 Ga. 418, 423; *Isam v. Hooks*, 46 Ga. 309; *Hutchins v. Carver Co.*, 16 Minn. 13.

37. *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

38. *Douglas v. Whiting*, 28 Ill. 362.

39. *Beaumont v. Eason*, 12 Heisk. (Tenn.) 417, difference is in the power of sale which goes with levy of execution.

As to garnishment generally, see 10 STANDARD PROC. 365.

40. *Cal.*—*Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. *Ill.*—*Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842. *Minn.*—*Hutchins v. Carver Co.*, 16 Minn. 13; *Tullis v. Brawley*, 3 Minn. 277. *Mont.*—*Britannia Co. v. United States F. & G. Co.*, 43 Mont. 93, 100, 115 Pac. 46.

*Effect of levy as bringing property into the custody of the law*, see *infra*, II, B, 4, s, (1).

41. *Ala.*—*White v. Farley*, 81 Ala. 563, 8 So. 215; *Ware v. Bradford*, 2 Ala. 676, 36 Am. Dec. 427. *Ark.*—*Hughes v. Watt*, 26 Ark. 228; *Whiting & Slark v. Beebe*, 12 Ark. 421, 542. *Cal.*—*Herron v. Hughes*, 25 Cal. 555. *Ga.*—*Yoemans v. Bird*, 81 Ga. 340, 6 S. E. 179; *Kellogg & Co. v. Buckler & Short*, 17 Ga. 187. *Haw.*—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. *Ill.*—*Goss Mfg. Co. v. People*, 4 Ill. App. 510. *Ky.*—*Leath v. Deweese*, 162 Ky. 227, 172 S. W. 516; *Addison v. Crow & Jarvis*, 5 Dana 271. *La.*—*Williams v. Clark*, 11 La. Ann. 761; *Gaines v. Merchants' Bank*, 4 La. Ann. 369. *Me.*—*Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285. *Md.*—*Jarboe v. Hall*, 37 Md. 345; *Langley v. Jones*, 33 Md. 171; *Dorsey's Lessee v. Dorsey*, 23 Md. 388; *Wright v. Orrell*, 19 Md. 151; *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519; *Waters v. Duvall*, 11 Gill & J. 37, 33 Am. Dec. 693; *Berry v. Griffith*, 2 Harr. & G. 337, 345, 18 Am. Dec. 309. *Mass.*—*Wright v. Morley*, 150 Mass. 513, 23 N. E. 232. *Miss.*—*Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358. *Mo.*—*Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Yeldell & Barnes v. Stemmons*, 15 Mo. 443; *Hobbs v. Williams*, 175 Mo. App. 409, 162 S. W. 334; *Caffery v. Choctaw Coal & M. Co.*, 95 Mo. App. 174, 68 S. W. 1049. *N. J.*—*Cook v. Wood*, 16 N. J. L. 254; *Matthews v. Warne*, 11 N. J. L. 295; *Nelson v. Van Gazelle V. Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943. *N. Y.*—*Walker v. Henry*, 85 N. Y. 130; *Hathaway v. Howell*, 54 N. Y. 97; *Van Gelder v. Van Gelder*, 26 Hun 356; *Hartwell v. Root*, 19 Johns. 345, 10 Am. Dec. 232; *Smith v. Hill*, 22 Barb. 656. *N. C.*—*Doe ex dem. Brazier v. Thomas*, 44 N. C. 28; *Borden v. Smith*, 20 N. C.

personal, or to enable him to bring an action for the goods.<sup>42</sup> In many states, a levy is necessary to establish or preserve a lien on the property of the defendant and create a bar to a subsequent sale thereof.<sup>43</sup>

**Where Judgment Is a Lien.**—In a number of jurisdictions it is not necessary for the officer to make a formal levy on real estate when the judgment is a lien upon it,<sup>44</sup> or when the property has been seized

27, 34; *Knight v. Leak*, 19 N. C. 133. Compare, *Doe ex dem. McEntire v. Durham*, 29 N. C. 151, 45 Am. Dec. 512, holding there is no law which requires a purchaser of land at a sheriff's sale to show that the execution has been levied on the same. **N. D.**—Rev. Codes, 1905, §7110. **Ore.**—Lord's Laws, ch. 4, §233. **Pa.**—Braden's Estate, 165 Pa. 184, 30 Atl. 746; *Sturges's Appeal*, 86 Pa. 413; *Buehler v. Rogers*, 68 Pa. 9; *Samuel v. Knight & Co.*, 9 Pa. Super. 352; *Knelly v. Bachert*, 28 Pa. Co. Ct. 446. See *Lippincott v. Tanner*, 1 Miles 286. **R. I.**—*Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763. **S. C.**—*Manning v. Dove*, 10 Rich. L. 395. **S. D.**—*Black Hills Brew. Co. v. Middle West Fire Ins. Co.*, 31 S. D. 318, 140 N. W. 687. **Tex.**—*Borden v. McRae*, 46 Tex. 396; *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280. **Wis.**—*St.*, 1898, §2985; *Brown v. Pratt*, 4 Wis. 513, 65 Am. Dec. 330.

42. **Ill.**—*Persels v. McConnell*, 16 Ill. App. 526. **Mo.**—*Hobbs v. Williams*, 175 Mo. App. 409, 162 S. W. 334. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218; *Wintermute v. Hankinson*, 6 N. J. L. 140. **N. Y.**—*Hathaway v. Howell*, 54 N. Y. 97; *Hotchkiss v. M'Vickar*, 12 Johns. 403; *Marsh v. Lawrence*, 4 Cow. 461. **Pa.**—*Chuley v. Lockhart*, 59 Pa. 376, 98 Am. Dec. 350; *Lewis v. Carsaw*, 15 Pa. 31. **S. C.**—*Brian v. Strait*, *Dudley* 19.

[a] The officer does not acquire a title enabling him to sue for the goods, by virtue of the writ itself. *Lloyd v. Wyckoff*, 11 N. J. L. 218; *Wintermute v. Hankinson*, 6 N. J. L. 140; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461.

[b] In *Hotchkiss v. M'Vickar*, 12 Johns. (N. Y.) 403, it was held that a sheriff cannot maintain trover for goods tortiously taken out of the possession of the party against whom the execution issued after the teste but before the delivery of the execution to and seizure of them by him.

**As to right of officer to sue for prop-**

erty levied on, see *infra*, II, B, 4, t, (V).

43. **Haw.**—*Everett v. Bolles*, 6 Hawaii 153. **Ia.**—*Reeves & Co. v. Sebern*, 16 Iowa 234, 85 Am. Dec. 513. **Mo.**—*Hopke v. Lindsay*, 83 Mo. App. 85. **N. Y.**—*Abeel v. Anderson*, 39 Hun 514, 3 How. Pr. (N. S.) 489, 9 Civ. Proc. 274; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 312; *Butler v. Maynard*, 11 Wend. 548, 27 Am. Dec. 100. **S. D.**—*McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99. **Va.**—See *Humphrey v. Hitt*, 6 Gratt. (47 Va.) 509, 527, 52 Am. Dec. 133.

[a] Under a statute providing that goods and chattels are bound by the execution from the time of its delivery to the sheriff, there must be an actual levy otherwise the lien of the execution is lost. *Abeel v. Anderson*, 39 Hun (N. Y.) 514, 3 How. Pr. (N. S.) 489, 9 Civ. Proc. 274. See also *Hotchkiss v. M'Vickar*, 12 Johns. (N. Y.) 403.

**Effect of levy as creating a lien**, see *infra*, II, B, 4, s, (III).

44. **Cal.**—*Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 540, 76 Pac. 243; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56; *Utter v. Chapman*, 38 Cal. 659, 99 Am. Dec. 441; *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256. **Minn.**—*Carlson v. Smith*, 127 Minn. 203, 149 N. W. 199; *Knox v. Randall*, 24 Minn. 479, 496; *Hutchins v. Carver Co.*, 16 Minn. 13; *Lockwood v. Bigelow*, 11 Minn. 113; *Bidwell v. Coleman*, 11 Minn. 78; *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *Tullis v. Brawley*, 3 Minn. 277. **Mont.**—*Britania Co. v. United States F. & G. Co.*, 43 Mont. 93, 115 Pac. 46. **Neb.**—*Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113. **N. Y.**—*Van Gelder v. Van Gelder*, 26 Hun 356; *Wood v. Colvin*, 5 Hill 228. **N. C.**—*Farrior v. Houston*, 100 N. C. 369, 6 S. E. 72, 6 Am. St. Rep. 597; *Surratt v. Crawford*, 87 N. C. 372; *Doe*



under a writ of attachment,<sup>45</sup> but it is not improper to do so.<sup>46</sup> But where the judgment is not a lien, the property is not taken on execution until a levy.<sup>47</sup>

When the judgment itself designates the property which is to be sold, there is no occasion for a levy.<sup>48</sup> Thus, a levy is not necessary before selling premises upon a decree foreclosing a lien upon them.<sup>49</sup>

(II.) **Waiver of Levy.**—The judgment defendant may waive a levy upon the property and where there is such a waiver the sale passes such defendant's title as effectually as if a levy had been actually made.<sup>50</sup>

*ex dem.* McEntire v. Durham, 29 N. C. 151, 45 Am. Dec. 512; Shamburger v. Kennedy, 12 N. C. 1. Ore.—Smith v. Dwight, 156 Pac. 573; Bank of British Columbia v. Page, 7 Ore. 454.

[a] **Reason for the Rule.**—The great object of a levy is to take property into the custody of the law and, by this act, render it liable to the lien of the execution, thus putting it out of the power of the debtor to divert it to any other purpose. Where the property is subject to the lien of the judgment and already beyond the control of the debtor, the result to be attained by a levy is accomplished and the levy is therefore unnecessary. Tullis v. Brawley, 3 Minn. 277.

[b] **Effect of the Statute.**—(1) A statutory provision that "until a levy, property shall not be affected by the execution," does not require a levy to pass title. Its purpose is merely to annul a mischievous rule of the common law. "By the common law all judgments had relation to the first day of the term at which they were rendered, and an execution could be issued and tested as of that day; and also by the common law the goods of the defendant were bound by the execution from its date. Under this rule the title of the sheriff was better than that of a bona fide purchaser who may have purchased the goods of the defendant in the execution even before any judgment was in fact entered against him, or an execution awarded." This was avoided somewhat by the statute of frauds and completely by the provision under consideration. Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441. (2) In Tullis v. Brawley, 3 Minn. 277, it was held that this clause referred to personal property only. See also Knox v. Randall, 24 Minn. 479, 496; Hutchins v. Carver

Co., 16 Minn. 13; Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429.

[c] **Property affixed to the realty** is real property and need not be levied upon, as the judgment is a lien upon it. Britannia Min. Co. v. United States Fid. & Guar. Co., 43 Mont. 93, 115 Pac. 46.

45. Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195; Holter Hdw. Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

As to manner of levy on property seized on attachment, see *infra*, II, B, 4, g, (XIV), (A).

46. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Knox v. Randall, 24 Minn. 479, 496.

47. Lean v. Givens, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79; Summer-ville v. Stockton Milling Co., 142 Cal. 529, 540, 76 Pac. 243.

48. Cal.—Southern California Lumb. Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. Ind.—Ewing v. Hatfield, 17 Ind. 513. Ia.—Croft v. Colfax E. L. & P. Co., 113 Iowa 455, 85 N. W. 761.

49. Ind.—See Ewing v. Hatfield, 17 Ind. 513. Ia.—Croft v. Colfax E. L. & P. Co., 113 Iowa 455, 85 N. W. 761. Kan.—Smith v. Burnes, 8 Kan. 197. Ore.—Bank of British Columbia v. Page, 7 Ore. 454. Tex.—Patton v. Collier, 13 Tex. Civ. App. 544, 38 S. W. 53.

50. Greer v. Wintersmith, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; Harlan v. Harlan, 14 Lea (Tenn.) 107.

[a] **Waiver Not a Levy.**—A defendant may waive a levy so as to dispense with it altogether, but his waiver is not a levy at all. Ray v. Harcourt, 19 Wend. 495.

[b] **Effect of Waiver on Sheriff's Status.**—This waiver on the part of the execution defendant, however, does

(III.) Presumption as to Levy. — Where an officer sells property under a valid judgment and execution, it will be presumed that there has been a valid levy upon it.<sup>51</sup>

c. *Control of Writ and Instructions to Officer.*<sup>52</sup> — A plaintiff in an execution at law or his attorney, has a right to control the same, and direct what proceeding shall or shall not be taken thereunder,<sup>53</sup>

not convert the sheriff into a mere private agent of the defendant. The sheriff, notwithstanding the waiver, still acts, in making the sale, in his official capacity. *Greer v. Winter-smith*, 85 Ky. 516, 520, 4 S. W. 232.

[c] *Waiver a Question of Fact.* The question whether there has been a waiver of the levy is for the jury. *Vanosdall v. Hamilton*, 118 Mich. 533, 77 N. W. 9.

As to waiver of actual seizure of personal property, see *infra*, II, B, 4, g, (X), (C), (5).

51. *Colo.*—*Herr v. Broadwell*, 5 *Colo.* App. 467, 39 *Pac.* 70. *Ky.*—*Scott's Exr. v. Scott*, 85 Ky. 385, 9 Ky. L. Rep. 363, 3 S. W. 598, 5 S. W. 423; *Evans v. Davis*, 3 B. Mon. 344; *Greer v. Howard*, 4 Ky. L. Rep. 350. *Miss.*—*Hamblen v. Hamblen*, 33 *Miss.* 455, as to levy on land. *N. Y.*—*Smith v. Hill*, 22 *Barb.* 656; *McCombes v. Becker*, 3 *Hun* 342, 5 *Thomp. & C.* 550 (personal property); *Hartwell v. Root*, 19 *Johns.* 345, 10 *Am. Dec.* 232 (personal property); *Jackson ex dem. Sternberg v. Shaffer*, 11 *Johns.* 513.

As to presumptions as to performance of duty by officers generally, see *infra*, II, B, 4, q.

52. As to who may cause issuance of writ, see *supra*, II, B, 1, d.

Directions in the writ, see *supra*, II, B, 2, f, (II).

53. *Ala.*—*Patton v. Hamner*, 28 *Ala.* 618; *Robertson v. Coker*, 11 *Ala.* 466; *Crenshaw v. Harrison*, 8 *Ala.* 342. *Ark.*—*Burnside v. Pendleton*, 132 S. W. 221; *Bickham v. Kosminsky*, 74 *Ark.* 413, 86 S. W. 292; *Black v. Nettles*, 25 *Ark.* 606; *Fowler v. Pearce*, 7 *Ark.* 28, 44 *Am. Dec.* 526. *Del.*—*State to use of Roe v. Gemmill*, 1 *Houst.* 9. *Fla.*—*Lawyers' Co-operative Pub. Co. v. Bennett*, 34 *Fla.* 302, 16 *So.* 185. *Ga.*—*Lancaster v. Hill*, 136 *Ga.* 405, 71 S. E. 731; *Smith v. Martin*, 54 *Ga.* 600. *Ill.*—*Morgan v. People*, 59 *Ill.* 58; *Red-dick v. Cloud*, 7 *Ill.* 670; *Scheubert v. Honel*, 50 *Ill.* App. 597; *Scolburn v. Barton*, 17 *Ill.* App. 391; *Koren v.*

*Roemheld*, 6 *Ill.* App. 275. *Ia.*—*Merritt v. Grover*, 61 *Iowa* 99, 15 N. W. 860; *McWilliams v. Myers*, 10 *Iowa* 325. *La.*—*Sevey v. Chappius Co.*, 116 *La.* 759, 41 *So.* 62. *Me.*—*Bingham v. Smith*, 64 *Me.* 450. *Mass.*—*Tobey v. Leonard*, 15 *Mass.* 200. *Miss.*—*Garrett v. Hamblin*, 11 *Smed. & M.* 219, 49 *Am. Dec.* 53; *Osgood & Co. v. Brown*, *Freem. Ch.* 392. *N. H.*—*Rogers v. McDearmid*, 7 *N. H.* 506. *N. J.*—*Cumber-land Bank v. Hann*, 19 *N. J. L.* 166. *N. M.*—*Comp. Laws*, 1897, §3117. *N. Y.*—*Smith v. Erwin*, 77 *N. Y.* 466, 471; *Ansonia Brass & Copper Co. v. Bab-bitt*, 74 *N. Y.* 395; *Root v. Wagner*, 30 *N. Y.* 9, 86 *Am. Dec.* 348; *Walters v. Sykes*, 22 *Wend.* 566; *Gorham v. Gale*, 7 *Cow.* 739, 17 *Am. Dec.* 549; *Crossitt v. Wiles*, 13 *Civ. Pro.* 327. *N. C.*—*Atkin v. Mooney*, 6 *N. C.* 31. *Pa.*—*Mc-Laughlin v. McLaughlin*, 85 *Pa.* 317; *Dorrance's Admrs. v. Com.*, 13 *Pa.* 160. See *Stern's Appeal*, 64 *Pa.* 447. *S. C.*—*Farrar & Hays v. Wingate*, 4 *Rich. L.* 35, 53 *Am. Dec.* 709. *Tenn.*—*Bank of Tennessee v. Turney*, 7 *Humph.* 271; *Parrish v. Saunders*, 3 *Humph.* 431. *Tex.*—*Daugherty v. Moon*, 59 *Tex.* 397. *Va.*—*Rowe's Admr. v. Hardy's Admr.*, 97 *Va.* 674, 34 S. E. 625; *Humphrey v. Hitt*, 6 *Gratt.* (47 *Va.*) 509, 528, 52 *Am. Dec.* 133.

[a] Where an execution is issued by the equitable owner of a judgment in the name of the plaintiff on the record, the court will not permit the plaintiff to control such execution. *Reinhard, Meyer & Co. v. Baker*, 13 *W. Va.* 805, *distinguishing* *Wallop's Admr. v. Scarborough*, 5 *Gratt.* (46 *Va.*) 1.

[b] A surety may acquire control of the execution by paying the debt and obtaining an assignment from the creditor. *Jones v. Spencer*, 1 *Ky. L. Rep.* 344. Control by assignee, see *infra*, this section.

[c] If the plaintiff in execution die after issuance of the execution, the administrator, executor or it may be the heirs at law or any person who

even after return day,<sup>54</sup> but he is not required to direct or advise the sheriff what to do or how to proceed.<sup>55</sup>

The plaintiff may, if he chooses, release the debt,<sup>56</sup> or direct its collection in a particular manner.<sup>57</sup> He may order the execution to proceed forthwith,<sup>58</sup> to be stayed,<sup>59</sup> withdrawn,<sup>60</sup> returned,<sup>61</sup> or he may order it to be suspended after levy.<sup>62</sup> The plaintiff in execution may waive the levy,<sup>63</sup> postpone the sale,<sup>64</sup> or he may even forbid it altogether.<sup>65</sup> Where an execution is against several persons, the plaintiff may direct that the whole amount or less be collected out of the property of any of them.<sup>66</sup>

But after the office of the execution has been fully performed, and the sale has been made, the writ of execution is *functus officio* and there is nothing remaining which the plaintiff can control.<sup>67</sup>

owns the execution may have the execution levied. *Rogers v. Truett*, 73 Ga. 386.

[d] **Over a fee bill**, the plaintiff has no control. *Reddick v. Cloud*, 7 Ill. 670.

**As to duty of sheriff to obey instructions**, see *infra*, II, B, 4, e, (III).

54. *Fowler v. Pearce*, 7 Ark. 28, 44 Am. Dec. 526; *Dorrance's Admr. v. Com.*, 13 Pa. 160.

55. *In re Tengwall Co.*, 210 Fed. 82, 119 C. C. A. 420; *Koren v. Roemheld*, 6 Ill. App. 275.

[a] **A refusal of the plaintiff to give directions** is not a waiver of the right resting upon the sheriff to obey the commands of the writ. *In re Tengwall*, 210 Fed. 82, 119 C. C. A. 420.

56. *Dorrance's Admr. v. Com.*, 13 Pa. 160.

57. *Atkin v. Mooney*, 61 N. C. 31, collection in specie.

58. *Tucker v. Bradley*, 15 Conn. 46; *Smith v. Martin*, 54 Ga. 600.

59. State to use of *Roe v. Gemmill*, 1 Houst. (Del.) 9; *McLaughlin v. McLaughlin*, 85 Pa. 317; *Shryock v. Jones*, 22 Pa. 303.

[a] **Writing Required**.—Under Ky. St., 1903, §1713, the officer should not stay proceedings unless plaintiff consents to, or requires, the stay in writing. *Davis v. Gott*, 130 Ky. 486, 113 S. W. 826.

[b] **A mere statement by the party delivering the execution**, in reply to the question "what he wanted done with it?" "Nothing that I know of" is not sufficient direction to warrant the sheriff in holding the execution, and failing to make a levy ac-

cording to the mandate of the writ. *Koren v. Roemheld*, 6 Ill. App. 275.

60. N. Y.—*Brown v. Ferguson*, 2 How. Pr. 178. N. C.—*Isler v. Colgrove*, 75 N. C. 334. Pa.—*McLaughlin v. McLaughlin*, 85 Pa. 317; *Shryock v. Jones*, 22 Pa. 303. Tenn.—*Parrish v. Saunders*, 3 Humph. 431. Va.—*Humphrey v. Hitt*, 6 Gratt. (47 Va.) 509, 527, 52 Am. Dec. 133.

61. *Fowler v. Pearce*, 7 Ark. 28, 44 Am. Dec. 526; *McWilliams v. Myers*, 10 Iowa 325.

62. *Smith v. Martin*, 54 Ga. 600; *Humphrey v. Hitt*, 6 Gratt. (47 Va.) 509, 527, 52 Am. Dec. 133.

63. **As to waiver, abandonment or release of levy**, see *infra*, II, B, 4, n.

64. *Morgan v. People*, 59 Ill. 58; *Dorrance's Admr. v. Com.*, 13 Pa. 160.

65. Ark.—*Fowler v. Pearce*, 7 Ark. 28, 44 Am. Dec. 526. N. C.—*Seawell v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722. Pa.—*Dorrance's Admr. v. Com.*, 13 Pa. 160. Tenn.—*Bank of Tennessee v. Turney*, 7 Humph. 271.

[a] **A parol order**, without withdrawing the writ, is sufficient. *Seawell v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722.

66. Ind.—*Starry v. Johnson*, 32 Ind. 438. N. Y.—*Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Flanders v. Batten*, 50 Hun 542, 3 N. Y. Supp. 728; *Godfrey v. Gibbons*, 22 Wend. 569; *Crossitt v. Wiles*, 13 Civ. Pro. 327. Ohio.—*Dunn & Co. v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 Wkly. L. Bul. 127. Wis.—*Hyde v. Rodgers*, 59 Wis. 154, 17 N. W. 127.

67. U. S.—*Smith v. Bank of Columbia*, 4 Cranch C. C. 143, 22 Fed. Cas.



Since it is also the duty of the officer to act under the command of the writ, the plaintiff cannot hasten the time of its execution sooner than is prescribed by the statute,<sup>68</sup> or authorize the sheriff to do any other acts contrary to the statutes.<sup>69</sup> A party having an execution which is a lien on property, has no legal right to extend the time for its collection, to the injury of other creditors.<sup>70</sup>

If the plaintiff instructs the officer as to his procedure under the writ he cannot complain of his loss of priority or other ill effect resulting from compliance with his instructions.<sup>71</sup> Thus if, pending a stay of execution ordered by the plaintiff, a second execution comes into the officer's hands with instructions to levy, it takes precedence over the first writ.<sup>72</sup>

The instructions may be given orally,<sup>73</sup> in the absence of a contrary statute,<sup>74</sup> by indorsement upon the execution,<sup>75</sup> or by telegraph.<sup>76</sup>

Where a judgment has been assigned, the assignee has control of the execution,<sup>77</sup> and the assignor cannot control an execution issued at the instance of the assignee.<sup>78</sup>

The attorney of the execution plaintiff has no right to control the process as against the express directions of his client,<sup>79</sup> or the latter's assignee.<sup>80</sup>

No. 13,011, holding after a *fiery facias* has been executed, the plaintiff has no authority to countermand the writ. **N. Y.**—Thomas v. Bogert, 33 Hun 11. **N. C.**—See Isler v. Colgrove, 75 N. C. 334, holding the plaintiff may withdraw the execution before it is so acted on that its withdrawal would be injurious to third persons.

[a] A countermand of the writ avails nothing after the sale has been made. Thomas v. Bogert, 33 Hun (N. Y.) 11.

68. Sidelinger v. Jones-Earl Shoe Co., 89 Ill. App. 188.

As to duty of sheriff to obey the writ, see *infra*, II, B, 4, c, (II).

69. Burnside v. Pendleton (Ark.), 132 S. W. 221; Bickham v. Kosminsky, 74 Ark. 413, 86 S. W. 292; Swan v. Gilbert, 67 Ill. App. 236. See also Scheubert v. Honel, 50 Ill. App. 597.

70. Gilmore v. Davis, 84 Ill. 487; Ross v. Weber, 26 Ill. 221.

71. Ind.—Murphy v. Hill, 77 Ind. 129. Mo.—State to use of Ross v. Cave, 49 Mo. 129. N. J.—Paterson Bank v. Hamilton, 13 N. J. L. 159.

72. U. S.—Berry v. Smith, 3 Wash. C. C. 60. Ill.—Gilmore v. Davis, 84 Ill. 487. Mo.—Wise v. Darby, 9 Mo. 131. Pa.—Stern's Appeal, 64 Pa. 447. See Shryock v. Jones, 22 Pa. 303. Eng. Hunt v. Hooper, 12 Mees. & W. 664, 670. See Kempland v. Macauley, Peake

66. Can.—Bank of Montreal v. Munro, 23 U. C. Q. B. 414.

*Contra.*—Van Wagoner v. Moses, 26 N. J. L. 570; Caldwell v. Fifield & Matthews, 24 N. J. L. 150; Cumberland Bank v. Hann, 19 N. J. L. 166. See Stephens v. Clark, 8 N. J. L. 270; Cashier v. Peterson, 4 N. J. L. 317.

73. Flanders v. Batten, 50 Hun 542, 3 N. Y. Supp. 728; Seawell v. Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722.

74. Davis v. Gott, 130 Ky. 486, 113 S. W. 826.

75. Flanders v. Batten, 50 Hun 542, 3 N. Y. Supp. 728.

76. Morgan v. People, 59 Ill. 58, direction to suspend sale.

77. Bressler v. Beach, 21 Ill. App. 423; McWilliams v. Myers, 10 Iowa 325. See Murray v. Meade, 5 Wash. 693, 32 Pac. 780.

[a] The assignee must notify the officer of his interest therein or at least have made such statements and claim as would be reasonably calculated to put the officer on inquiry. Bressler v. Beach, 21 Ill. App. 423.

78. State v. Herod, 6 Blackf. (Ind.) 444.

79. Ill.—Morgan v. People, 59 Ill.

58. Tex.—Daugherty v. Moon, 59 Tex.

397. Wash.—Murray v. Meade, 5 Wash. 693, 698, 32 Pac. 780.

80. As Against Attorney of As-

A stranger to the execution has no right to control it.<sup>81</sup>

Nor has the officer levying the writ a right to control the execution.<sup>82</sup>

The court should not order the officer to collect an execution in a particular manner,<sup>83</sup> except in so far as the writ itself contains directions authorized by law.<sup>84</sup>

d. *By Whom Made*.—The general rule is that no one can execute the writ except the officer to whom the writ is directed, his successor, or deputy.<sup>85</sup> Where the writ is directed to the proper officer and is

signor.—Where, after levy of execution, the sheriff is informed that the judgment has been assigned, and is directed in writing by the execution plaintiff and his assignee to proceed with the execution for the benefit of the assignee, the sheriff is liable in damages for releasing the property upon the subsequent direction of the attorney of the execution plaintiff. *Murray v. Meade*, 5 Wash. 693, 698, 32 Pac. 780, in which case the court said: "A client, unless the attorney has some interest in the judgment more than that involved in the making of the money upon an execution for the benefit of his client, has a right to control both his attorney and the sheriff."

81. Ill.—*Bressler v. Beach*, 21 Ill. App. 423. La.—*State v. Pillsbury*, 35 La. Ann. 408; *Willis v. Nicholson*, 24 La. Ann. 548; *Fluker v. Turner*, 5 Mart. N. S. 707. Tex.—*Daugherty v. Moon*, 59 Tex. 397.

[a] A person interested in the judgment who is not a party of record, cannot control an execution issued thereon. *Willis v. Nicholson*, 24 La. Ann. 548; *Fluker v. Turner*, 5 Mart. N. S. (La.) 707.

82. *Morgan v. People*, 59 Ill. 58; *Newkirk v. Chapron*, 17 Ill. 344.

83. Cal.—*Fraser v. Thrift*, 50 Cal. 476. Fla.—*Clonts v. Ritch*, 12 Fla. 633. Mont.—*McGregor v. Wells, Fargo & Co.*, 1 Mont. 142. N. Y.—*Bowie v. Brabe*, 2 Abb. Pr. 161, 4 Duer. 676.

[a] The sheriff should be permitted to fulfill his duty by following the mandate of the writ unmolested by orders of the court. *Adams v. Bowe*, 12 Abb. N. C. (N. Y.) 322n.

[b] *Levy on Particular Property*. (1) A judgment is a general lien upon real estate, and a court of law cannot control that general lien by directing execution of the judgment against specific portions of the property of the defendant in execution to the exclu-

sion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. *Clonts v. Ritch*, 12 Fla. 633. (2) The court cannot, on motion of the plaintiff in execution, order the sheriff to levy upon a particular tract of land. *Fraser v. Thrift*, 50 Cal. 476.

As to levy or execution of process by officer whose term of office has expired, see the title "Sheriffs, Constables and Marshals."

[c] *Not Reversible Error*.—*McGregor v. Wells, Fargo & Co.*, 1 Mont. 142, 147. See also *Wright v. Young*, 6 Ore. 87.

84. As to directions in the writ itself, see *supra*, II, B, 2, f, (II).

85. U. S.—*Kent v. Roberts*, 2 Story 591, 14 Fed. Cas. No. 7,715. Ala.—*Gresham v. Leverett*, 10 Ala. 384; *Pope & Hickman v. Stout*, 1 Stew. 375. See *Pruit v. Lowry*, 1 Port. 101. Ariz.—*Satterwhite v. Melezer*, 3 Ariz. 162, 24 Pac. 184. Colo.—*Porter v. Stapp*, 6 Colo. 32. Ga.—*Peeples v. Garrison & Son*, 141 Ga. 411, 81 S. E. 116; *Rucker v. Tabor*, 126 Ga. 132, 54 S. E. 959; *Colquitt Nat. Bank v. Poitvint*, 15 Ga. App. 329, 83 S. E. 198. Ill.—*People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355. Ky.—*Johnson v. Elkins*, 90 Ky. 163, 11 Ky. L. Rep. 967, 13 S. W. 448, 8 L. R. A. 552. Me.—*Pillsbury v. Smyth*, 25 Me. 427. Mass.—*Brier v. Woodbury*, 1 Pick. 362. Tenn.—*Brown v. Barker*, 10 Humph. 346. Tex.—*Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539; *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474. Wyo.—*Wyoming Fair Assn. v. Talbott*, 3 Wyo. 244, 21 Pac. 700.

To whom writ directed, see *supra*, II, B, 2, f, (I).

[a] Where the writ is directed to a special class of officers the levy should not be made by an officer not of that class. Ariz.—*Satterwhite v. Melezer*, 3

executed by some one else, the levy is void.<sup>86</sup> But it has been held that if the writ is executed by an officer authorized by law to execute such process, the execution is not invalidated by the fact that the writ was directed to another officer who either did,<sup>87</sup> or did not,<sup>88</sup> have the requisite authority. And a levy made by an improper officer is not void where it is recognized and returned by the proper officer.<sup>89</sup>

The writ should not be levied by a private person,<sup>90</sup> unless he has

Ariz. 162, 24 Pac. 184. Colo.—Porter v. Stapp, 6 Colo. 32. Tex.—Steel v. Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474.

[b] Where there is no direction (1) to any officer in the county, a levy by an officer in the county is unauthorized. Pillsbury v. Smyth, 25 Me. 427. (2) Where the power of the constable in levying executions is concurrent with that of the sheriff, in the absence of a direction, it will be presumed it was intended to be served by the sheriff. Brier v. Woodbury, 1 Pick. (Mass.) 362.

[c] A levy by a special deputy sheriff is valid, he being none the less a deputy because he styles himself a special deputy. Miller v. Clements, 54 Tex. 351.

[d] Where a sheriff levies an attachment in an action, an execution on the judgment in the action, issued after such sheriff goes out of office, should be delivered to, and executed by, the sheriff in office when it issues. Butler v. White, 25 Minn. 432.

86. Ala.—Gresham v. Leverett, 10 Ala. 384. Ariz.—Satterwhite v. Melzer, 3 Ariz. 162, 24 Pac. 184. Ga.—Peeples v. Garrison & Co., 141 Ga. 411, 81 S. E. 116; Collins & Son v. Hudson, 69 Ga. 684; Gillis v. Smith, 67 Ga. 446. Compare, Glenn v. Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032. Ky.—Johnson v. Elkins, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552.

[a] Where the writ is directed to the sheriff, (1) a levy by a constable (Satterwhite v. Melzer, 3 Ariz. 162, 24 Pac. 184; Peeples v. Garrison & Co., 141 Ga. 411, 81 S. E. 116), (2) or coroner (Gresham v. Leverett, 10 Ala. 384; Johnson v. Elkins, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552), where there is no sheriff in the county at the time, is unauthorized and void, even where the sheriff is incompetent to act. Gresham v. Leverett, 10 Ala. 384. (3)

But statutes have been enacted in some states which change this rule somewhat. Mass. Rev. Laws, 1902, p. 1602, providing where the officer is ill or absent, the judgment creditor or the officer who began the service, may delegate any other qualified officer temporarily to act for him during such illness or absence. And see How. Mich. St., §13,034; Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

[b] When a writ of fieri facias is issued to the coroner for the reason that at the time there is no sheriff, when a sheriff is subsequently appointed and qualified, the coroner may turn over to him all unexecuted writs to be executed, and his levy under the execution will be good. Carr v. Youse, 39 Mo. 346. Compare supra, II, B, 2, f, (I).

[c] Where an execution is directed to the coroner or jailer, a levy by the latter is void as he cannot act unless both the sheriff and coroner are interested. Gowdy v. Sanders, 88 Ky. 346, 10 Ky. L. Rep. 912, 11 S. W. 82. Compare supra, II, B, 2, f, (I).

87. Ross v. Wellman, 102 Cal. 1, 36 Pac. 402, holding that the constable and sheriff have full power to execute the writ and it is an indifferent matter to whom it is directed. A service and return by a sheriff of a writ directed to a constable is an irregularity merely, and the service is not void.

88. Idaho.—Pecotte v. Oliver, 2 Idaho 230, 10 Pac. 302, and the writ will be amended. Kan.—First Nat. Bank v. Franklin, 20 Kan. 264. Okla. Christy v. Springs, 11 Okla. 710, 69 Pac. 864.

But see Kent v. Roberts, 2 Story 591, 14 Fed. Cas. No. 7,715.

89. Pruitt v. Lowry, 1 Port. (Ala.) 101.

90. McMillan v. Rowe, 15 Neb. 520, 19 N. W. 504.



been lawfully authorized thereto.<sup>91</sup> But a levy by a de facto officer is valid.<sup>92</sup>

The attaching officer has no vested right to make a levy of an execution issuing in the action. The execution may be given to another officer for service,<sup>93</sup> and must be when the attaching officer's term of office has expired.<sup>94</sup>

**Effect of Interest.** — Nothing can be better settled than that no person has the right to levy an execution in an action in which he is a party, or is interested.<sup>95</sup> And upon the principle of public policy, which makes it unlawful for the sheriff to levy his own execution, it

91. See *supra*, II, B, 2, f, (I).

[a] Where the levy has been made by a private person appointed for that purpose it will be presumed that the circumstances authorizing such an appointment existed and that the levy was legal. *Alfred v. Batson*, 91 Miss. 749, 45 So. 465.

92. *Gunn v. Tackett*, 67 Ga. 725; *Nason v. Dillingham*, 15 Mass. 170.

93. *Me.*—*Smith v. Bodfish*, 39 Me. 136. *Mass.*—*Beaulieu v. Clark*, 210 Mass. 90, 90 N. E. 319. *N. H.*—*Lovell v. Sabin*, 15 N. H. 29. *Vt.*—*Blodgett v. Adams*, 24 Vt. 23.

94. *Butler v. White*, 25 Minn. 432.

See generally the title "Sheriffs, Constables and Marshals."

95. *Cal.*—*Buckeye Ref. Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536. *Ga.*—*Gillis v. Smith*, 67 Ga. 446; *State v. Jeter*, 60 Ga. 489. *Ill.*—*Snydacker v. Brosse*, 51 Ill. 357; *People v. Loeff*, 142 Ill. App. 30. *Ky.*—*Samuel v. Com.*, 6 Mon. 173; *Chambers v. Thomas*, 1 Litt. 268. *N. Y.*—*Carpenter v. Stilwell*, 11 N. Y. 61; *Albany City Nat. Bank v. Kearney*, 9 Hun 535; *Mills v. Young*, 23 Wend. 314; *Jackson v. Bowker*, 53 N. Y. Supp. 585. *N. C.*—*Bowen v. Jones*, 35 N. C. 25, 55 Am. Dec. 426; *Collais v. McLeod*, 30 N. C. 221, 49 Am. Dec. 376. *Ohio.*—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85. *R. I.*—*Stephanian, Petitioner*, 25 R. I. 541, 56 Atl. 1034. *S. C.*—*Cauble v. Hoke*, 1 Spears 168; *Singletary v. Carter*, 1 Bailey 467, 21 Am. Dec. 480. *Tenn.*—*Riner v. Stacey*, 8 Humph. 288; *Stewart v. Magness*, 2 Coldw. 310; *Carson v. Browder*, 2 Lea 701. *Tex.*—*Erwin v. Bowman*, 51 Tex. 513. *Vt.*—*Bank of Rutland v. Parsons*, 21 Vt. 199. *Va.*—*Carter v. Harris*, 4 Rand. 199. *W. Va.*—*Code*, 1906, §1297. *Can.*—*Huxtable v. Conn*, 14 Manitoba 713.

[a] Where Sheriff Is the Usuee.

*Knight v. Morrison*, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405.

[b] **An officer who owns stock in a corporation**, has no such interest as will disqualify him from executing the writ in a case to which the corporation is a party. *Adams v. Wiscasset*, 1 Greenl. (Me.) 361, 10 Am. Dec. 88; *Hardwick v. Jones*, 65 Mo. 54.

[c] **A levy by the owner of the judgment, under special deputation by the sheriff**, is void, and a sale under it by him will communicate no title to the purchaser. *Riner v. Stacey*, 8 Humph. (Tenn.) 288. *Contra*, *Huxtable v. Conn*, 14 Manitoba (Can.) 713.

[d] **Effect of Assigning Interest Before Execution Issued.**—Where the officer, in whose favor a judgment was rendered, assigns the judgment to his son before issuance of execution, and then levies the execution, the levy is void. *Jackson v. Bowker*, 53 N. Y. Supp. 585.

[e] **Brother-in-Law.**—The fact that the sheriff is the brother-in-law of the defendant does not invalidate the proceedings. *Brackenridge v. Cobb*, 2 Tex. Civ. App. 161, 21 S. W. 614.

[f] **A levy by the successor of the sheriff who is interested in the execution is valid.** *Gillis v. Smith*, 67 Ga. 446.

[g] **A sheriff (1) cannot pay with his own money a judgment on which he holds an execution, and then levy and collect the amount from the debtor's property.** *N. Y.*—*Albany City Nat. Bank v. Kearney*, 9 Hun 535; *Reed v. Pruyn & Staats*, 7 Johns. 426, 5 Am. Dec. 287. *Ohio.*—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85. *Tenn.*—*Harwell v. Worsham*, 2 Humph. 524, 37 Am. Dec. 572. (2) Nor will he be permitted, after he is in default for not collecting or returning the execution, to pay the amount and wield the pro-

is held to be unlawful for a deputy sheriff to execute process to which either he or the sheriff is a party.<sup>96</sup>

e. *Duty and Authority of Officer.* — (I.) *Authority.* — The writ of execution is the sheriff's warrant of authority,<sup>97</sup> and the delivery of the writ to the officer authorizes him to levy upon the property of the defendant, remove and sell it.<sup>98</sup>

(II.) *Duty To Obey Writ.* — It is the duty of the officer to whom a valid writ of execution is directed to obey the mandate of the writ, and make a sufficient levy thereof,<sup>99</sup> unless he is otherwise instructed

cess for his own indemnity. *Albany City Nat. Bank v. Kearney*, 9 Hun (N. Y.) 535; *Carpenter v. Stilwell*, 12 Barb. 128, s. c., 11 N. Y. 61; *Bigelow v. Provost*, 5 Hill (N. Y.) 566.

[h] *Interest in Costs.* — A levying officer may levy an execution for costs, whether he be interested in the costs or not. *Vining v. Officers of Court*, 86 Ga. 127, 12 S. E. 298.

[i] *Where Sheriff Will Receive Commissions.* — In *Badley v. Ladd*, 70 Miss. 688, 12 So. 832, it was held that a deputy sheriff was not disqualified by reason of the fact that he is the agent for the plaintiff in collecting the judgment, and is to receive a commission on the amount collected.

*Interest as a ground for dismissal of a levy*, see *infra*, IV, C.

96. *Chambers v. Thomas*, 3 A. K. Marsh. (Ky.) 537; *Riner v. Stacey*, 8 Humph. (Tenn.) 288.

97. *Ala.* — *Alabama Gold L. Ins. Co. v. McCreary*, 65 Ala. 127. *Cal.* — *Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. *Del.* — *West v. Shockley*, 4 Harr. 287. *La.* — *Sheldon v. New Orleans C. & B. Co.*, 11 Rob. 181. *Miss.* — *Osgood & Co. v. Brown*, Freem. Ch. 392. *Eng.* — *Scott v. Scholey*, 8 East 467, 484, 103 Eng. Reprint 423.

*Expiration of office as affecting right to execute the writ*, see the title "Sheriffs, Constables and Marshals."

*As to power of sheriff to execute writ outside the county*, see the title "Sheriffs, Constables and Marshals."

98. *U. S.* — See *Simms v. Slacum*, 3 Cranch 300, 2 L. ed. 446. *Ala.* — *Alabama Gold Ins. Co. v. McCreary*, 65 Ala. 127. *Ill.* — *Smith v. Hughes*, 24 Ill. 270. *Mich.* — *Cary v. Hewitt*, 26 Mich. 228. *Minn.* — *Leonard v. Maginnis*, 34 Minn. 506, 26 N. W. 733. *N. Y.* — *Catlin v. Jackson*, 8 Johns. 520; *Hendricks v. Robinson*, 2 Johns. Ch. 283,

312; *Marsh v. Lawrence*, 4 Cow. 461. *Pa.* — *Cluley v. Lockhart*, 59 Pa. 376, 98 Am. Dec. 350. *Tex.* — *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81. *Eng.* — *Playfair v. Musgrove*, 14 Mees. & W. 239; *Lowthall v. Tonkins*, 2 Eq. Cas. Ab. 380, c. 14, 22 Eng. Reprint 323.

[a] "An execution is sufficient justification to the sheriff for the seizure of the property of the debtor, and it is immaterial whether the property be in the actual possession of the debtor, or in the possession of an agent or parties holding it for his benefit. But if the property be in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce, not only the writ, but the judgment which authorizes its issuance." *Knox v. Marshall*, 19 Cal. 617, quoting *Bickerstaff v. Doub*, 19 Cal. 109, 112, 79 Am. Dec. 204. To same effect *Kane v. Desmond*, 63 Cal. 464; *Mitchell v. Ashby*, 78 Ky. 254.

[b] *Where Writ Directs Levy on Particular Property.* — An officer cannot seize real estate under an execution directing him to seize goods and chattels. *Thompson v. Chauveau*, 7 Mart. N. S. (La.) 331, 18 Am. Dec. 246.

[c] *A venditioni exponas confers no power on the officer to levy upon land.* *Fenno v. Coulter*, 14 Ark. 38.

*As to what property may be levied on*, see *supra*, II, B, 3.

*Directions in writ as to the property to be levied on*, see *supra*, II, B, 2, f, (II).

99. *U. S.* — *In re Tengwall Co.*, 201 Fed. 82, 119 C. C. A. 420. *Ala.* — *Patton v. Hamner*, 28 Ala. 618; *Crenshaw v. Harrison*, 8 Ala. 342. *Ark.* — *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. *Conn.* — *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324. *Fla.* — *Johnson v.*

by the plaintiff or his attorney,<sup>1</sup> the court,<sup>2</sup> or perhaps by some one having an interest admitted by the plaintiff,<sup>3</sup> or unless some claim of exemption is lawfully interposed.<sup>4</sup>

Where the writ directs the officer to levy on a particular piece of property, it is his duty to seize that particular piece of property.<sup>5</sup> And where the direction of the writ is general directing the sheriff to satisfy the writ out of the property of the defendant subject to execution, he must seize the property of the defendant only.<sup>6</sup> If he

Price, 47 Fla. 265, 36 So. 1031. Ga. Hatcher v. Lord, 115 Ga. 619, 41 S. E. 1007. Ill.—Pike v. Colvin, 67 Ill. 227; People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; Sidelinger v. Jones-Earl Shoe Co., 89 Ill. App. 188; Koren v. Roemheld, 6 Ill. App. 275. Ia.—West v. St. John, 63 Iowa 287, 19 N. W. 238. La.—Morgan's Admr. v. Woorhies, 3 Mart. (O. S.) 462. Md.—State v. Boulton, 57 Md. 314, 319. Mich.—Vanosdall v. Hamilton, 118 Mich. 533, 77 N. W. 9. Miss.—Osgood & Co. v. Brown, Freeman. Ch. 392. Mo.—State *ex rel.* Clement v. Stokes, 99 Mo. App. 236, 73 S. W. 254; State *ex rel.* Clement v. Rainey, 99 Mo. App. 218, 73 S. W. 250; Fink & Schmidt v. Alderson, 20 Mo. App. 364. N. J.—Welsh v. Lawler, 73 N. J. Eq. 371, 68 Atl. 218. N. M. Bachelder Bros. v. Chaves, 5 N. M. 562, 25 Pac. 783. N. Y.—Hoffman v. Conner, 76 N. Y. 121; Bigelow v. Provost, 5 Hill 566; Adams v. Bowe, 12 Abb. N. C. 322. N. C.—Bryan v. Hubbs, 69 N. C. 423; Borden v. Smith, 20 N. C. 27, 34; Governor v. Carter, 10 N. C. 328, 14 Am. Dec. 588. Ore. Habersham v. Sears, 11 Ore. 431, 5 Pac. 208, 50 Am. Rep. 481. Pa.—Com. v. McCoy, 8 Watts 153, 34 Am. Dec. 445. S. C.—Farrar & Hays v. Wingate, 4 Rich. L. 35, 53 Am. Dec. 709. Tenn. Wingfield v. Crosby, 5 Coldw. 241; Mason v. Vance, 1 Sneed 178, 60 Am. Dec. 144; Stevenson v. McLean, 5 Humph. 332, 42 Am. Dec. 434. Tex. Fatheree v. Williams, 13 Tex. Civ. App. 430, 35 S. W. 324. Vt.—Fletcher v. Bradley, 12 Vt. 22, 36 Am. Dec. 324. Wyo.—Wyoming Fair Assn. v. Talbott, 3 Wyo. 244, 21 Pac. 700. Can.—Regina v. Monkman, 8 Manitoba 509.

[a] The execution creditor has an unconditional and absolute right to have the writ executed according to its mandate. Maloney v. Real Estate B. & L. Assn., 57 Mo. App. 384.

[b] Execution From Without the County.—It is the duty of the officer

who receives an execution from out of the county to execute it. Earle v. Thomas, 14 Tex. 583, 591.

1. Ala.—Patton v. Hamner, 28 Ala. 618; Crenshaw v. Harrison, 8 Ala. 342. Ill.—Koren v. Roemheld, 6 Ill. App. 275. S. C.—Farrar & Hays v. Wingate, 4 Rich. L. 35, 53 Am. Dec. 709. Tex. Daugherty v. Moon, 59 Tex. 397.

Right of plaintiff to control the writ, see *supra*, II, B, 4, c.

2. See the title "Supersedeas and Stay of Proceedings," and *supra*, II, B, 4, c.

[a] Until the sheriff receives notice that the execution has been superseded, he is to obey it according to its tenor. On receiving such notice, it is his duty to stop proceedings. Bryan v. Hubbs, 69 N. C. 423.

3. Patton v. Hamner, 28 Ala. 618; Crenshaw v. Harrison, 8 Ala. 342. See Fluker v. Turner, 5 Mart. N. S. (La.) 707.

4. Terrell v. State *ex rel.* Grubbs, 66 Ind. 570.

As to claim of exemption, see the title "Homesteads and Exemptions."

5. U. S.—Buck v. Colbath, 3 Wall. 334, 343, 18 L. ed. 257. Conn.—Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324. Ga.—Thornton v. Ferguson, 133 Ga. 825, 67 S. E. 97; Wallace v. Holly, 13 Ga. 389, 58 Am. Dec. 518. Mo. State v. Hailey, 71 Mo. App. 200. Wis. Watkins v. Page, 2 Wis. 92.

Directions in the writ as to property to be taken, see *supra*, II, B, 2, f, (II).

6. U. S.—Buck v. Colbath, 3 Wall. 334, 344, 18 L. ed. 257. Ala.—Adamson v. Noble, 137 Ala. 668, 35 So. 139; Cawthorne v. Knight, 11 Ala. 268. Conn.—Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324. Ga.—Wallace v. Holly, 13 Ga. 389, 58 Am. Dec. 518. Ill.—Richardson v. Rardin, 88 Ill. 124; Pike v. Colvin, 67 Ill. 227; Swan v. Gilbert, 67 Ill. App. 236. Ia.—Crosby v. Hungerford, 59 Iowa 712, 12 N. W. 582; Shea v. Watkins, 12 Iowa 605.



goes beyond the command of the writ and seizes property of a third person he becomes liable as though he acted without any writ,<sup>7</sup> and the levy will be void.<sup>8</sup> But the levy is not void, because it embraces property not owned by the debtor.<sup>9</sup> If the title to goods and chattels is doubtful the sheriff need not levy, unless the judgment creditor gives him an indemnity bond.<sup>10</sup>

If the writ is absolutely void, the sheriff is not bound to execute it;<sup>11</sup> but if it is not void but merely voidable it is the officer's duty to

**La.**—Duperron v. Van Wickle, 4 Rob. 39, 39 Am. Dec. 509. **S. C.**—Cholett v. Hart, 2 Bay 156. **Tenn.**—Loftin v. Espy, 4 Yerg. 84. **Vt.**—Tudor v. Taylor, 26 Vt. 444. **Wis.**—Elmore v. Hill, 46 Wis. 618, 1 N. W. 235.

[a] The execution debtor must have a leviable interest in the property to justify a levy upon it. Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733. As to what property may be levied on, see *supra*, II, B, 3.

[b] Where land is pointed out to the sheriff to be levied on, it is his duty to levy regardless of the title as a levy on land will not subject him to an action for damages. Wilson v. Dearborn (Tex. Civ. App.), 174 S. W. 296. But a direction to levy on personalty of a stranger need not be obeyed. See *infra*, II, B, 5, e, (III).

[c] The sheriff may rely upon the record evidence of ownership of land. Hardin v. Grover, 8 Ky. L. Rep. 260, 2 S. W. 64.

[d] In the exercise of a sound discretion, the sheriff may levy on property apparently belonging to a third person where he has good reason to believe such property is held for the purpose of protecting it from executions against the debtor, but he acts at his peril and is liable in damages if the property seized does not belong to the debtor. James v. Thompson, 12 La. Ann. 174.

7. **U. S.**—Buck v. Colbath, 3 Wall. 334, 344, 18 L. ed. 257. **Ala.**—Cawthorne v. Knight, 11 Ala. 268. **Ill.**—Pike v. Colvin, 67 Ill. 227. **Ind.**—McGee v. Givan, 4 Blackf. 16. **Ia.**—Shea v. Watkins, 12 Iowa 605. **Ky.**—Rudy v. Johnson, 11 Bush 543. **La.**—James v. Thompson, 12 La. Ann. 174. **Minn.**—Kloos v. Gatz, 97 Minn. 167, 105 N. W. 639; Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781. **N. Y.**—Hill v. Page, 108 App. Div. 71,

95 N. Y. Supp. 465. **Pa.**—Berwald v. Ray, 8 Pa. Super. 365.

As to remedy for wrongful levy, see *infra*, II, D.

As to quashing levy because made on property not belonging to the defendant, see *infra*, IV, A.

[a] Although two corporations have the same name, the service of an execution against one upon property of the other renders the sheriff liable in trespass. The officer in such case may refuse to proceed without an express direction of the creditor and an indemnity bond. Hallowell & Augusta Bank v. Howard, 14 Mass. 181. As to the right to demand indemnity before serving writ, see the title "Sheriffs, Constables and Marshals."

As to what property or interest may be levied upon, see *supra*, II, B, 3.

8. Starr v. United States, 8 App. Cas. (D. C.) 552; Sifford v. Beaty, 12 Ohio St. 189, 197.

[a] A levy upon an undivided half of a farm as the property of A is void where A owned only the north-westerly half and had no interest in the other half. Nye v. Drake, 9 Pick. (Mass.) 35.

9. Conley v. Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Virgie v. Stetson, 77 Me. 520, 1 Atl. 481; Grover v. Howard, 31 Me. 546.

10. Armstrong v. Grant, 7 Kan. 285. And see more fully 12 STANDARD PROC. 21, and the title "Sheriffs, Constables and Marshals."

11. **Ala.**—McCall v. McRae, 10 Ala. 313; Godbold v. Planters' & M. Bank, 4 Ala. 516, 520. **Ind.**—Palmer v. Galbreath, 74 Ind. 84, unauthorized execution. **N. M.**—Bachelder Bros. v. Chaves, 5 N. M. 562, 25 Pac. 783. **N. Y.**—Parmelee v. Hitchcock, 12 Wend. 96. *Compare*, Clearwater v. Brill, 4 Hun 728. **Ohio.**—Newburg v. Munshower, 29 Ohio St. 617, 23 Am. Rep. 769. **Tenn.**—Stevenson v. McLean, 5 Humph. 332, 42 Am. Dec. 434.

execute it.<sup>12</sup> Being a ministerial and not a judicial officer it is not his duty to inquire into the regularity of the proceedings upon which a writ, valid on its face, is grounded;<sup>13</sup> it is not his duty to inquire as to the legality of such a writ,<sup>14</sup> the judgment,<sup>15</sup> or the character of the indebtedness upon which the judgment was rendered;<sup>16</sup> or to determine conflicting interests.<sup>17</sup>

Where the judgment debtor has no property subject to execution, the sheriff need not levy a writ against him.<sup>18</sup>

(III.) Duty To Obey Instructions. — If the plaintiff or some one having authority to do so, gives instructions to the officer as to proceedings under the writ, it is his duty to obey the instructions<sup>19</sup> until he

[a] If an execution, regular on its face, is issued without a judgment to support it, the officer to whom it is directed may disregard its command without incurring any liability. *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769.

12. *Parmelee v. Hitchcock*, 12 Wend. (N. Y.) 96.

13. Ala.—*Martin v. Hall*, 70 Ala. 421; *McCall v. McRae*, 10 Ala. 313; *Godbold v. Planters' & M. Bank*, 4 Ala. 516, 520. Conn.—*Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324. N. M. *Bachelder Bros. v. Chaves*, 5 N. M. 562, 25 Pac. 783. Tenn.—*Stevenson v. McLean*, 5 Humph. 332, 42 Am. Dec. 434.

[a] In Louisiana, in executing a writ of possession, the sheriff is bound to consult the petition and the reasons for judgment, if necessary to explain what is uncertain in the decree, and will be responsible in damages to plaintiff, if he neglect or refuse to execute the judgment, if practicable with those explanations. *Levy v. Bondy*, 15 La. Ann. 573.

14. Ga.—*Camp v. Williams Bros.*, 119 Ga. 152, 46 S. E. 66. Ia.—*West v. St. Johns*, 63 Iowa 287, 19 N. W. 238. Ky.—*Com. v. O'Call*, 7 J. J. Marsh. 149, 23 Am. Dec. 393. Mo. *State v. Rucker*, 19 Mo. App. 587. N. Y.—*Parmelee v. Hitchcock*, 12 Wend. 96. Tenn.—*Stevenson v. McLean*, 5 Humph. 332, 42 Am. Dec. 434.

[a] It is not the duty of the sheriff to ascertain whether the writ of execution is in conformity to the judgment upon which it is issued. Ill.—*Bybee v. Ashby*, 7 Ill. 151. N. M.—*Bachelder Bros. v. Chaves*, 5 N. M. 562, 25 Pac. 783. N. Y.—*Parmelee v. Hitchcock*, 12 Wend. 96.

15. *St. Louis & San Francisco Ry.*

*Co. v. Lowder*, 138 Mo. 533, 39 S. W. 799.

16. It is not the duty of the sheriff to ascertain whether the writ issued against one of the members of a partnership is for a firm or an individual indebtedness. *Swan v. Gilbert*, 67 Ill. App. 236.

17. *Patton v. Hamner*, 28 Ala. 618; *Crenshaw v. Harrison*, 8 Ala. 342.

18. *Armstrong v. Grant*, 7 Kan. 285.

[a] Property Insufficient To Pay Charges.—Where a sheriff is of opinion that the property of an execution defendant will not sell for enough to pay the expenses of the sale, he may, at his peril, refuse to levy upon it, and stating the facts, return the execution unsatisfied. *In re Petition of Luke Mowry*, 12 Wis. 53.

19. Ark.—*Burnside v. Pendleton*, 132 S. W. 221; *Bickham v. Kosminsky*, 74 Ark. 413, 86 S. W. 292. Ga.—*Hunter v. Phillips*, 56 Ga. 634. Ill.—*Morgan v. People*, 59 Ill. 58; *Swan v. Gilbert*, 67 Ill. App. 236; *Scheubert v. Honel*, 50 Ill. App. 597; *Mann v. Reed*, 49 Ill. App. 406, 416. Ky.—*Poston v. Southern*, 7 B. Mon. 289; *Richardson v. Bartley*, 2 B. Mon. 328. La.—*Kershaw v. Delahoussaye*, 9 Rob. 77. N. H.—*Rogers v. McDearmid*, 7 N. H. 506; *Ball v. Badger*, 6 N. H. 405. N. Y.—*Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Colton v. Camp*, 1 Wend. 365; *Crossitt v. Wiles*, 13 Civ. Proc. 327. Ore.—*Habersham v. Sears*, 11 Ore. 431, 5 Pac. 208, 50 Am. Rep. 481. Pa.—*Dorrance's Admrs. v. Com.*, 13 Pa. 160; *Maybury v. Jones*, 4 Yeates 21. S. C.—*Farrar & Hays v. Wingate*, 4 Rich. L. 35, 53 Am. Dec. 709. Tex.—*Daugherty v. Moon*, 59 Tex. 397; *Wilson v. Dearborn* (Tex. Civ. App.), 174 S. W. 296. Vt. *Walworth v. Readsboro*, 24 Vt. 252.

As to instructions to officer and con-

receives notice that the party has parted with his interest,<sup>20</sup> unless the instructions are illegal<sup>21</sup> or oppressive.<sup>22</sup> But the sheriff is not required to obey instructions of strangers.<sup>23</sup>

(IV.) **Duty To Exercise Diligence.**—An officer to whom has been intrusted the collection of a judgment by an execution placed in his hands, must with reasonable diligence seek out and levy on such personal property of the judgment defendant as is subject to execution.<sup>24</sup> The diligence which the officer must exercise in this respect, has been

trol of the writ, see *supra*, II, B, 4, c.

[a] **The officer is not bound to execute the writ in any other manner than according to instructions lawfully given him.** Ball v. Badger, 6 N. H. 405.

[b] **Loss of priority by instructing officer to delay levy,** see *supra*, II, B, 4, c. Where a levy under the first writ in his hands has been stayed by instructions, it is the officer's duty to levy another writ against the same debtor though subsequently placed in his hands. Kempland v. Macauley, Peake (Eng.) 66. See also Stern's Appeal, 64 Pa. 447.

20. Colton v. Camp, 1 Wend. (N. Y.) 365.

21. Swan v. Gilbert, 67 Ill. App. 236, where instructed to levy on property of B under an execution against A.

See *supra*, II, B, 4, c.

[a] **Directions Given on Sunday.** Under a statute which forbids the sheriff to keep his office open on Sunday to receive directions as to his official duties, the direction by the plaintiff, given on Sunday, to proceed with the levy which had been previously delayed at the plaintiff's request, does not render it necessary for the officer to so levy in preference to a writ coming into his hands on Monday. Stern's Appeal, 64 Pa. 447.

22. McDonald v. Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431, where obedience to the instructions would produce a great sacrifice of property.

23. Bressler v. Beach, 21 Ill. App. 423, 426; Daugherty v. Moon, 59 Tex. 397. See *supra*, II, B, 4, c.

[a] **Instructions of Stranger.**—If one, other than the plaintiff or his attorney, assumes the right to control the officer, the officer need not obey his instructions unless he clothe himself with the legal or equitable title to the judgment. Daugherty v. Moon 59 Tex. 397.

24. U. S.—Berry v. Smith, 3 Wash.

C. C. 60, 3 Fed. Cas. No. 1,359. Ark. Lawson v. State, 10 Ark. 28, 50 Am. Dec. 238. Conn.—Dayton v. Lynes, 31 Conn. 578. Ill.—Pike v. Colvin, 67 Ill. 227; People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; Dunlap v. Berry, 5 Ill. 327, 39 Am. Dec. 413; Hargrave v. Penrod, 1 Ill. 401, 12 Am. Dec. 201; Gilbert v. Gallup, 76 Ill. App. 526. Compare, Matson v. Sweetser, 50 Ill. App. 518, 525, requiring the officer to proceed at once. Kan.—Collins v. Ritchie, 31 Kan. 371, 2 Pac. 623; Armstrong v. Grant, 7 Kan. 285. Ky. Bell v. Com., 1 J. J. Marsh. 550. Me. Strout v. Pennell, 74 Me. 260. Mass. Weld v. Bartlett, 10 Mass. 470. Minn. Guiterman v. Sharvey, 46 Minn. 183, 48 N. W. 780, 24 Am. St. Rep. 218; Armour Packing Co. v. Richter, 42 Minn. 188, 43 N. W. 1114. Mo.—State v. Ownby, 49 Mo. 71; Fisher v. Gordon, 8 Mo. 386. Neb.—Steele v. Crabtree, 40 Neb. 420, 58 N. W. 1022. N. Y. Bowman v. Cornell, 39 Barb. 69; Watson v. Brennan, 7 Jones & S. 81. N. C. Sherrill v. Shuford, 32 N. C. 200; Lindsay's Exrs. v. Armfield, 10 N. C. 548, 14 Am. Dec. 603 (as soon after the writ comes into the officer's hands as the nature of the case will admit). Ore.—Haberham v. Sears, 11 Ore. 431, 5 Pac. 208, 50 Am. Rep. 481. Pa. Com. v. Contner, 18 Pa. 439. See Henry v. Com., 107 Pa. 361. Vt. Watkinson v. Bennington, 12 Vt. 404. Wis.—Elmore v. Hill, 46 Wis. 618, 1 N. W. 235, s. c., 51 Wis. 365, 8 N. W. 240, four day delay unreasonable. Irish.—Hodgson v. Lynch, 1 R. 5 C. L. 353.

[a] It is the duty of the sheriff to levy the writ as soon as he conveniently can after receiving the writ. Armstrong v. Grant, 7 Kan. 285.

[b] **Question of Fact.**—The question of the exercise of diligence is one of fact for the jury. Del.—Cake v. Cannon, 2 Houst. 427, 435. Ill. Gilbert v. Gallup, 76 Ill. App. 526.



variously designated merely as diligence,<sup>25</sup> due diligence,<sup>26</sup> and ordinary diligence.<sup>27</sup> In many cases, the circumstances may be such as to require that the officer proceed at once,<sup>28</sup> as where the plaintiff directs the sheriff to proceed forthwith, or intimates that promptitude is necessary.<sup>29</sup> And in some jurisdictions it is the duty of the sheriff to proceed with the execution of the writ without delay and at once,<sup>30</sup>

**Mo.**—State *ex rel.* Farwell v. Leland, 82 Mo. 260. **Tenn.**—Barnes v. Thompson, 2 Swan 313. **Can.**—Finnigan v. Jarvis, 8 U. C. Q. B. 210.

[c] What will constitute a reasonable time in which to levy the execution is a question for the jury. *Cake v. Cannon*, 2 *Houst.* (Del.) 427, 435; *State to use of Roe v. Gemmill*, 1 *Houst.* (Del.) 9; *Janvier v. Vandever*, 3 *Harr.* (Del.) 29.

[d] **Diligence Depends on Facts in the Case.**—While the law requires of public officers only reasonable diligence in the service of process, yet what constitutes reasonable diligence depends upon the particular facts in connection with the duty, as, for example, the special instructions given or the apparent necessity for quick action. *Guiterman v. Sharvey*, 46 *Minn.* 183, 48 *N. W.* 780, 24 *Am. St. Rep.* 219, holding that a delay, from four o'clock in the afternoon until after ten o'clock the next day, in making a levy under an execution, is unreasonable and negligent, the plaintiff's attorney having declared the importance of prompt action.

As to remedies and proceedings against the officer by the judgment creditor, see the title "Sheriffs, Constables and Marshals."

25. *Ala. Code*, 1907, §4098; *Wilson v. Brown*, 58 *Ala.* 62, 29 *Am. Rep.* 727; *Northern Alabama R. Co. v. Lowery*, 3 *Ala. App.* 511, 57 *So.* 260. And see *Harris v. Murfree*, 54 *Ala.* 161; *Andrews v. Keep*, 38 *Ala.* 315; *Griffin v. Isbell*, 17 *Ala.* 184; *Hallett v. Lee*, 3 *Ala.* 28; *Hunter v. Phillips*, 56 *Ga.* 634. See *Wakefield v. Moore*, 65 *Ga.* 268; *French Richards & Co. v. Kemp*, 64 *Ga.* 749 (a prima facie case is made out by showing a delay of six months).

26. *Richards v. Gilmore*, 11 *N. H.* 493; *Ball v. Badger*, 6 *N. H.* 405; *Finnigan v. Jarvis*, 8 *U. C. Q. B.* (Can.) 210. See *Hutchings v. Ruttan*, 6 *U. C. C. P.* (Can.) 452.

27. *Del.*—*Cake v. Cannon*, 2 *Houst.*

427; *State to use of Roe v. Gemmill*, 1 *Houst.* 9 (due diligence). See, however, *Janvier v. Vandever*, 3 *Harr.* 29 (reasonable diligence); *State, use of Jewell v. Porter*, 1 *Harr.* 126 (reasonable diligence). **Ind.**—*State ex rel. Bennett v. Nelson*, 1 *Ind.* 522; *State ex rel. Bement v. Nelson*, *Smith* 401. See *State ex rel. Alford v. Blanch*, 70 *Ind.* 204, holding a delay of fourteen days not negligent. **Tenn.**—*Barnes v. Thompson*, 2 *Swan* 313. See *Trigg v. McDonald*, 2 *Humph.* 386, reasonable diligence. **Tex.**—*Cook v. De la Garza*, 13 *Tex.* 431.

[a] **Ordinary diligence** is all that is required in the absence of any information by the plaintiff that promptitude is essential in levying the execution. *Cake v. Cannon*, 2 *Houst.* (Del.) 427, 437.

28. *State ex rel. Farwell v. Leland*, 82 *Mo.* 260; *State v. Ferguson*, 13 *Mo.* 166.

[a] If the sheriff has reasonable grounds to believe that if he does not immediately serve the writ there will be danger of loss, he is bound to serve it immediately. *Armstrong v. Grant*, 7 *Kan.* 285.

29. **Conn.**—*Tucker v. Bradley*, 15 *Conn.* 46. **Del.**—*Cake v. Cannon*, 2 *Houst.* 427, 437. **Kan.**—*Armstrong v. Grant*, 7 *Kan.* 285. **Minn.**—*Guiterman v. Sharvey*, 46 *Minn.* 183, 48 *N. W.* 780, 24 *Am. St. Rep.* 218. **Ore.**—*Haber-sham v. Sears*, 11 *Ore.* 431, 5 *Pac.* 208, 50 *Am. Rep.* 481.

30. **U. S.**—*Berry v. Smith*, 3 *Wash. C. C.* 60, 3 *Fed. Cas. No.* 1,359. **Ala.** See *Easley v. Walker*, 10 *Ala.* 671. **Colo.**—*Williams v. Mellor*, 12 *Colo.* 1, 19 *Pac.* 839; *Bell v. Kaufman*, 9 *Colo. App.* 259, 47 *Pac.* 1035. **Ia.**—*West v. St. John*, 63 *Iowa* 287, 19 *N. W.* 238. And see *Crosby v. Hungerford*, 59 *Iowa* 712, 12 *N. W.* 582, requiring reasonable diligence. **La.**—*Code Pr.*, art. 643; *Marshall & Co. v. Simpson*, 13 *La. Ann.* 437. **Mo.**—*Douglass v. Baker*, 9 *Mo.* 41. **Okla.**—*Comp. Laws*, 1909, §5973. **Tex.**—*Vern. Sayle's St.*, 1914, art.

or with utmost expedition, or as soon after he receives it as the nature of the case admits.<sup>31</sup>

(V.) **Where Writ Is Against Joint Defendants.** — Where there are several defendants, each liable for the whole amount of the judgment, though as between themselves they may be bound to contribute equally to its discharge, there is no obligation resting upon the officer to make the amount in equal portions out of the property of each.<sup>32</sup> He may do so,<sup>33</sup> or he may make the whole amount of any one.<sup>34</sup>

(VI.) **Duty Where Officer Has Several Writs.** — Where several writs of execution against a debtor are placed in the hands of an officer, it is his duty to levy them in the order in which he received them;<sup>35</sup> unless he has received instructions not to execute one of them.<sup>36</sup> But a levy and sale under the writ last delivered will confer upon the purchaser a good title,<sup>37</sup> the remedy of the plaintiffs in the other execu-

3734; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

31. *Wyer v. Andrews*, 13 Me. 168; *Lindsay's Exrs. v. Armfield*, 10 N. C. 548, 14 Am. Dec. 603.

32. **Ky.**—*Faris v. Banton*, 6 J. J. Marsh. 235. **Tenn.**—*Hassell v. Southern Bank*, 2 Head 381. **Tex.**—*Mitchusson v. Wadsworth*, 1 White & W. Civ. Cas., §976. **Vt.**—*Warren v. Edgerton*, 22 Vt. 199, 54 Am. Dec. 66.

[a] The officer (1) is not required to investigate and determine the respective equities of the different defendants as against each other. *Mitchusson v. Wadsworth*, 1 White & W. Civ. Cas. (Tex.), §976. (2) He is not required to regard an offer of one of the debtors to expose the property of his co-debtors. *Warren v. Edgerton*, 22 Vt. 199, 54 Am. Dec. 66.

In case of principal and surety, see the title "Principal and Surety."

33. *Faris v. Banton*, 6 J. J. Marsh. (Ky.) 235.

34. **Ill.**—*Reed v. Garfield*, 15 Ill. App. 290. **Ky.**—*Faris v. Banton*, 6 J. J. Marsh. 235. **Mass.**—*Parker v. Dennie*, 6 Pick. 227. **Minn.**—*West Duluth Land Co. v. Bradley*, 75 Minn. 275, 77 N. W. 964. **Ohio.**—*Harris v. Clark*, 10 Ohio 5; *Billingsheimer v. Rickey*, 2 Cin. Sup. Ct. 492. **R. I.**—*Burdick v. Burdick*, 16 R. I. 495, 17 Atl. 859. **Tex.**—*Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769. **Vt.**—*Warren v. Edgerton*, 22 Vt. 199, 54 Am. Dec. 66.

35. **Del.**—*Rust, Wells & Hitch v. Pritchett*, 5 Harr. 260. **Fla.**—*Love v. Williams*, 4 Fla. 126. **Ill.**—*Rogers v. Dickey*, 6 Ill. 637. **Ind.**—*Bragg v.*

*State*, 30 Ind. 427. **Ky.**—*Com. v. Straton*, 7 J. J. Marsh. 90; *Arberry v. Noland*, 2 J. J. Marsh. 421; *Tabb v. Harris*, 4 Bibb 29; *Million v. Com.*, 1 B. Mon. 310. **Md.**—*May v. Buckhannon R. L. Co.*, 70 Md. 448, 17 Atl. 274. **Minn.**—*Albrecht v. Long*, 25 Minn. 163. **N. Y.**—*In the Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999. **Pa.**—*McClelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224. **Tex.**—*McMahan v. Hall*, 36 Tex. 59; *Gardner's Admr. v. Cutler's Admr.*, 28 Tex. 175. **Vt.**—*St.*, 1894, §1795. **Va.** Code, 1904, §3590; *Hoekman v. Hoekman*, 93 Va. 455, 25 S. E. 534. **W. Va.** *Hartman v. Campbell*, 5 W. Va. 394. **Wis.**—*Ohlson v. Pierce*, 55 Wis. 205, 12 N. W. 429; *Knox v. Webster*, 18 Wis. 406. **Eng.**—*Heenan v. Evans*, 1 Dowl. N. S. 204; *Hunt v. Hooper*, 12 Mees. & W. 664, 670; *Payne v. Drewe*, 4 East 523, 102 Eng. Reprint 931; *Smallecomb v. Cross*, 1 Ld. Raym. 251, 91 Eng. Reprint 1064; *Smallecomb v. Buckingham*, 5 Mod. 376, 87 Eng. Reprint 715.

[a] No preference will be given if the writs are delivered to the officer on the same day, though at different hours. *Okla. Comp. Laws*, 1909, §5971; *Bachman v. Sulzbacher*, 5 S. C. 58.

[b] The sheriff may change the rights of the parties by levying the writs out of their true order. *Johnson v. Gorham*, 6 Cal. 195; *Million v. Com.*, 1 B. Mon. (Ky.) 310.

36. See *supra*, II, B, 4, c.

37. **Ill.**—*Rogers v. Dickey*, 6 Ill. 637. **Mo.**—*Wise v. Darby*, 9 Mo. 131. **N. Y.**—*Marsh v. Lawrence*, 4 Cow. 461. **Pa.**—*McClelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224. See *Rudy*

tions being against the officer.<sup>38</sup> It seems, however, that a sheriff having two executions against a defendant may receive from him a sum of money to be paid to the junior execution creditor.<sup>39</sup>

(VII.) *Mandamus To Compel Levy*.<sup>40</sup> — In the absence of statute providing otherwise, where there is another adequate legal remedy, as by an action against the officer on his bond, mandamus will not lie to compel a sheriff to levy a writ of execution in his hands.<sup>41</sup> But if the legal remedy is inadequate, as where the officer refuses to execute a writ of possession for specific property, mandamus will lie.<sup>42</sup>

f. *Time of Levy*.<sup>43</sup> — (I.) *In General*. — An execution must be levied during the life of the writ or in other words, before return day. A levy made thereafter is void.<sup>44</sup> A levy cannot be lawfully

r. Com., 35 Pa. 166. Eng.—Payne v. Drewe, 4 East 523, 539, 102 Eng. Reprint 931; Smallcomb v. Cross, 1 Ld. Raym. 251, 91 Eng. Reprint 1064; Smallcomb v. Buckingham, 5 Mod. 376, 87 Eng. Reprint 715.

38. Ill.—Rogers v. Dickey, 6 Ill. 636, 41 Am. Dec. 204. Mo.—Wise v. Darby, 9 Mo. 131. Pa.—McClelland v. Slingluff, 7 Watts & S. 134, 42 Am. Dec. 224. Eng.—Payne v. Drewe, 4 East 523, 539, 102 Eng. Reprint 931; Smallcomb v. Cross, 1 Ld. Raym. 251, 91 Eng. Reprint 1064; Smallcomb v. Buckingham, 5 Mod. 376, 87 Eng. Reprint 715. Can.—Patterson v. McKellar, 4 Ont. 407, 424.

39. Rudy v. Com., 35 Pa. 166.

[a] A sheriff having two executions in his hands sold the defendant's personal property for a sum that was insufficient to satisfy the first writ, and made a levy on real estate for the balance. Subsequently the defendant gave the sheriff a sum of money with directions to pay it to the creditor of the junior execution. Under these circumstances the sheriff could not make a levy under the first execution upon this money and he is justified in returning that it was made on the second writ. Rudy v. Com., 35 Pa. 166, 78 Am. Dec. 330.

40. *Compelling issuance of execution*, see *supra*, II, B, 1, j.

41. Fla.—State ex rel. Bradley v. Cone, 40 Fla. 409, 25 So. 279, 74 Am. St. Rep. 150; State ex rel. Proseus v. Craft, 17 Fla. 722. But this has been changed by statute which provides that an officer who has an unsatisfied execution in his hands may be compelled by mandamus to levy it. Armstrong v. Stansel, 47 Fla. 127, 36 So. 762.

Ind.—State ex rel. Wheatley v. Beck, 175 Ind. 312, 93 N. E. 664. Ohio. State ex rel. Burtscher v. Chambers, 5 Ohio Cir. Ct. N. S. 57, 26 Ohio Cir. Ct. 404. Ore.—Habersham v. Sears, 11 Ore. 431, 5 Pac. 203, 50 Am. Rep. 481.

42. North Pacific C. R. Co. v. Gardner, 79 Cal. 213, 21 Pac. 735.

[a] *Service of a writ of restitution* may be compelled by mandamus. Fogarty v. Sparks, 22 Cal. 142; Fremont v. Crippen, 10 Cal. 211, 70 Am. Dec. 711; State ex rel. Clement v. Stokes, 99 Mo. App. 236, 73 S. W. 254.

[b] *But if the title to the property which the sheriff is directed to levy on is in dispute, a mandamus will not lie to compel the levy.* State ex rel. Proseus v. Craft, 17 Fla. 722.

43. *Time of issuance of writ*, see *supra*, II, B, 1, f.

44. Ala.—Mitchell v. Corbin, 91 Ala. 599, 8 So. 810; Waldrop v. Friedman, 90 Ala. 157, 7 So. 510; Easley v. Walker, 10 Ala. 671. Cal.—Tower v. McDowell, 3 Cal. (Unrep.) 714, 31 Pac. 843; Southern California Lumb. Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. Del. Lofland v. Jefferson, 4 Harr. 303; West v. Shockley, 4 Harr. 287. Ga.—Hill v. De Launay, 34 Ga. 427. Ill.—Chittenden v. Rogers, 42 Ill. 100; Davidson v. Waldron, 31 Ill. 120, 134, 83 Am. Dec. 206. Ky.—Bell v. Com., 1 J. J. Marsh. 550; Gaines' Heirs v. Clark, 1 Bibb 608; Glenn v. White, Sneed Dec. 296; Castleman v. Griffith, Sneed Dec. 293; Aloes v. Abbott, 9 Ky. Opin. 822. La. Dugot v. Babin, 8 Mart. (N. S.) 391; Johnston's Exr. v. Wall, 1 Mart. (N. S.) 541. Md.—Gaither v. Martin, 3 Md. 146. Mass.—Prescott v. Wright,



made before the writ of execution becomes operative.<sup>45</sup> But after issuance of a writ of execution it may be levied at any time<sup>46</sup> up to and

6 Mass. 20. **Mich.**—*Evans v. Calman*, 92 Mich. 427, 52 N. W. 787; *Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262; *Blair v. Compton*, 33 Mich. 414. **Miss.**—*Edwards v. Ingraham*, 31 Miss. 272. **Mo.**—*State ex rel. Farwell v. Leland*, 82 Mo. 269; *Gamache v. Prevost*, 71 Mo. 84; *McDonald v. Gronefeld*, 45 Mo. 28; *Bank of the State of Mo. v. Bray*, 37 Mo. 194; *Hombs v. Corbin*, 29 Mo. App. 497. See *Karnes v. Alexander*, 92 Mo. 660, 4 S. W. 518. **N. J.**—*Olden v. Sassman*, 72 N. J. Eq. 637, 66 Atl. 603; *Kemble v. Harris*, 36 N. J. L. 526; *Cook v. Wood*, 16 N. J. L. 254; *Matthews v. Warne*, 11 N. J. L. 295; *Lloyd v. Wyckoff*, 11 N. J. L. 218. **N. Y.**—*Smith v. Smith*, 60 N. Y. 161; *Hathaway v. Howell*, 54 N. Y. 97; *Crouse v. Bailey*, 56 Hun 645, 10 N. Y. Supp. 273; *Abeel v. Anderson*, 39 Hun 514, 3 How. Pr. (N. S.) 489, 9 Civ. Proc. 274; *Haggerty & Nobles v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321; *Slingerland v. Swart*, 13 Johns. 255; *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999. **N. C.**—*Parish v. Turner*, 27 N. C. 279; *Love v. Gates*, 24 N. C. 14; *Barden v. McKinnie*, 11 N. C. 279, 15 Am. Dec. 519; *Lanier v. Stone*, 8 N. C. 329. **Pa.**—*Boyer v. Miller*, 200 Pa. 589, 50 Atl. 184; *Braden's Estate*, 165 Pa. 184, 30 Atl. 746; *Finn v. Com.*, 6 Pa. 460; *Knelly v. Bachert*, 28 Pa. Co. Ct. 446; *Farrel v. Copeland*, 18 W. N. C. 94. **S. C.**—*McElwee v. Sutton*, 2 Bailey 361; *Ross v. McCartan*, 1 Brev. 507. **Tenn.**—*State v. Parchmen*, 3 Head 609. **Tex.**—*Harris, Norton & Co. v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296. **Vt.**—*Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312; *Little v. Sleeper*, 37 Vt. 105; *Perrin v. Reed*, 33 Vt. 62; *Downer v. Hazen*, 10 Vt. 418; *Barnard v. Stevens*, 2 Aik. 429. **Va.**—*Grandstaff v. Ridgely*, 30 Gratt. (71 Va.) 1. **Can.** *Lee v. Howes*, 30 U. C. Q. B. 292; *Castle v. Ruttan*, 4 U. C. C. P. 252.

**Duty of officer to exercise diligence**, see *supra*, II, B, 4, e, (IV).

[a] Where a levy is by sale, it is "considered as made at the time of first giving notice of sale." *Bell v. Walsh*, 130 Mass. 163.

[b] Although the sheriff's bill of sale recites a levy after the return day as his authority to sell, if there

has been a valid levy on the same property by the same sheriff under another execution, the purchaser's title may be referred to that and will be valid. *McElwee v. Sutton*, 2 Bailey (S. C.) 361.

[c] Where the terms of a court are changed by statute to a later period, and all writs, etc., are made returnable to the new term, an execution remains in force till the new return day, and a levy made upon it after it is returnable by its terms, will be valid. *Brown v. Roberts*, 24 N. H. 131.

As to executing writ at night, see the title "Sheriffs, Constables and Marshals."

45. *Hathaway v. Howell*, 54 N. Y. 97.

46. **U. S.**—*United States v. Hogg*, 112 Fed. 909, 50 C. C. A. 608. **Cal.** *Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. **Ind.**—*Lowry v. Reed*, 89 Ind. 442. **Ky.**—*Gaines' Heirs v. Clark*, 1 Bibb 608; *Aloes v. Abbott*, 9 Ky. Opin. 822. **Me.**—*Chase v. Gilman*, 15 Me. 64. **Mich.**—*Smith v. Thompson*, 1 Walk. Ch. 1. **Mo.** *State v. Leland*, 82 Mo. 260; *State v. Rollins*, 13 Mo. 179. **Tenn.**—*State v. Parchman*, 3 Head 609. **Vt.**—*Fletcher v. Bradley*, 12 Vt. 22, 36 Am. Dec. 324.

[a] At any time during the last day of the writ. **Cal.**—*Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. **Ky.**—*Gaines' Heirs v. Clark*, 1 Bibb 608; *Aloes v. Abbott*, 9 Ky. Opin. 822. **Mass.**—*Prescott v. Wright*, 6 Mass. 20.

[b] During First Day of Term. When an execution is returnable to a court to be held at a certain day and place, it may be executed at any time on that day, while the court is sitting; but after the court is adjourned to the next day, it cannot then be executed, the authority of the officer being determined. **Mass.**—*Prescott v. Wright*, 6 Mass. 20. **N. H.**—*Blaisdell v. Sheafe*, 5 N. H. 201. **Eng.**—*Parkins v. Woollaston*, 6 Mod. 130, 1 Salk. 321, 87 Eng. Reprint 886. But see *Maud*

including the return day, but not thereafter,<sup>47</sup> although it is sufficient if the levy shall have been commenced before the return day, the whole having relation to the time the levy is commenced.<sup>48</sup> A proper levy before return day will not keep the execution alive so as to justify a fresh levy after the return day.<sup>49</sup>

**Where Time Allowed To Claim Exemption.**—In some states, statutes allow a debtor a certain time after service of execution upon him in which to claim his exemption. A levy in violation of this statute before the expiration of the specified period is unauthorized and is a trespass.<sup>50</sup>

**Levy on Sunday.**—It has been held that a levy made on Sunday is void.<sup>51</sup>

(II.) **After Death of Plaintiff.**—A writ should be levied notwithstanding the death of the creditor after the issuance of the writ.<sup>52</sup>

(III.) **After Death of Defendant.**—At common law the execution bound the defendant's goods from its teste, and it could be levied where the defendant died after the teste and before delivery to the sheriff.<sup>53</sup> But under statutes binding the defendant's property from the delivery of the writ to the officer, the rule is otherwise.<sup>54</sup> If the defendant dies after delivery of the writ to the sheriff and before levy made, the officer may generally levy the writ.<sup>55</sup>

r. Barnard, 2 Burr. 812, 97 Eng. Reprint 575.

47. See cases cited in preceding notes.

[a] **The power of the officer to take property** by virtue of the execution ends with the expiration of the day on which it is returnable. *Aloes v. Abbott*, 9 Ky. Opin. 822.

48. *Ala.*—See *Bagley v. Ward*, 37 Cal. 121, 138, 99 Am. Dec. 256. *Me.* Rev. St., 1903, ch. 86, §26. *Mass.* *Bell v. Walsh*, 130 Mass. 163; *Prescott v. Wright*, 6 Mass. 20. *Mich.*—*Blair v. Compton*, 33 Mich. 414. *Minn.*—*Knox v. Randall*, 24 Minn. 479, 496. *N. Y.* *Clinton v. Croswell*, 2 Caines Cas. 245, 2 Am. Dec. 235.

[a] *Contra*, *Downer v. Hazen*, 10 Vt. 418, holding a levy upon real estate void which was not finished and recorded before return day.

[b] If a levy has been duly made, the property may be removed after return day. *West v. Shockey*, 4 Harr. (Del.) 287; *Duncan's Appeal*, 37 Pa. 500, *quaere*.

49. *Ross v. McCartan*, 1 Brev. (S. C.) 507.

**As to successive levies**, see *infra*, II, B, 4, m.

50. *Taylor v. Crowe*, 122 Ill. App. 518.

**As to claim of exemption**, see the

title "**Homesteads and Exemptions.**"

51. *Field v. Parks*, 20 Johns. (N. Y.) 140; *Butler v. Kelsey*, 15 Johns. (N. Y.) 177; *Van Vechten v. Paddock*, 12 Johns. (N. Y.) 178; *Bland v. Whitfield*, 46 N. C. 122.

**As to service of process on Sunday and holidays**, see the title "**Sunday and Holidays.**"

52. *Ala.*—Code, 1907, §4101. *Ga.* *Rogers v. Truett*, 73 Ga. 386. *Me.* *Wing v. Hussey*, 71 Me. 185. *Tenn.* *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Harvey v. Berry*, *Demovalle & Co.*, 1 Baxt. 252; *Neil v. Gaut*, 1 Coldw. 396. *Tex.*—*Bennett v. Gamble*, 1 Tex. 124. *Va.*—*Turnbull v. Claibornes*, 3 Leigh 392.

**Issuance of execution after death of plaintiff or plaintiffs**, see *supra*, II, B, 1, h, (I), (II) and (III).

53. *U. S.*—*Erwin's Lessee v. Dundas*, 4 How. 58, 11 L. ed. 875. *Ark.* *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182. *Ill.*—*People v. Bradley*, 17 Ill. 485.

**Issuance of execution after death of defendants**, see *supra*, II, B, 1, h, (IV) and (V).

54. *People v. Bradley*, 17 Ill. 485.

55. *Ala.*—Code, 1907, §4101; *Keel v. Larkin*, 72 Ala. 493. *Cal.*—Code Civ. Proc., §686. *Del.*—*Graham's Exr. v.*

(IV.) **Presumption as to Time of Levy.**—It will be presumed that the officer did his duty by levying the execution while in full force, the return being silent upon the subject.<sup>56</sup>

g. **Manner of Levy.**—(I.) **In General.**—A plaintiff in execution has an unconditional and absolute right to have his writ executed in the usual and customary way.<sup>57</sup> The practice in the various states as to the manner of making levies of writs of execution is not uniform and the cases themselves are not always clear as to what is necessary to constitute a valid levy. The strictness required by the English authorities has been departed from in the United States.<sup>58</sup> In some cases a distinction is made between a levy which is good against the debtor and one which is good against the world,<sup>59</sup> but, on the other hand, it has been said that different rules should not obtain in this respect, and that a levy good against a debtor should be good against everybody.<sup>60</sup> Generally speaking, executions and attachments are levied in the same manner.<sup>61</sup>

Wilson, 5 Harr. 435. **Ill.**—Logsdon v. Spivey, 54 Ill. 104; Dodge v. Mack, 22 Ill. 93. **Ind.**—Burns' Ann. St., 1908, §833; Blumenthal v. Tibbits, 160 Ind. 70, 66 N. E. 159. **Me.**—Wing v. Hussey, 71 Me. 185. **Md.**—Hanson v. Barnes' Lessee, 3 Gill & J. 359, 22 Am. Dec. 322. **N. C.**—Parish v. Turner, 27 N. C. 279. **Tenn.**—Trust Co. v. Weaver, 102 Tenn. 65, 50 S. W. 763; Preston v. Surgoine, Peck 71; Battle v. Bering, 7 Yerg. 529; Neil v. Gaut, 1 Coldw. 396. **Tex.**—Bennett v. Gamble, 1 Tex. 124. Compare Webb v. Mallard, 27 Tex. 80. **Va.**—Trevillians' Exrs. v. Guerrant's Exrs., 31 Gratt. (72 Va.) 525.

*Contra*, James v. Marcus, 18 Ark. 421; Davis v. Oswalt, 18 Ark. 414, 68 Am. Dec. 182; Cartney v. Reed, 5 Ohio 221; Massie's Heirs' Lessee v. Long, 2 Ohio 287, 15 Am. Dec. 547; Arnold v. Fuller's Heirs, 1 Ohio 458.

[a] In Trust Co. v. Weaver, 102 Tenn. 65, 50 S. W. 763, the court said, "Being, in fact, alive at the date of the teste, he is, in law, assumed to be alive at the date of the levy." And see also Black v. Planters' Bank, 4 Humph. (Tenn.) 367; Harvey, Demoville & Co. v. Berry, 1 Baxt. (Tenn.) 252.

[b] **Scire Facias Not Necessary.** The death of a defendant before levy of an execution in the hands of the sheriff prior to the death does not render a scire facias against the heirs and terre tenants necessary. Hanson v. Barnes' Lessee, 3 Gill & J. (Md.)

359, 22 Am. Dec. 322; Parish v. Turner, 27 N. C. 279.

**Effect of death of defendant after levy and before sale**, see *infra*, II, B, 7.

56. **Ky.**—Greer v. Wintersmith, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. Rep. 96, 7 Am. St. Rep. 613. See Gaines' Heirs v. Clark, 1 Bibb 608. **N. Y.** Hartwell v. Root, 19 Johns. 345, 10 Am. Dec. 232. **Pa.**—Fitler v. Patton, 8 Watts & S. 455.

**As to presumptions generally**, see *supra*, II, B, 4, q.

57. Maloney v. Real Est. B. & L. Assn., 57 Mo. App. 384, that is, by levy and sale of any property belonging to the defendant and subject to execution.

58. **Mich.**—Quackenbush v. Henry, 42 Mich. 75, 3 N. W. 262. **N. Y.** Westervelt v. Pinckney, 14 Wend. 123, 28 Am. Dec. 516; Beekman v. Lansing, 3 Wend. 446, 20 Am. Dec. 707. **Pa.** Duncan's Appeal, 37 Pa. 500.

59. **Cal.**—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Shirran v. Dallas, 21 Cal. App. 405, 416, 132 Pac. 454. **Ill.**—Davidson v. Waldron, 31 Ill. 120, 133, 83 Am. Dec. 206. **Minn.** Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099.

60. Barnard's Admr. v. Russell, 19 Vt. 334.

61. Union Nat. Bank v. Byram, 131 Ill. 92, 22 N. E. 842.

**As to the manner of levying a writ of attachment**, see 3 STANDARD PROC. 501, 502, et seq.



(II.) **Compliance With Statute.**—The manner of levying an execution is generally regulated by statutes.<sup>62</sup> As to that property which was not subject to levy and sale at common law,<sup>63</sup> there is necessarily no common-law method of making a levy, and a levy can, therefore, be made only by pursuing the statute conferring and regulating the right.<sup>64</sup> And generally where the manner of making a levy is prescribed by statute, it is the duty of the officer levying the writ to comply strictly with the provisions of the statutes regulating the manner of levy.<sup>65</sup> But with respect to certain matters these statutes are sometimes held to be merely directory.<sup>66</sup>

62. See the statutes.

63. **Property subject to execution,** see *supra*, II, B, 3.

64. **III.**—Goss & Phillips Mfg. Co. v. People, 4 Ill. App. 510. **Mich.**—Blair v. Compton, 33 Mich. 414. **S. D.**—McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99.

65. **Cal.**—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454. **Conn.**—Schroeder v. Tomlinson, 70 Conn. 348, 39 Atl. 484. **Idaho.**—Wells v. Price, 6 Idaho 490, 56 Pac. 266. **Ill.**—See Goss & Phillips Mfg. Co. v. People, 4 Ill. App. 510, holding the language of the statute providing the manner of levy upon corporate stock is mandatory. **Ky.**—Hayden v. Dunlap, 3 Bibb 216. **La.**—Lowry v. Erwin, 6 Rob. 192, 204, 39 Am. Dec. 556. **Me.**—Mysroll v. Violette, 55 Me. 108. **Okla.**—Osborne & Co. v. Hughey, 14 Okla. 29, 76 Pac. 146. **Ore.**—Dufur Oil Co. v. Enos, 59 Ore. 528, 117 Pac. 457. **Pa.**—Haberstroh v. Toby, 9 Phila. 614; Conniff v. Doyle, 8 Phila. 630. **Vt.**—Morton v. Edwin, 19 Vt. 77. **Wis.**—Butler v. Gillis, 104 Wis. 421, 80 N. W. 735.

[a] **Substantial Compliance.**—Unless the acts of the officer are substantially conformable to the statute, they are invalid. **Me.**—Benson v. Smith, 42 Me. 414, 66 Am. Dec. 285. **Mich.**—Blair v. Compton, 33 Mich. 414, levy upon corporate stock. **Mo.**—Caffery v. Choctaw Coal & M. Co., 95 Mo. App. 174, 68 S. W. 1049.

[a] **Proceedings for taking land upon execution** are *stricti juris*, and no title passes unless the statute is exactly pursued. **Schroeder v. Tomlinson**, 70 Conn. 348, 39 Atl. 484; **Hobart v. Frisbie**, 5 Conn. 592; **Downer v. Hazen**, 10 Vt. 418.

[c] **Greater Strictness Necessary as**

**to Third Persons.**—The performance of the acts described in the statute is material only in reference to the intervening rights of third persons, or persons who are not parties to the writ. **Blood v. Light**, 38 Cal. 649, 99 Am. Dec. 441; **Shirran v. Dallas**, 21 Cal. App. 405, 132 Pac. 454. See *supra*, II, B, 4, g, (I). Compare, **Barnard's Admr. v. Russell**, 19 Vt. 334.

66. **Cal.**—Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; **Smith v. Randall**, 6 Cal. 47, 65 Am. Dec. 475. **Ga.**—Cox v. Montford, 66 Ga. 62; **Solomon v. Peters**, 37 Ga. 251, 92 Am. Dec. 69 (statute as to notice of levy). **Ind.**—Tillotson v. Doe *ex dem.* Gregory, 5 Blackf. 590, statute relating to designation of property to be levied on. **Ia.**—Cavender v. Smith's Heirs, 1 Iowa 306, statute allowing defendant to select property. **Ky.**—Faris v. Banton, 6 J. J. Marsh. 235 (statute regulating order in which property shall be taken); **Beeler's Heirs v. Bullitt's Heirs**, 3 A. K. Marsh. 280, 13 Am. Dec. 161; **Hayden v. Dunlap**, 3 Bibb 216. **Mo.**—Hobein v. Murphy, 20 Mo. 447, 64 Am. Dec. 194, statute requiring notice of execution. **Ohio.**—The Coal Co. v. First Nat. Bank, 55 Ohio St. 233, 250, 45 N. E. 630, statute relating to order of levy. **Tenn.**—Nighbert v. Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736 (statute relating to delivery bond); **Sellers v. Fite, Anderson & Green**, 3 Baxt. 131 (statute requiring principal's property to be taken before surety's); **Dice v. Penn**, 2 Swan 561 (statute regulating order of levy). **Tex.**—Beck v. Avondino, 82 Tex. 314, 18 S. W. 69 (statute relating to right of defendant to select property); **Odle v. Frost, Barry & Lee**, 59 Tex. 684; **Pearson v. Flanagan**, 52 Tex. 266, 280 (statute relative to order property is to be seized); **Midkiff v.**

(III.) By Illegal and Oppressive Acts. — The sheriff owes a duty to the debtor as well as to the creditor;<sup>67</sup> and in levying a writ of execution, he should do as little mischief as possible,<sup>68</sup> and avoid proceeding in a reckless, illegal and oppressive manner.<sup>69</sup> Levies accomplished by fraudulent tricks and devices and other unlawful acts will not be upheld by the courts.<sup>70</sup>

Questions as to the degree of force which the officer can use and his right to break and enter to levy on property will be found treated elsewhere.<sup>71</sup>

(IV.) Demand and Notice. — (A.) NECESSITY FOR. — In the absence of statute requiring it, it is not necessary generally for the officer to notify the defendant of the issuance of the writ, or to make a demand for payment.<sup>72</sup> But in some states, either by statute or otherwise, it is required that the sheriff shall notify the defendant of the execution,<sup>73</sup> or serve the execution upon him,<sup>74</sup> and make a demand

Bedell (Tex. Civ. App.), 127 S. W. 271; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324. Vt. *Collins v. Perkins*, 31 Vt. 624, *affirming* *Dow v. Smith*, 6 Vt. 519, statute relating to previous demand.

As to the effect of omitting particular requirements, see *infra*, II, B, 4, g, (IV), et seq.

67. *Wallace v. Atlanta Medical College*, 52 Ga. 164.

68. *Handy v. Clippert*, 50 Mich. 355, 15 N. W. 507.

Levy should not be excessive, see *infra*, II, B, 4, h, (I), (A).

69. Ga.—*Wallace v. Atlanta Medical College*, 52 Ga. 164. Me.—*Wyer v. Andrews*, 13 Me. 168. Md.—*Wilson v. Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849.

[a] Levy by committing trespass is bad. *Bailey v. Wright*, 39 Mich. 96.

[b] A levy upon part of a lot in such a manner that it included seven-tenths of a valuable building is void because it is a reckless and wanton injury to the debtor. *Wallace v. Atlanta Medical College*, 52 Ga. 164.

70. *Williams v. Steenrod*, 11 Pa. Dist. 22. See also *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

[a] Getting Property Into Jurisdiction by Fraud.—*Williams v. Steenrod*, 11 Pa. Dist. 22, setting aside a levy where by false representations the debtor was induced to bring his property into the state and where it was then levied on.

71. See the titles "Service of Process and Papers;" "Sheriffs, Constables and Marshals."

72. Colo.—*Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac.

70. Ia.—*Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346. La.—*Tompkins v. Stroud*, 16 La. 274. Md.—*State v. Boulden*, 57 Md. 314.

[a] Where property attached has been released on the giving of security, it is the duty of the officer on receiving a writ of execution to make a demand for the property. *Kohn & Co. v. Hinshaw*, 17 Ore. 308, 20 Pac. 629.

As to notice of levy, see *infra*, II, B, 4, k.

73. Ill.—*Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Rock v. Haas*, 110 Ill. 528; *Thomas v. Hebenstreit*, 68 Ill. 115; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Hamilton v. Quimby*, 46 Ill. 90; *Pitts v. Magie*, 24 Ill. 610; *Tuttle v. Wilson*, 24 Ill. 553; *Bingham v. Maxcy*, 15 Ill. 290. Mo.—*Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *McAnaw v. Matthis*, 129 Mo. 142, 152, 31 S. W. 344; *Hobein v. Drewell*, 20 Mo. 450; *Hobein v. Murphy*, 20 Mo. 447, 64 Am. Dec. 194. See *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575. Pa.—*Conniff v. Doyle*, 8 Phila. 630.

[a] In Missouri no notice is required where the defendant does not reside in the county at the time of the issuance of the execution. *McAnaw v. Matthis*, 129 Mo. 142, 152, 31 S. W. 344; *Buchanan v. Atchison*, 39 Mo. 503.

74. *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Bingham v. Maxcy*,

for payment,<sup>75</sup> or that he point out and designate property upon which a levy should be made.<sup>76</sup> In some states, it is the duty of the officer to apprise the debtor of his exemption rights.<sup>77</sup> If it is impossible<sup>78</sup> or inexpedient<sup>79</sup> to give notice, a levy may be made without notice of the execution or demand of payment.

**Effect of Failure To Make Demand.** — An omission to make a previous demand for payment does not render the levy void,<sup>80</sup> vitiate the sale,

15 Ill. 290; *Guerin v. Kraner*, 97 Ind. 533.

[a] **The object of the service of the execution upon the defendant is to give him an opportunity to pay the execution without further costs, or the right to designate the property to be levied upon.** *Bingham v. Maxey*, 15 Ill. 290; *Guerin v. Kraner*, 97 Ind. 533. As to the right of a defendant to select property to be levied on, see *infra*, II, B, 4, g, (VI), (A).

75. Conn.—Gen. St., 1902, §901; *Dutton v. Tracy*, 4 Conn. 365. Ill. *Rock v. Haas*, 110 Ill. 528. N. M. St., 1915, §2192. Ohio.—See *Seymour v. Milford & C. Tp. Co.*, 10 Ohio 476, 488, under statute requiring, in the case of judgment against a turnpike company, that a bill stating the amount of the judgment and costs be sent to it within a specified time. Pa. 2 *Purdon's Dig.*, 1547, §64; *Conniff v. Doyle*, 8 Phila. 630; *Com. v. Keystone Elec. L. H. & P. Co.*, 2 Dauph. Co. 1, 4 Lack. Leg. N. 353. Vt.—Pub. St., 1906, §§2153, 2165; *Collins v. Perkins*, 31 Vt. 624; *Walter v. Denison*, 24 Vt. 551; *Dow v. Smith*, 6 Vt. 519; *Bates v. Carter*, 5 Vt. 602.

[a] **Where There Is No One on Whom To Make Demand.**—If the defendant is a corporation and has appointed no officers upon whom a demand can be made, no demand is necessary. *Spencer v. Champion*, 9 Conn. 536.

76. Ill.—*Pitts v. Magie*, 24 Ill. 610, it is the right of the defendant to turn out his realty before a levy is made on his personality and he must be given an opportunity to do so. Ind.—*Guerin v. Kraner*, 97 Ind. 533; *Terrell v. State ex rel. Grubbs*, 66 Ind. 570. Compare, *Drake v. Murphy*, 42 Ind. 82, holding it is not necessary for the officer to go to the party whose property is to be levied on, to get him to exercise his right of designation. Kan.—*Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623, but it is not

necessary where the officer has exercised reasonable diligence to discover chattels whereon to levy. N. M.—St., 1915, §2192. Tex.—*Vern. Sayles' St.*, 1914, art. 3735; *Odle v. Frost, Barry & Lee*, 59 Tex. 684; *Pearson v. Flanagan*, 52 Tex. 266, 280; *Kendrick v. Rice*, 16 Tex. 254; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324. See *Barbee v. Heflin*, 1 White & W. Civ. Cas., §744.

[a] **Application to the defendant's agent is not required unless the officer knows the defendant has an agent for the purpose of pointing out property.** *Cook v. De la Garza*, 13 Tex. 431.

**As to designation of property by defendant, see *infra*, II, B, 4, g, (VI), (A).**

77. See 11 STANDARD PROC. 474.

78. *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

[a] **Unless the defendant is within the county, the officer is not required to make a demand upon him to exercise the privilege of pointing out property.** *Kendrick v. Rice*, 16 Tex. 254; *Cook v. De la Garza*, 13 Tex. 431.

[b] **If the defendant is absent from the state, no demand need be made.** *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Opothlarholer v. Gardiner*, 15 La. 512.

[c] **Where defendant is a convict in a state's prison beyond the official precincts of the officer, a demand on him is not required.** *Grant v. Dalliber*, 11 Conn. 234.

79. *Gardner v. Eberhart*, 82 Ill. 316; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

[a] **If making a demand would occasion the loss of the debt as by affording the defendant an opportunity to conceal his property or put it out of reach, none need be made.** *Bates v. Carter*, 5 Vt. 602.

80. *Odle v. Frost, Barry & Lee*, 59 Tex. 684; *Pearson v. Flanagan*, 52 Tex. 266, 280; *Barbee v. Heflin*, 1 White & W. Civ. Cas., §744; *Collins v. Perkins*,



or affect the title acquired by the sale,<sup>81</sup> but it may make the sheriff liable for any damage growing out of his neglect of duty.<sup>82</sup>

(B.) ON WHOM MADE. — The demand must be made on the defendant<sup>83</sup> personally.<sup>84</sup> If the defendant be a corporation demand must be made on the officers or agents.<sup>85</sup> And if there be several defendants, demand must be made on all.<sup>86</sup>

(C.) WHERE MADE. — Some statutes provide for demand at the defendant's usual place of abode,<sup>87</sup> though in some jurisdictions it need not be made out of the officer's county.<sup>88</sup>

(D.) DEMAND IS NOT PART OF LEVY. — The demand is preliminary merely and not the actual commencement of the levy.<sup>89</sup>

(V.) Exhibition of Authority. — The failure of an officer to exhibit to the debtor his authority for levying an execution, although it may be better practice to do so, does not invalidate the levy,<sup>90</sup> though it may make the officer guilty of a trespass.<sup>91</sup>

(VI.) Designation of Property. — (A.) BY DEBTOR. — (1.) *Right To Designate.* At common law, the debtor had no right to elect upon what property

31 Vt. 624; *Dow v. Smith*, 6 Vt. 519; *Bates v. Carter*, 5 Vt. 602.

[a] **Mere Irregularity.**—A failure to notify a defendant of the issuance of the execution is a mere irregularity. *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Hobein v. Drewell*, 20 Mo. 450.

81. Ill.—*Rock v. Haas*, 110 Ill. 528; *Gardner v. Eberhart*, 82 Ill. 316. Ind. *Guerin v. Kraner*, 97 Ind. 533. Tex. *Odle v. Frost, Barry & Lee*, 59 Tex. 684. Vt.—*Bates v. Carter*, 5 Vt. 602; *Eastman v. Curtis*, 4 Vt. 616.

[a] Where there is a gross inadequacy of price, and the officer has failed to demand payment, or in any manner to give notice of the execution to the defendant, the court is warranted in finding that there has been an attempt to secure an unfair advantage by obtaining the property for a sum largely less than its value. *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254.

82. *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Rock v. Haas*, 110 Ill. 528; *Pitts v. Magie*, 24 Ill. 610; *Dow v. Smith*, 6 Vt. 519; *Eastman v. Curtis*, 4 Vt. 616.

[a] **An Unwarrantable Trespass.** A levy made without a previous demand constitutes an unwarrantable trespass. *Dutton v. Tracy*, 4 Conn. 365. *Contra*, *Dow v. Smith*, 6 Vt. 519.

83. *Barbee v. Heflin*, 1 White & W. Civ. Cas. (Tex.), §744. See the statutes.

84. *Dutton v. Tracy*, 4 Conn. 365.

85. *Spencer v. Champion*, 9 Conn. 536.

[a] **Demand on Municipal Officer.** Demand made upon the proper person but not in his official capacity does not render the levy invalid, as against a municipal corporation. *Walter v. Denison*, 24 Vt. 551.

[b] **Notwithstanding all the stock is acquired by one person**, the demand must be made on the corporation's agents. A demand need not be made on the sole stockholder as such. *Spencer v. Champion*, 9 Conn. 536.

86. *Dutton v. Tracy*, 4 Conn. 365.

[a] **A demand of one joint debtor** does not authorize a levy on the property of another joint debtor. *Dutton v. Tracy*, 4 Conn. 365.

87. Conn. Gen. St., 1902, §901 (if within the officer's precincts); *Dutton v. Tracy*, 4 Conn. 365.

[a] **A demand on the land**, to re-seise which the execution issued, is nugatory. *Dutton v. Tracy*, 4 Conn. 365.

88. *Kendrick v. Rice*, 16 Tex. 254; *Cook v. De la Garza*, 13 Tex. 431; *Kingsland, Ferguson & Co. v. Harrell*, 1 White & W. Civ. Cas. (Tex.), §§736, 739.

89. *Dutton v. Tracy*, 4 Conn. 365.

90. *Mayhew v. Smith*, 42 Colo. 534, 95 Pac. 549; *Farley v. Lea*, 20 N. C. 169.

91. *Copley v. Rose*, 2 N. Y. 115. And see *Morrissey v. Feeley*, 36 Ill. App. 556.

the levy should be made,<sup>92</sup> but this privilege has been generally conferred by statute,<sup>93</sup> and when promptly exercised, the defendant's selection cannot be ignored except at the peril of the party levying the writ.<sup>94</sup>

(2.) *Exercise of Right.* — It is the duty of the officer executing a writ of execution to give the defendant an opportunity to exercise his right of selection.<sup>95</sup> In some jurisdictions the defendant may tender other

92. *Bodley v. Downing*, 4 Litt. (Ky.) 28.

93. Ala.—Civ. Code, 1907, §4115. Ark.—Dig. St., 1904, §3230; *Trappall v. Richardson*, 13 Ark. 543; *Whiting & Stark v. Beebe*, 12 Ark. 421, 546; *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. Cal.—Code Civ. Proc., §691; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820. Ga.—*Hollinshead v. Woodward*, 124 Ga. 721, 52 S. E. 815; *Barfield v. Barfield*, 77 Ga. 83; *Thompson v. Mitchell*, 73 Ga. 127; *Benson v. Dyer*, 69 Ga. 190; *Hopkins v. Burch*, 3 Ga. 222. Ill.—*Wright v. Devoe*, 86 Ill. 490; *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Bingham v. Maxey*, 15 Ill. 290; *Beard v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197, query. Ind. *State ex rel. Farnham v. Willis*, 33 Ind. 118; *Davis v. Campbell*, 12 Ind. 192; *Miller v. Ashton*, 7 Blackf. 29. Ia. *Cavender v. Smith's Heirs*, 1 Iowa 306. Ky.—*Vallandingham v. Worthington*, 85 Ky. 83, 2 S. W. 772; *Bodley v. Downing*, 4 Litt. 28. La.—*Wheeling Pottery Co. v. Levi*, 48 La. Ann. 777, 19 So. 752; *Deville v. Hayes*, 23 La. Ann. 550; *Pumphrey v. Delahoussaye*, 9 Rob. 42; *Noble v. Nettles*, 3 Rob. 52; *Miller v. Morgan*, 6 Mart. N. S. 86. See *Morgan's Admr. v. Woorhies*, 3 Mart. (O. S.) 462. Mo.—*Ashby v. Dillon*, 19 Mo. 619. Okla.—*Osborne & Co. v. Hughey*, 14 Okla. 29, 76 Pac. 146. Tex.—*Texas-Mexican Ry. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200; *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690; *Atcheson v. Hutchison*, 51 Tex. 223; *Kendrick v. Rice*, 16 Tex. 254; *Bryan v. Bridge*, 6 Tex. 137; *Midkiff v. Bedell* (Tex. Civ. App.), 127 S. W. 271; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324; *Jackson v. Browning & Co.*, 1 Tex. Civ. Cas., §606.

[a] *Statute Is Directory.*—*Cavender v. Smith's Heirs*, 1 Iowa 306; *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690; *O. R. v. Texas-Mex. Ry. Co.*, 50

Tex. 684; *Midkiff v. Bedell* (Tex. Civ. App.), 127 S. W. 271. But its violation may subject the officer to an action for damages. See *infra*, II, B, 4, g, (VI), (A), (4).

[b] The lien of the execution does not deprive the defendant of the right of designation. *Cloud v. Smith*, 1 Tex. 611.

[c] A writ of execution so framed as to deprive the debtor of his right to point out property is unauthorized and void. *Midkiff v. Bedell* (Tex. Civ. App.), 127 S. W. 271.

[d] In Louisiana the debtor has not the right to designate property to be levied on when the creditor has a privilege or mortgage on his property. Code Pr., art. 648; *Lambeth v. Sentell*, 38 La. Ann. 691.

94. Ga.—*Benson & Coleman v. Dyer*, 69 Ga. 190. La.—*Miller v. Morgan*, 6 Mart. N. S. 86. Tex.—*Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

Effect of failure to respect defendant's designation, see *infra*, II, B, 4, g, (VI), (A), (4).

95. *Atcheson v. Hutchison*, 51 Tex. 223, 233; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[a] When given an opportunity it is defendant's duty to make a choice. *Barbee v. Heflin*, 1 White & W. Civ. Cas. (Tex.), §744.

Necessity for demand upon defendant to point out property for levy, see *supra*, II, B, 4, g, (IV), (A).

[b] If the defendant cannot be notified of the execution, the sheriff should proceed with the execution, and thereafter the defendant may designate the property precisely as he might have done before levy, provided the property selected by the defendant to be retained is such in quality and value as he might previously have selected. *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

property for that levied on, at any time before sale,<sup>96</sup> though in others the right of substitution is more limited.<sup>97</sup>

**Right Is Personal.**—It has been held that this right is personal to the defendant,<sup>98</sup> though in some states a purchaser from the debtor may require a levy on other property of his vendor.<sup>99</sup>

**Delivering Possession.**—A defendant desiring certain property to be levied on should deliver such possession to the officer as the nature of the case will admit of.<sup>1</sup>

**What Property May Be Pointed Out.**—The property pointed out for levy must of course be that of the judgment debtor.<sup>2</sup> The defend-

96. *Ala.*—Civ. Code, 1907, §4114. *Fla.*—Gen. St., 1906, §1620, the officer levying may release property upon receiving other property in his opinion of equivalent value. *Ind.*—*Davis v. Campbell*, 12 Ind. 192. *Kan.*—*Treptow v. Buse*, 10 Kan. 170. *La.*—*Pumphrey v. Delahoussaye*, 9 Rob. 42, until the property has been advertised for sale. *Tex.*—*Ross v. Lister*, 14 Tex. 469.

[a] A defendant whose realty has been levied on and who wishes his personal property to be levied on may turn it over to the sheriff at any time before sale. *Davis v. Campbell*, 12 Ind. 192; *Treptow v. Buse*, 10 Kan. 170.

97. See *Bingham v. Maxcy*, 15 Ill. 290 (before execution of delivery bond); *Shelton v. Westervelt*, 1 Duer (N. Y.) 109 (before return day).

98. *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

[a] **Designation by Sureties.**—Where the principal defendant refuses to point out property, the officer may make his levy without calling on the sureties, or he may adopt their designation of the property of their principal. *Martin v. Rice*, 16 Tex. 157.

99. **Designation by Purchaser From Debtor.**—If a purchaser of land from one against whom there is a judgment, desires to have other lands of his grantor first levied upon and sold to satisfy the judgment, it is his duty to give notice of his interest in the property brought by him, and to point out other property that the creditor may take in execution. *Dobbins v. Wilson*, 107 Ill. 17.

1. *Ross v. Lister*, 14 Tex. 469, 475. See *Smith v. Frederick*, 32 Tex. 256, the defendant must tell the officer where the property can be found.

[a] **The Tender of Other Property Must Be Unconditional.**—*Ross v. Lister*, 14 Tex. 469, 474.

[b] The possession given the officer must be such as places the property under the control of the officer so that it can be delivered to the purchaser. *Texas-Mexican Ry. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200.

[c] **Insufficient Designation.**—“The declaration of the debtor to the constable, ‘that he had horses in his lot here in town subject to execution sufficient and more to satisfy said execution, and to levy on them,’ is not a sufficient designation, under the statute to avoid a levy on land. *Anderson v. Oldham*, 82 Tex. 228, 233, 18 S. W. 557.

[d] **Designation of Realty.**—While it would seem that under a statute requiring that the debtor shall, in designating realty, “deliver to the officer, a description thereof by metes and bounds,” the description should be in writing, yet a verbal designation of certain lots by their blocks and numbers was held sufficient in *Beek & Co. v. Avindino*, 29 Tex. Civ. App. 500, 504, 68 S. W. 827.

[e] The officer is not bound to take any loose memorandum which the defendant may offer as evidence of his title to lands and thereupon expose the same for sale. The defendant should exhibit every reasonable evidence of title. *Beaird v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197.

[f] Where a levy has been made and the debtor designates some of the property already levied on, as property he desires to retain, he must, on notifying the officer, surrender or offer to surrender an amount of other property sufficient to satisfy the execution. *People v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

2. *Thompson v. Mitchell*, 73 Ga. 127.



ant may direct a levy of his real estate in preference to his personal estate,<sup>3</sup> but it has been held that he cannot do so when such a direction would prejudice the rights of others.<sup>4</sup> The property pointed out must not be so encumbered as to make it valueless for purposes of levy,<sup>5</sup> and must be in the county where the judgment is rendered or to which the execution is issued.<sup>6</sup>

(3.) *Waiver or Estoppel.*—This right to designate the property may be waived or the debtor may be estopped by his conduct to claim it.<sup>7</sup> If the defendant neglects or refuses to make a selection of property he is held to have waived his privilege.<sup>8</sup>

(4.) *Effect of Depriving Defendant of Right.*—The failure to give a defendant an opportunity to designate property to be levied on does not vitiate the sale.<sup>9</sup> The failure to levy on and sell the property pointed out by the defendant does not affect the title of the purchaser or invalidate the levy made,<sup>10</sup> but it will make the officer liable for any damage sustained,<sup>11</sup> and may be ground for enjoining the en-

3. *Cal.*—*Bartholomew v. Hook*, 23 Cal. 277; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475. *Ga.*—*Hollingsworth v. Dickey*, 24 Ga. 434; *Hopkins v. Burch*, 3 Ga. 222. *Ind.*—*Davis v. Campbell*, 12 Ind. 192. *N. J.*—*Bulat v. Londrigan*, 63 N. J. Eq. 22, 50 Atl. 909. *N. C.*—*Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592. *Tex.*—*Wilson v. Smith*, 50 Tex. 365, 370; *Willis v. Nichols*, 5 Tex. Civ. App. 154, 23 S. W. 1025.

*Contra*, *Morgan's Admr. v. Woorhies*, 3 Mart. O. S. (La.) 462.

[a] **Land held merely under bond for title** need not be accepted by the officer. *Thompson v. Mitchell*, 73 Ga. 127.

**Duty of officer to exhaust personal estate** before levying on realty, see *infra*, II, B, 4, g, (VII), (B).

4. *Bartholomew v. Hook*, 23 Cal. 277.

[a] **Homestead.**—A wife, who files a homestead on the real property after the rendition of a judgment against the husband, has such an interest in the homestead that the husband cannot direct a sale of the homestead property before exhausting his personal property, without her consent and contrary to her wishes. *Bartholomew v. Hook*, 23 Cal. 277.

5. *Todd v. Gordy*, 29 La. Ann. 498; *Pumphrey v. Delahoussaye*, 9 Rob. (La.) 42.

6. *Jackson v. Browning*, 1 Tex. App. Civ. Cas., §606.

7. *Cal.*—*Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Wellington v. Sedgwick*,

12 Cal. 469. *Ill.*—*Bingham v. Maxey*, 15 Ill. 290. *Tex.*—*Rosenthal & Desberger v. Mounts* (Tex. Civ. App.), 130 S. W. 192.

See also the cases cited in the preceding section.

8. *Cal.*—*Frink v. Roe*, 70 Cal. 296, 11 Pac. 820. *Ill.*—*Wright v. Deyoe*, 86 Ill. 490. *La.*—*Code Pr.*, art. 649; *Wheeling Pottery Co. v. Levi*, 48 La. Ann. 777, 19 So. 752; *Hefner v. Hesse & Vergez*, 29 La. Ann. 149; *Deville v. Hayes*, 23 La. Ann. 550; *Noble v. Nettles*, 3 Rob. 152. *Tex.*—*Martin v. Rice*, 16 Tex. 157; *Barbee v. Heflin*, 1 White & W. Civ. Cas., §744; *Jackson v. Browning & Co.*, 1 Tex. App. Civ. Cas., §606.

[a] **If the defendant fails to furnish a description of his property** subject to execution, he is considered to have waived his rights under the statute. *Bingham v. Maxey*, 15 Ill. 290.

9. *Crain v. Hogan* (Tex.), 16 S. W. 1019.

10. *Ga.*—*Hollinshed v. Woodard*, 124 Ga. 721, 52 S. E. 815; *Barfield v. Barfield*, 77 Ga. 83. *Ind.*—*Tillotson v. Doe ex dem. Gregory*, 5 Blackf. 590. *Ia.*—*Cavender v. Smith's Heirs*, 1 Iowa 306.

[a] **Setting Aside Sale.**—In *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690, there is an intimation that the debtor may have the sale set aside.

11. *Hollinshed v. Woodard*, 124 Ga. 721, 52 S. E. 815; *Barfield v. Barfield*, 77 Ga. 83; *Thompson v. Mitchell*, 73 Ga. 127; *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690.

enforcement of the writ,<sup>12</sup> or quashing the levy.<sup>13</sup>

(B.) BY CREDITOR. — The plaintiff is frequently allowed to point out property to be levied on where the defendant does not exercise his privilege.<sup>14</sup> But generally he is not required to do so,<sup>15</sup> although some cases hold that ordinarily a sheriff is not required to levy on real estate unless the same is pointed out by the judgment creditor.<sup>16</sup>

(VII.) Order in Which Property Shall Be Levied on. — (A.) GENERALLY. The writ frequently, if not generally, contains directions to the officer as to the order in which the debtor's property shall be levied upon,<sup>17</sup> in which event of course it is the officer's duty to follow the directions of the writ.<sup>18</sup>

Attached Property. — Statutes sometimes require the writ to direct a resort to attached property first,<sup>19</sup> and in some jurisdictions the

12. *Kingsland, Ferguson & Co. v. Harrell*, 1 White & W. Civ. Cas. (Tex.), §§736, 739. See *Thompson v. Mitchell*, 73 Ga. 127; *Hefner v. Hesse & Vergez*, 29 La. Ann. 149.

13. See *infra*, IV.

14. *U. S.*—*Harrington v. McDuel*, 3 Cranch C. C. 355, 11 Fed. Cas. No. 6,108; *United States v. Baker*, 1 Cranch C. C. 268, 24 Fed. Cas. No. 14,502. *Ark.*—*Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. *Ga.*—*Benson & Coleman v. Dyer*, 69 Ga. 190. See *Levy v. Shockley*, 29 Ga. 710. *Ill.*—*Colburn v. Barton*, 17 Ill. App. 391. *La.*—*Morgan's Admr. v. Woorhies*, 3 Mart. (O. S.) 462, when the debtor fails to designate property to be levied on, the creditor may. *N. C.*—*Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592. *Vt.*—*Pub. St.*, 1906, §2153. *Can.*—*Hutchings v. Ruttan*, 6 U. C. C. P. 452.

[a] Sufficient Designation. — Plaintiff's attorney need not accompany the sheriff to point out the property. It is sufficient to inform the sheriff where the property is. *Marshall & Co. v. Simpson*, 13 La. Ann. 437.

[b] The plaintiff or his agent has a right to enter a defendant's house with a constable to show him the defendant's property upon which to levy a fieri facias. *United States v. Baker*, 1 Cranch C. C. 268, 24 Fed. Cas. No. 14,502; *Harrington v. McDuel*, 3 Cranch C. C. 355, 11 Fed. Cas. No. 6,108.

[c] The authority of the agent need not be in writing. *United States v. Baker*, 1 Cranch C. C. 268, 24 Fed. Cas. No. 14,502.

[d] In Texas.—The plaintiff has no right to insist upon making a designation, in any case where prop-

erty is to be sold without appraisement. The sheriff may adopt the plaintiff's designation as his own, however, where the defendant refuses to designate. Where the property is to be sold under appraisement on the third levy where the defendant has not availed himself of his privilege, the plaintiff has the right of designation under statute. *Bryan v. Bridge*, 6 Tex. 137; *Scott v. Allen*, 1 Tex. 508, 518.

[e] The designation by the creditor is merely to aid the officer in identifying the property of the defendant and it imposes no duty on the officer to levy on the particular property pointed out in preference to other property. *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238; *Kendrick v. Rice*, 16 Tex. 254; *Bryan v. Bridge*, 6 Tex. 137.

[f] It serves as indemnity to the sheriff. *Benson & Coleman v. Dyer*, 69 Ga. 190.

As to right to give sheriff instructions, see *supra*, II, B, 4, c.

15. *Ga.*—*Benson & Coleman v. Dyer*, 69 Ga. 190. *Mich.*—*Albany City Bank v. Dorr*, Walk. 317. *Tex.*—*Kendrick v. Rice*, 16 Tex. 254; *Rosenthal & Desberger v. Mounts* (Tex. Civ. App.), 130 S. W. 192. *Can.*—*Hutchings v. Ruttan*, 6 U. C. C. P. 452.

[a] But if the sheriff requests the plaintiff to point out property on which to levy and he refuses, the sheriff is exonerated. *Batte v. Chandler*, 53 Tex. 613.

16. *Armstrong v. Grant*, 7 Kan. 285; *Bank of Newbury v. Baldwin*, 31 Vt. 311.

17. See *supra*, II, B, 2, f, (II).

18. See *supra*, II, B, 4, e, (II).

19. See *supra*, II, B, 2, f, (II).

judgment itself may contain provisions as to the satisfaction out of attached property.<sup>20</sup> It has been held that an officer, receiving an execution without any special directions, should levy it upon such property as has been attached in the case.<sup>21</sup>

(B.) EXHAUSTING PERSONALTY BEFORE LEVYING ON REALTY. — (1.) *In General.* In some states the sheriff may in his discretion levy upon real or personal property,<sup>22</sup> but generally the order in which property shall be levied on is pointed out by statute, and in many states it is required that in the absence of any designation by the defendant, the sheriff, executing a general execution shall exhaust the personal property before levying upon the real property of the defendant.<sup>23</sup> If the personal property of the defendant proves to be insufficient to satisfy

20. See 3 STANDARD PROC. 731, et seq.

21. *Richmond v. Davis*, Quincy (Mass.) 279.

22. *Ala.*—*Powell v. Governor*, 9 Ala. 36. *Md.*—*Hanson v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322. *Mass.*—*Hoar v. Tilden*, 178 Mass. 157, 59 N. E. 641.

[a] But after death of the debtor, (1) the lands are only secondarily liable. *Hanson v. Barnes' Lessee*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322; *Stockard's Heirs v. Pinkard*, 6 Humph. (Tenn.) 119. (2) This must be taken with the qualification that prior to the death, the lands had not become liable to be affected by the execution. *Hanson v. Barnes' Lessee*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322.

[b] In Georgia, (1) "there is no law which requires that an execution from the superior court shall be first levied upon personal property before a levy upon land would be lawful." *Landrum v. Broadwell*, 110 Ga. 538, 35 S. E. 638; *Smith v. Jones*, 40 Ga. 39. (2) But statute forbids a levy by a constable on land if the debtor has personal property sufficient to satisfy the debt. *Eaves v. Garner*, 111 Ga. 273, 36 S. E. 688; *Robinson v. Burge*, 71 Ga. 526; *Hollingsworth v. Dickey*, 24 Ga. 434; *Hopkins v. Burch*, 3 Ga. 222; *Daniel v. Justices of the Inferior Court*, Dudley 2.

23. *Ariz.*—*Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. *Cal.*—*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Bartholomew v. Hook*, 27 Cal. 277. *Conn.*—*Coe v. Wickham*, 33 Conn. 389; *Booth v. Booth*, 7 Conn. 350. But see *Spencer v. Champion*, 13 Conn. 11, 21 Ga.—Justice's execution. See reading note in preceding note. *Ill.*—*Ryder v.*

*Buckmaster*, 4 Ill. 196. *Ind.*—*Nelson v. Bronnenburg*, 81 Ind. 193; *Drake v. Murphy*, 42 Ind. 82; *Davis v. Campbell*, 12 Ind. 192. *Ia.*—*Cavender v. Heirs of Smith*, 1 Iowa 306. *Kan.*—*Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623; *Greeno v. Barnard*, 18 Kan. 518; *Trep-tow v. Buse*, 10 Kan. 170; *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451. *Ky.*—*Faris v. Banton*, 6 J. J. Marsh. 235; *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, 13 Am. Dec. 161; *Hayden v. Dunlap*, 3 Bibb 216. *La.*—*Thompson v. Chretien*, 12 Mart. (O. S.) 250; *Morgan's Admr. v. Woorhies*, 3 Mart. (O. S.) 462. *Minn.*—*Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016; *Knox v. Randall*, 24 Minn. 479, 496. *Miss.*—See *Brian v. Davidson*, 25 Miss. 213. *Neb.*—*Runge v. Brown*, 29 Neb. 116, 45 N. W. 271. *N. J.*—*Bulat v. Londrigan*, 63 N. J. Eq. 22, 50 Atl. 909. *N. C.*—*Stancill v. Branch*, 61 N. C. 217; *Sloan v. Stanly*, 33 N. C. 627; *Huggins v. Ketchum*, 20 N. C. 414, 550; *Governor v. Carter*, 10 N. C. 328, 14 Am. Dec. 588. *Ohio.*—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630. *Pa.*—*Maybury v. Jones*, 4 Yeates 21. *R. I.*—*Aldrich v. Wilcox*, 10 R. I. 405; *Kenyon v. Clarke*, 2 R. I. 67. *S. C.*—*Lawrence v. Grambling*, 13 S. C. 120. *Tenn.*—*Hassell v. Southern Bank*, 2 Head 381; *Dice v. Penn*, 2 Swan 561; *Crowder v. Sims*, 7 Humph. 257; *Stockard's Heirs v. Pinkard*, 6 Humph. 119; *Frogg v. Haggard & Dillon's Lessee*, 2 Yerg. 577. *Tex.*—*Pearson v. Flanagan*, 52 Tex. 266, 280 (first on movable property, then on uncultivated lands and lastly on cultivated lands); *Martin v. Rice*, 16 Tex. 157; *Ross v. Lister*, 14 Tex. 469; *Scott v. Allen*, 1 Tex. 508; *Jackson v. Browning & Co.*, 1 Tex. App. Civ. Cas., §606.



the execution, the officer may levy upon his real property,<sup>24</sup> even before advertisement and sale of the personalty levied on,<sup>25</sup> but no more real property should be taken than with the personal property will be sufficient to satisfy the execution.<sup>26</sup>

Where there are several defendants, it is not necessary that the personal estate of all of them be exhausted before the realty of any one be levied on and sold. When any one of them has no personal estate subject to levy, the sheriff may levy upon his realty.<sup>27</sup>

Where Personalty Is Encumbered. — The officer need not first levy upon the personal property of the debtor, if it be so encumbered that it will produce nothing upon the execution.<sup>28</sup>

The subsequent acquisition of property required to be first levied on will not annul a levy on property secondarily liable,<sup>29</sup> or divest the title acquired by the sale of it.<sup>30</sup>

(2.) *Demand and Search for Personalty.* — In some states, it is the duty of the officer to make a demand upon the defendant for personal property upon which to levy,<sup>31</sup> or make a search for such property.<sup>32</sup> It

[a] **Absence of Debtor and Direction by Creditor.**—The fact that the defendant is absent from the state and the creditor directs a levy upon the land does not authorize a levy upon the land, when there is sufficient personal estate available. *Coe v. Wickham*, 33 Conn. 389.

[b] **In Illinois**, a sheriff cannot levy upon the debtor's personal property without giving him a right to turn out his realty. It is the duty of the sheriff to levy first upon the real property. *Pitts v. Magie*, 24 Ill. 610; *Tuttle v. Wilson*, 24 Ill. 553; *Ryder v. Buckmaster*, 4 Ill. 196; *Metz v. McAvoy Brew. Co.*, 98 Ill. App. 584.

[c] **In Louisiana**.—The claim that the sheriff cannot seize immovable property before movable property can be entertained only where the creditor has no privilege or mortgage on the debtor's property. *Lambeth v. Sentell*, 38 La. Ann. 691.

[d] **In Vermont**, without special directions from the creditor, it is the duty of the officer to levy on the debtor's personal property and it is not his duty to levy on real estate except when directed to do so by the creditor. *Bank of Newbury v. Baldwin*, 31 Vt. 311.

**Right of defendant to designate property to be levied upon**, see *supra*, II, B, 4, g, (VI).

24. **Cal.**—*Bartholomew v. Hook*, 23 Cal. 277. **La.**—*Morgan's Admr. v. Woorhies*, 3 Mart. (O. S.) 462. **Neb.**

*Runge v. Brown*, 29 Neb. 116, 45 N. W. 271. **N. C.**—*Sloan v. Stanly*, 33 N. C. 627.

25. *Runge v. Brown*, 29 Neb. 116, 45 N. W. 271.

26. *Runge v. Brown*, 29 Neb. 116, 45 N. W. 271.

As to amount of property to be levied on, see *infra*, II, B, 4, h.

27. **Ind.**—*Drake v. Murphy*, 42 Ind. 82. **Ky.**—*Faris v. Banton*, 6 J. J. Marsh. 235. **N. Y.**—*Flanders v. Batten*, 50 Hun 542, 3 N. Y. Supp. 728. **Tenn.**—*Crowder v. Sims*, 7 Humph. 257. But see *Hassell v. Southern Bank*, 2 Head 381.

28. *Nelson v. Bronnenburg*, 81 Ind. 193; *Detrick v. State Bank*, 6 Ind. 439; *Dice v. Penn*, 2 Swan (Tenn.) 561.

29. *Ryder v. Buckmaster*, 4 Ill. 196.

[a] **Nor will it justify the officer in releasing the property taken in execution.** *Ryder v. Buckmaster*, 4 Ill. 196.

30. *Ryder v. Buckmaster*, 4 Ill. 196.

31. *Coe v. Wickham*, 33 Conn. 389; *Booth v. Booth*, 7 Conn. 350, 365; *Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623.

[a] **Where reasonable diligence to discover goods and chattels has been exercised**, a notification to the defendant that the officer holds an execution against him is not necessary. *Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623.

32. **Conn.**—*Coe v. Wickham*, 33 Conn. 389; *Booth v. Booth*, 7 Conn.

is sufficient that he exercise reasonable and ordinary diligence to discover the debtor's personal property.<sup>33</sup> In some states it is the duty of the judgment debtor, where the sheriff does not levy on his personalty first, to call the attention of the sheriff to the fact that he has personalty,<sup>34</sup> and if it does not appear that the officer knows of the existence of personalty, he may levy upon realty.<sup>35</sup>

**Presumption.** — In the absence of evidence to the contrary it will be presumed that the officer did his duty in this regard.<sup>36</sup>

(3.) *Who May Take Advantage of the Statute.* — As the statute is for the benefit of the debtor, it has been held that no other person can take advantage of it or sustain objection to a title derived under a levy contrary thereto.<sup>37</sup>

350, 365. **Ga.**—*Eaves v. Garner*, 111 Ga. 273, 36 S. E. 688. **Kan.**—*Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623.

[a] **An entry** upon the execution, "I know of no personal property in the possession of the defendant, on which to levy this fieri facias," does not show a compliance with the statute. *Eaves v. Garner*, 111 Ga. 273, 36 S. E. 688.

[b] **Levy at Hour of Receipt of Writ.**—A return which shows that the officer received the writ at 4 p. m. on a certain day and that he levied on a lot at 4 p. m. of the same day and states that the officer made a diligent search for goods does not show that he did not have ample time in which to make a search. *Treptow v. Buse*, 10 Kan. 170.

[c] **A complaint to set aside a sheriff's sale** on the ground the sheriff did not exhaust the personalty before levying upon the realty of the debtor is insufficient without an averment that the sheriff had knowledge of the personalty or by reasonable diligence might have discovered and that the same might have been taken under execution had he discovered it. *Nelson v. Bronnenburg*, 81 Ind. 193.

33. *Nelson v. Bronnenburg*, 81 Ind. 193; *First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

[a] **Previous Knowledge of Officer.** If the officer at the issuance of the execution knows that the defendant has no personal property subject to levy, a search is wholly useless and need not be made. *Collins v. Ritchie*, 31 Kan. 371, 2 Pac. 623; *Treptow v. Buse*, 10 Kan. 170.

34. **Ariz.**—*Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. **N. C.**—*Sloan v.*

*Stanly*, 33 N. C. 627. **S. D.**—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

[a] **If the officer refuses to levy on the personalty first** on his attention being called to his neglect of duty by the debtor, the debtor may compel him to do so by proper processes. *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553.

35. **Ind.**—*Nelson v. Bronnenburg*, 81 Ind. 193. **N. C.**—*Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592; *Sloan v. Stanly*, 33 N. C. 627. **S. D.**—*See First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852. **Tenn.**—*Dice v. Penn*, 2 Swan 561.

36. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Knox v. Randall*, 24 Minn. 479, 496.

[a] "When a levy is made upon land, the presumption is there were no goods on which to levy." *The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 251, 45 N. E. 630.

37. **La.**—*Thompson v. Chretien*, 12 Mart. (O. S.) 250. **N. C.**—*Governor v. Carter*, 10 N. C. 328, 14 Am. Dec. 588, plaintiff in execution cannot complain. **Ohio.**—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 251, 45 N. E. 630. **Tenn.**—*Dice v. Penn*, 2 Swan 561.

[a] **But the wife who has filed a homestead** on the realty has such an interest as entitles her to object to a designation by the defendant husband of his realty in preference to his personalty. *Bartholomew v. Hook*, 23 Cal. 277.

[b] **A vendee** (1) may obtain an order from a court of equity requiring the judgment creditor to first exhaust property held by the debtor. *Sansberry v. Lord*, 82 Ind. 521. (2) But if the vendee stands by and allows his

(4.) *Objections.* — An objection that the sheriff has seized immovable property before having exhausted the movables should be made in apt time.<sup>38</sup>

(5.) *Waiver.* — This requirement is for the benefit of the debtor<sup>39</sup> and he may waive,<sup>40</sup> or forfeit<sup>41</sup> it. This he may do by neglecting<sup>42</sup> or refusing<sup>43</sup> to offer personal property to be levied on on demand, by asking that the levy be made on his realty,<sup>44</sup> by standing by without objection when his land is sold,<sup>45</sup> or by making a fraudulent conveyance of all of his property.<sup>46</sup>

(6.) *Effect of Failure To Comply With Statute.* — In some jurisdictions, it is a fatal objection to a levy that it is made upon land when there is sufficient personal estate available,<sup>47</sup> and the purchaser is held to acquire no title by virtue of the execution sale.<sup>48</sup> In other jurisdictions, the statute is regarded as being directory merely,<sup>49</sup> and a failure of the officer to comply with it will not invalidate the levy,<sup>50</sup> render it subject to collateral attack,<sup>51</sup> authorize setting aside the writ,<sup>52</sup> or vitiate the sale,<sup>53</sup> nor will it affect the title of an innocent purchas-

property to be sold without asking such relief, the sale is valid. *Sansberry v. Lord*, 82 Ind. 521.

38. See cases in following section.

[a] *The objection comes too late* when made for the first time after the property has been advertised for sale. *Schwann v. Sanders*, 121 La. 461, 46 So. 573.

39. *Conn.*—*Coe v. Wickham*, 33 Conn. 389; *Graves v. Merwin*, 19 Conn. 96. *N. C.*—*Sloan v. Stanly*, 33 N. C. 627. *Ohio.*—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630. *Tenn.*—*Dice v. Penn*, 2 Swan 561.

40. *Conn.*—*Coe v. Wickham*, 33 Conn. 389; *Graves v. Merwin*, 19 Conn. 96. *N. C.*—*Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592. *Ohio.*—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630.

*Compare, Morgan's Admr. v. Woorhies*, 3 Mart. O. S. (La.) 462.

41. *Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592.

42. *Ariz.*—*Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. *Conn.*—*Graves v. Merwin*, 19 Conn. 96; *Booth v. Booth*, 7 Conn. 350, 365. *N. C.*—*Sloan v. Stanly*, 33 N. C. 627.

43. *Graves v. Merwin*, 19 Conn. 96; *Booth v. Booth*, 7 Conn. 350, 365; *West v. Cooper*, 19 Ind. 1.

44. *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475.

As to right of debtor to designate property to be levied upon, see *supra*, II, B, 4, g, (VI).

45. *Hollingsworth v. Dickey*, 24 Ga. 434.

46. *Stancill v. Branch*, 61 N. C. 306, 93 Am. Dec. 592.

47. *Coe v. Wickham*, 33 Conn. 389; *Hopkins v. Burch*, 3 Ga. 222.

48. *Robinson v. Burge*, 71 Ga. 526; *Hopkins v. Burch*, 3 Ga. 222. See *Henderson v. Hill*, 59 Ga. 595.

49. *Cal.*—*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441. *Ia.*—*Cavender v. Heirs of Smith*, 1 Iowa 306. *Ky.* *Faris v. Banton*, 6 J. J. Marsh. 235; *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, 13 Am. Dec. 161; *Hayden v. Dunlap*, 3 Bibb 216. *Ohio.* *The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630. *Tenn.* *Dice v. Penn*, 2 Swan 561. But see *Stockard's Heirs v. Pinkard*, 6 Humph. 119. *Tex.*—*Odle v. Frost, Barry & Lee*, 59 Tex. 684; *Pearson v. Flanagan*, 52 Tex. 266, 280.

50. *The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630.

As to vacation of levy because levy was first made on realty, see *infra*, IV, A.

51. *The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630.

52. *Clark v. Fell*, 139 Pa. 469, 22 Atl. 649.

53. *Ariz.*—*Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. *Ia.*—*Cavender v. Heirs of Smith*, 1 Iowa 306. *Ky.* *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, 13 Am. Dec. 161; *Hayden v. Dunlap*, 3 Bibb 216. *La.*—*Morgan's Admr. v. Woorhies*, 3 Mart. (O.



er,<sup>54</sup> or of the creditor if he purchases the realty and was not instrumental in causing the sheriff to violate the law.<sup>55</sup> But it has been held that a sale made in violation of this requirement should not be confirmed,<sup>56</sup> and that if prejudicial, particularly if fraudulent or unconscionable, the sale may be set aside or vacated,<sup>57</sup> or relief may be had in equity.<sup>58</sup> The debtor has a remedy against the sheriff, however.<sup>59</sup>

(C.) EXHAUSTING PROPERTY OF PRINCIPAL BEFORE LEVYING ON PROPERTY OF SURETY. — The necessity of exhausting the property of a principal before resorting to property of a surety will be treated elsewhere in this work.<sup>60</sup>

(VIII.) In Whose Name Made. — It has been held that the officer, in following the directions of the writ, must make the levy in the name of the party in whose name the writ issued.<sup>61</sup>

(IX.) Indemnity to Officer. — The right of a sheriff to require, of the plaintiff in execution, an indemnity bond will be treated in a subsequent title.<sup>62</sup>

(X.) Levy Upon Personal Property. — (A.) IN GENERAL. — To constitute a good levy, in all ordinary cases, the officer should see the goods and have them in his power. In addition to this, he should do some act demonstrating his intention from that time forward, to appropriate them in obedience to the commands of the writ.<sup>63</sup> The levy must be

S.) 462, 479. **Minn.**—*Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016, the sale is not absolutely void. **N. C.**—See *Simpson v. Hiatt*, 35 N. C. 470. **Tex.**—*Pearson v. Flanagan*, 52 Tex. 266, 280.

54. **Ariz.**—*Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. **Cal.**—*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441. **Ky.**—*Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, 13 Am. Dec. 161. **Ohio.**—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 45 N. E. 630. **S. C.**—*Lawrence v. Grambling*, 13 S. C. 120. **Tenn.**—*Dice v. Penn*, 2 Swan 561.

55. *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; *Lanier v. Stone*, 8 N. C. 329.

[a] It is not sufficient to invalidate the creditor's title to realty purchased at the sheriff's sale that he knew there was personal property sufficient to satisfy the execution. This is not a fraud in law. *Lanier v. Stone*, 8 N. C. 329.

56. *First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

57. *Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016. See *Nelson v. Bronnenburg*, 81 Ind. 193.

[a] Offer of Personalty After Levy

and Before Sale.—A sheriff's sale will be set aside where the sheriff sold the debtor's realty in disregard of the debtor's tender of personalty during the pendency of the levy. *Davis v. Campbell*, 12 Ind. 192.

58. *Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016.

59. **Ky.**—*Hayden v. Dunlap*, 3 Bibb 216. **La.**—*Morgan's Admr. v. Woorhies*, 3 Mart. (O. S.) 462. **N. C.**—*Simpson v. Hiatt*, 35 N. C. 470; *Coy v. Beard*, 9 N. C. 377, 6 Am. Dec. 773. **Tenn.**—*Hassell v. Southern Bank*, 2 Head 381; *Dice v. Penn*, 2 Swan 561. **Tex.**—*Pearson v. Flanagan*, 52 Tex. 266.

60. See the title "Principal and Surety."

61. *Mysroll v. Violette*, 55 Me. 108.

[a] Under a writ issued in the name of S. and B. for the benefit of H., a levy upon realty in the name of H. is invalid. *Mysroll v. Violette*, 55 Me. 108.

62. See the title "Sheriffs, Constables and Marshals."

As to indemnity generally, see 12 STANDARD PROC. 21.

63. *Lloyd v. Wyckoff*, 11 N. J. L. 218, 236.

[a] "It is impossible to describe

so made that it identifies or gives the means of identifying the property levied on,<sup>64</sup> and it must be distinct and explicit.<sup>65</sup>

A mere declaration of the sheriff of an intent to make a levy,<sup>66</sup> or a declaration or proclamation of the making of a levy,<sup>67</sup> is insufficient to constitute a levy.

what these acts, under all circumstances, should be. Some, however, may be mentioned. As, actual seizure of the goods; or, seizure of part, in the name of the whole then present; or a public declaration plainly designating the property levied on; or, the taking of an inventory." *Lloyd v. Wyckoff*, 11 N. J. L. 218, 236.

[b] **Statement of Rule.**—To constitute a valid levy upon personal property generally, the property must be within the power and control of the officer when it is made, and he must take it into his possession in a reasonable time thereafter, unless a delivery bond is tendered, in such an open, public, and unequivocal manner as to apprise everybody that it is taken in execution. *Windmiller v. Chapman*, 139 Ill. 163, 28 N. E. 979; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Minor v. Herriford*, 25 Ill. 304, 344.

[c] "It is said in *Beekman v. Lansing*, 3 Wendell 446, as the result of the cases there referred to, that in order to constitute a levy the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them (if they are such of which possession can be taken); the goods should be brought within his view and subject to his control; and that it is *proper* also, if not necessary, that an inventory should be taken. The officer should assert his title to the goods by virtue of the execution, and his acts, in the assertion of his right and the divesting of the possession of the defendant should be of such a character as would subject him to an action as a trespasser, but for the protection of the execution they should be public, open and unequivocal; and nothing should be done by him to cast concealment over the transaction. *Haggerty v. Wilber*, 16 Johns. 288. In England the rule is still more strict. The officer leaves one of his assistants in possession of the goods or causes an inventory to be made and removes them. 1 Archb. Pr. 293; 1 Maule & Sel. 711; 5 Taunt.

198." *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 124.

[d] "I would define a levy of personalty good as against a subsequent purchaser or mortgagee, to be either an actual and continued manual seizure of the property by the officer, when such seizure is practicable, or if the property is within his view and power of control, the making by him such distinct, open and unequivocal assertion of dominion over it as the nature and situation of the property and the surrounding circumstances may admit, or as the judgment debtor may recognize and acquiesce in, and constituting such an interference with the possession of the property, either actual or constructive, that trespass would lie against him but for the protection afforded by his writ." *Minor v. Smith*, 13 Ohio St. 79.

[e] **Serving a notice of levy** upon the defendant does not of itself constitute a levy, as such notice can be properly given only after a valid levy has been made. *Anby v. Rathbun*, 11 S. D. 474, 78 N. W. 952.

64. *Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262.

65. Ill.—*Douglas v. Whiting*, 28 Ill. 362. Ky.—*Johnson v. Rowe*, 10 Ky. Opin. 682. See *Hill v. Harris*, 10 B. Mon. 120, 50 Am. Dec. 542. N. J. *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

[a] **By Seizure.**—A levy of an execution upon personal property is made by the officer having the writ seizing the property and taking it into his possession. *People v. Finch*, 19 Colo. App. 512, 521, 76 Pac. 1120.

66. *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765; *Dean v. State*, 9 Ga. App. 303, 71 S. E. 597; *Brian v. Strait*, *Dudley* 19.

[a] **Merely announcing** that he is there with a writ for the purpose of making a levy and attempting thereafter to obtain the defendant's consent is insufficient to constitute a levy. *Hobbs v. Williams*, 175 Mo. App. 409, 162 S. W. 334.

67. Ky.—*Demint v. Thompson*, 80

**Pen and Ink Levy.** — A mere pen and ink or paper levy upon personalty, that is, by making a mere indorsement on the writ of a levy on goods not in the officer's control, is not sufficient.<sup>68</sup> But if an officer, who has made a mere paper levy, perfects his levy afterwards by an actual seizure of the property, the levy is valid.<sup>69</sup>

(B.) **Test.** — An essential criterion of a valid levy upon personal property is that the officer levying the writ must do some act in relation to the personal property to be levied upon in the way of taking possession or asserting dominion over it, which, in the absence of the writ in his hands, would make him a trespasser.<sup>70</sup>

Ky. 255. **N. Y.**—Haggerty & Nobles *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321. **S. C.**—Brian *v.* Strait, Dudley 19. **Tenn.**—Bradley & Dortch *v.* Kesse, 5 Coldw. 223, 94 Am. Dec. 246. **Tex.** Converse & Co. *v.* McKee, 14 Tex. 20, 30. **Can.**—Dickinson *v.* Robertson, 11 Brit. Col. 155, where the officer gave notice that goods twenty miles away are under seizure.

68. **U. S.**—Steers *v.* Daniel, 2 Flip. 310, 4 Fed. 587. **Ark.**—Kennedy & Co. *v.* Clayton, 29 Ark. 270. **Ill.**—Chittenden *v.* Rogers, 42 Ill. 100; Havelly *v.* Lowry, 30 Ill. 446; Larsen *v.* Ditto, 90 Ill. App. 384; Persels *v.* McConnell, 16 Ill. App. 526. **Ind.**—Dawson *v.* Sparks, 77 Ind. 88. **Ia.**—Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653; Techmeyer *v.* Waltz, 49 Iowa 645. **Kan.**—National Bank *v.* Duff, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047; Crisfield *v.* Neal, 36 Kan. 278, 13 Pac. 272. **Ky.** Demint *v.* Thompson, 80 Ky. 255. **La.** Cronan *v.* Cochran, 27 La. Ann. 120. **Me.**—Penney *v.* Earle, 87 Me. 167, 32 Atl. 879. **Md.**—Horsey *v.* Knowles, 74 Md. 602, 22 Atl. 1104. **Mass.**—See Wright *v.* Morley, 150 Mass. 513, 23 N. E. 232, a levy cannot be made by minuting on the execution the time of delivery of execution to officer. **Ohio.** Murphy & Bro. *v.* Swadener, 33 Ohio St. 85. **Pa.**—Schuylkill County's Appeal, 30 Pa. 358; Glazier *v.* Sawyer, 11 Pa. Co. Ct. 34; Farrel *v.* Copeland, 18 W. N. C. 94. **Tenn.**—Evans *v.* Higdon, 1 Baxt. 245.

[a] **But where the property is in sight,** (1) making a note of levy on the back of an execution in the presence of the defendant is a sufficient levy. Moss *v.* Moore, 3 Hill (S. C.) 276; Bradley & Dortch *v.* Kesse, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246. And see Bond *v.* Willett, 31 N. Y. 102; Van Wyck *v.* Pine, 2 Hill (N. Y.)

666; Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287; Lowry *v.* Coulter, 9 Pa. 349; Samuel *v.* Knight & Co., 9 Pa. Super. 352. (2) But the making of a memorandum on the execution, in the view of the property, without the knowledge of any person other than the sheriff, is not a valid levy, where the property is left in its place. Minor *v.* Smith, 13 Ohio St. 79. As to necessity for view see *infra*, II, B, 4, g, (X), (C), (1).

[b] **"When the execution defendant agrees with the officer to surrender certain property to satisfy an execution in the officer's hands, and the levy is at once indorsed on the writ, there seems to be no reason for holding that such a levy is invalid."** Carlisle *v.* Wathen, 78 Ky. 365.

69. Dawson *v.* Sparks, 77 Ind. 88.

70. **Ala.**—Goode & Ulrick *v.* Longmire, 35 Ala. 668, 76 Am. Dec. 309. **Ga.**—Dean *v.* State, 9 Ga. App. 303, 71 S. E. 597. **Ill.**—Windmiller *v.* Chapman, 139 Ill. 163, 28 N. E. 979; Logsdon *v.* Spivey, 54 Ill. 104; Chittenden *v.* Rogers, 42 Ill. 100; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Havelly *v.* Lowry, 30 Ill. 446; Minor *v.* Herriford, 25 Ill. 344; Larsen *v.* Ditto, 90 Ill. App. 384. **Ind.**—State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257. **Ia.**—Peppers *v.* Harris, 145 Iowa 635, 124 N. W. 625; Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497; Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653. **Ky.**—Herman Goepper & Co. *v.* Phoenix Brew. Co., 115 Ky. 708, 74 S. W. 726; McBurnie *v.* Overstreet, 8 B. Mon. 300. **Mo.**—Douglas *v.* Orr, 58 Mo. 573; Hobbs *v.* Williams, 175 Mo. App. 409, 162 S. W. 334; Shanklin *v.* Francis, 67 Mo. App. 457. **Neb.**—Battle Creek Valley Bank *v.* First Nat. Bank, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124; Pitkins *v.* Burham, 62 Neb. 385, 87 N. W. 160,



(C.) GENERAL REQUIREMENTS.—(1.) *Officer Must See the Property.*

It is generally required that the personality to be levied upon be within the view of the officer levying the execution,<sup>71</sup> especially as against everybody except the execution creditor,<sup>72</sup> but the bare sight of the property without more is not sufficient to constitute a levy.<sup>73</sup> There may be circumstances, however, under which a levy may be valid even though the sheriff did not have the property within his power or

89 Am. St. Rep. 763, 55 L. R. A. 380; Grand Island Banking Co. v. Costello, 45 Neb. 119, 63 N. W. 376; Johnson v. Walker, 23 Neb. 736, 37 N. W. 639. **N. J.**—Nelson v. Van Gazelle Vale Mfg. Co., 45 N. J. Eq. 594, 17 Atl. 943. **N. Y.**—Roth v. Wells, 29 N. Y. 471; Barker v. Binniger, 14 N. Y. 270; Green v. Burke, 23 Wend. 490; Westervelt v. Pinckney, 14 Wend. 123, 28 Am. Dec. 516; Beekman v. Lansing, 3 Wend. 446, 20 Am. Dec. 707; Powers v. Elias, 21 Jones & S. 480, 1 N. Y. St. 248. **Ohio.**—Murphy & Bro. v. Swadener, 33 Ohio St. 85; Minor v. Smith, 13 Ohio St. 79. **Pa.**—Dixon v. White Sewing Mach. Co., 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659; Welsh v. Bell, 32 Pa. 12; Samuel v. Knight & Co., 9 Pa. Super. 352. **S. D.**—Auby v. Rathbun, 11 S. D. 474, 78 N. W. 952; State v. Cassidy, 4 S. D. 58, 54 N. W. 928. **Tenn.**—Bradley & Dortch v. Kesee, 5 Coldw. 223, 94 Am. Dec. 246. **Tex.**—Freiberg v. Johnson, 71 Tex. 558, 9 S. W. 455; Portis v. Parker, 8 Tex. 23; Bryan v. Bridge, 6 Tex. 137, 44; Burch v. Mounts (Tex. Civ. App.), 185 S. W. 889. **Wis.**—Gallagher v. Bishop, 15 Wis. 276.

71. **Ala.**—Goode & Ulrick v. Longmire, 35 Ala. 668, 76 Am. Dec. 309; Easley v. Walker, 10 Ala. 671; Cawthorn v. McCraw, 9 Ala. 519. **Cal.**—Herron v. Hughes, 25 Cal. 555. **Ga.**—Corniff v. Cook, 95 Ga. 61, 66, 22 S. E. 47; Russell v. State, 13 Ga. App. 561, 79 S. E. 495. **Ill.**—Gaines v. Becker, 7 Ill. App. 315. **Ind.**—Hadley v. Hadley, 82 Ind. 95. **Md.**—Horsey v. Knowles, 74 Md. 602, 22 Atl. 1104. **Miss.**—Minter v. Swain, 52 Miss. 174. **Mo.**—Douglas v. Orr, 58 Mo. 573; Shanklin v. Francis, 67 Mo. App. 457. **Neb.**—Boslow v. Shenberger, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. **N. J.**—Caldwell v. Fifield, 24 N. J. L. 150; Lloyd v. Wyekoff, 11 N. J. L. 218. **N. Y.**—Ray v. Harecourt, 19 Wend. 495; Westervelt v. Pinckney, 14 Wend. 123,

28 Am. Dec. 516; Beekman v. Lansing, 3 Wend. 446, 20 Am. Dec. 707; Haggerty & Nobles v. Wilber, 16 Johns. 287, 8 Am. Dec. 321; Camp v. Chamberlin, 5 Denio 198. **N. C.**—Perry v. Hardison, 99 N. C. 21, 5 S. E. 230; Gilkey v. Dickerson, 10 N. C. 293. **Ohio.**—Murphy & Bro. v. Swadener, 33 Ohio St. 85. **Pa.**—Titusville Novelty Iron Wks.' Appeal, 77 Pa. 103; Carey v. Bright, 58 Pa. 70; Linton v. Com., 46 Pa. 294; Duncan's Appeal, 37 Pa. 500; Lowry v. Coulter, 9 Pa. 349; Wood v. Vanarsdale, 3 Rawle 401; Hartman v. Heffelfinger, 47 Pa. Super. 1. **S. C.**—Collins v. Montgomery, 2 Nott & McC. 392; Brian v. Strait, Dudley 19. **S. D.**—State v. Cassidy, 4 S. D. 58, 54 N. W. 928. **Tenn.**—Nighbert v. Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Bradley v. Kesee & Dortch, 5 Coldw. 223, 94 Am. Dec. 246; Etheridge v. Edwards, 1 Swan 426. **Tex.**—Brown v. Lane, 19 Tex. 203; Portis v. Parker, 8 Tex. 23; Bryan v. Bridge, 6 Tex. 137; Burch v. Mounts (Tex. Civ. App.), 185 S. W. 889. **Vt.**—Keniston v. Stevens, 66 Vt. 351, 29 Atl. 312. **Wis.**—Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 330.

[a] An attempted levy upon saw logs some of which were in ponds covered with ice and others at various places in a river, some in view and others not, was held invalid in Brown v. Pratt, 4 Wis. 513.

[b] If levy is made by endorsement on the writ the property should be within the view of the officer. Bond v. Willett, 31 N. Y. 102; Van Wyck v. Pine, 2 Hill (N. Y.) 666; Haggerty v. Wilber, 16 Johns. (N. Y.) 287; Lowry v. Coulter, 9 Pa. 349; Samuel v. Knight Co., 9 Pa. Super. 352. See *supra*, II, B, 4, g, (X), (A).

72. McGirr v. Hunter, 13 Ill. App. 195; Dresser v. Ainsworth, 9 Barb. (N. Y.) 619; Van Wyck v. Pine, 2 Hill (N. Y.) 666.

73. Roebuck v. Thornton, 19 Ga. 149.

view,<sup>74</sup> as where the defendant acknowledges the levy by executing a delivery bond,<sup>75</sup> by furnishing an inventory of the goods,<sup>76</sup> or otherwise acknowledging possession to be in the officer,<sup>77</sup> at least as against the defendant himself.

(2.) *Property Must Be Within Control of Officer.*—With the exceptions hereinbefore noted,<sup>78</sup> it is generally held that the property must be within the power and control of the officer when the levy is made,<sup>79</sup>

74. See cases following.

[a] **Levy Obstructed by Third Person.**—Plaintiffs in an execution directed the sheriff to levy upon a hearse belonging to the defendant in the execution, which was in the possession of a third party. The sheriff went to the latter's premises and demanded the hearse, saying that he came to levy upon it. The sheriff made ineffectual efforts to get at it or see it; he then advertised the hearse and sold it with other property actually levied upon. The defendant in execution was present at the sale and made no objection. Subsequently the party in possession of the hearse levied upon it under a judgment obtained by him against the defendant in the execution. In trover by the purchaser at the first sale against the purchaser at the second sale it was held that the plaintiff was entitled to recover. *Stuckert v. Keller*, 105 Pa. 386. But see *Brian v. Strait*, *Dudley* (S. C.) 19.

75. *Ala.*—*Bolling v. Vandiver*, 91 *Ala.* 375, 8 So. 290; *Cawthorn v. McCraw*, 9 *Ala.* 519. See *Andrews v. Keith*, 34 *Ala.* 722. *Ga.*—*Roebuck v. Thornton*, 19 *Ga.* 149. *Tenn.*—*Ballard v. Dibrell*, 94 *Tenn.* 229, 28 S. W. 1087.

[a] It is equivalent to an actual seizure sufficient to uphold a forthcoming bond where the principal in the bond inserts in it a description of the property, procures the signatures of sureties and delivers the bond to the sheriff. *Walker v. Shotwell*, 13 *Smed. & M.* (Miss.) 544.

76. *Jayne v. Dillon*, 28 *Miss.* 283, holding it a sufficient levy where the defendant furnished a list of property to the sheriff who entered them on the writ as levied on, and where the defendant requested it remain in his possession a short time. *Avon-by-the-Sea, etc. Co. v. McDowell*, 71 *N. J. Eq.* 116, 62 *Atl.* 865; *Fox v. Cronan*, 47 *N. J. L.* 493, 2 *Atl.* 444, 54 *Am. Rep.* 190; *Dean v. Thatcher*, 32 *N. J. L.* 470;

*Caldwell v. Fifield*, 24 *N. J. L.* 150. But see *Perry v. Hardison*, 99 *N. C.* 21, 5 *S. E.* 230; *Gilkey v. Dickerson*, 10 *N. C.* 293, holding that a delivery by a debtor of a list of his personal property, it not being present, is not a levy; but that, if the property is present when the list is delivered, and the officer signifies that he holds it to answer the execution and there is no opposition to his possessing himself of the property if he so desires, there is a valid levy.

[a] **Merely checking property with items listed on a special execution to ascertain if all such articles are in a given place, without more, is insufficient.** *Arthur v. Sherman*, 11 *Wash.* 254, 39 *Pac.* 670.

77. *Dresser v. Ainsworth*, 9 *Barb.* (N. Y.) 619.

78. See preceding section.

79. *Ala.*—*Bolling v. Vandiver*, 91 *Ala.* 375, 8 So. 290; *Andrews v. Keith*, 34 *Ala.* 722; *Easley v. Walker*, 10 *Ala.* 671; *Cawthorn v. McCraw*, 9 *Ala.* 519; *Cobb v. Cage*, 7 *Ala.* 619. *Ark.*—*Whiting & Slark v. Beebe*, 12 *Ark.* 421, 539. *Ga.*—*Corniff v. Cook*, 95 *Ga.* 61, 66, 22 *S. E.* 47; *Dean v. State*, 9 *Ga. App.* 303, 71 *S. E.* 597. *Haw.*—*Ferry v. Hakalau Plantation Co.*, 21 *Hawaii* 745; *Everett v. Bolles*, 6 *Hawaii* 153. *Ill.*—*Windmiller v. Chapman*, 139 *Ill.* 163, 28 *N. E.* 979; *Logsdon v. Spivey*, 54 *Ill.* 104; *Davidson v. Waldron*, 31 *Ill.* 120, 83 *Am. Dec.* 206; *Minor v. Herriford*, 25 *Ill.* 304, 344. *Ia.*—*Rix v. Silknitter*, 57 *Iowa* 262, 10 *N. W.* 653. *Ky.*—*Hill v. Harris*, 10 *B. Mon.* 120, 50 *Am. Dec.* 542. *Md.*—*Horsey v. Knowles*, 74 *Md.* 602, 22 *Atl.* 1104. *Mo.*—*Douglas v. Orr*, 58 *Mo.* 573; *Hobbs v. Williams*, 175 *Mo. App.* 409, 162 *S. W.* 334. *Neb.*—*Battle Creek Valley Bank v. First Nat. Bank*, 62 *Neb.* 825, 88 *N. W.* 145, 56 *L. R. A.* 124; *Boslow v. Shenberger*, 52 *Neb.* 164, 71 *N. W.* 1012, 66 *Am. St. Rep.* 487. *N. J.*—*Caldwell v. Fifield*, 24 *N. J. L.* 150. *N. Y.*—*Ray v. Harecourt*, 19 *Wend.*

so that the officer can take immediate possession,<sup>80</sup> and so that the officer may touch<sup>81</sup> or remove it if he wishes.<sup>82</sup>

(3.) *Officer Must Assume Dominion.*—The officer levying a writ of execution must assume dominion of or assert title to the property, by virtue of the writ, with the intention of levying it.<sup>83</sup> His action in

495; *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Price v. Shippis*, 16 Barb. 585. **N. C.** *Perry v. Hardison*, 99 N. C. 21, 5 S. E. 230; *Bland v. Whitfield*, 46 N. C. 122; *Gilkey v. Dickerson*, 10 N. C. 293. **Ohio.**—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85. **Pa.**—*Carey v. Bright*, 58 Pa. 70; *Linton v. Com.*, 46 Pa. 294; *Duncan's Appeal*, 37 Pa. 500; *Wood v. Vanarsdale*, 3 Rawle 401; *Samuel v. Knight & Co.*, 9 Pa. Super. 352; *Corniff v. Doyle*, 8 Phila. 630; *Knelly v. Bacheit*, 28 Pa. Co. Ct. 446. See *Linton v. Com.*, 46 Pa. 294; *Knelly v. Bacheit*, 28 Pa. Co. Ct. 446. But see *Stuckert v. Keller*, 105 Pa. 386. **S. C.** *Brian v. Strait, Dudley* 19. **S. D.** *State v. Cassidy*, 4 S. D. 58, 54 N. W. 928. **Tenn.**—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; *Evans v. Higdon*, 1 Baxt. 245; *Bradley v. Kesee & Dortch*, 5 Coldw. 223, 94 Am. Dec. 246; *Etheridge v. Edwards*, 1 Swan 426. **Tex.** *Brown v. Lane*, 19 Tex. 203; *Portis v. Parker*, 8 Tex. 23; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889. **Va.** *Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269. **Wis.**—*Brown v. Pratt*, 4 Wis. 513, 65 Am. Dec. 330.

[a] **Property in Possession of Third Person.**—It is not a good levy for an officer to declare his intention although he may lay his hand upon it while the property is in the possession of another who refuses to deliver it up. *Brian v. Strait, Dudley* (S. C.) 19. But see *Stuckert v. Keller*, 105 Pa. 386, and *supra*, II, B, 4, g, (X), (C), (I).

80. **N. C.**—*Perry v. Hardison*, 99 N. C. 21, 5 S. E. 230; *Bland v. Whitfield*, 46 N. C. 122; *Gilkey v. Dickerson*, 10 N. C. 293. **Pa.**—*Duncan's Appeal*, 37 Pa. 500. **S. C.**—*Brian v. Strait, Dudley* 19. **Tenn.**—*Evans v. Higdon*, 1 Baxt. 245.

81. *Hill v. Harris*, 10 B. Mon. 120, 50 Am. Dec. 542; *Bradley & Dortch v. Kesee*, 5 Coldw. 223, 94 Am. Dec. 246.

82. *Hill v. Harris*, 10 B. Mon. 120, 50 Am. Dec. 542; *Bradley & Dortch v.*

*Kesee*, 5 Coldw. 223, 94 Am. Dec. 246.

83. **Ala.**—*Goode & Ulrick v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309. **Ga.**—*Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55; *Levy v. Shockley*, 29 Ga. 710. **Ill.**—*Chittenden v. Rogers*, 42 Ill. 100; *Trimble v. Hunt*, 169 Ill. App. 259; *Larsen v. Ditto*, 90 Ill. App. 384; *Gaines v. Becker*, 7 Ill. App. 315. **Mo.**—*Shanklin v. Francis*, 67 Mo. App. 457. **N. J.**—*Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. **N. Y.** *Roth v. Wells*, 29 N. Y. 471; *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Price v. Shippis*, 16 Barb. 585; *Elias v. Farley*, 2 Abb. Dec. 11, 42 N. Y. 398, 5 Abb. Pr. N. S. 39. **N. C.**—*Gilkey v. Dickerson*, 10 N. C. 293. **Ohio.**—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79. **S. C.**—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623. **S. D.**—*Auby v. Rathbun*, 11 S. D. 474, 72 N. W. 952. **Tenn.**—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; *Bradley v. Kesee*, 5 Coldw. 223, 94 Am. Dec. 246. **Tex.**—*Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95; *Bryan v. Bridge*, 6 Tex. 137; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

See also sections *supra*, II, B, 4, g, (X).

[a] The officer must perform some act which indicates an intention to seize the property. *Chittenden v. Rogers*, 42 Ill. 100; *Larsen v. Ditto*, 90 Ill. App. 384.

[b] The act of entrusting the property to the custody of the person in charge of the property with a direction to allow no one to remove it is a sufficient assertion of the sheriff's title under the writ. *Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487.

[c] **Insufficient Assertion of Dominion.**—Where the officer merely states to the debtor that he has come to levy on his property, at the same time giving him a written notice of levy



this respect must be inconsistent with an intention to permit the debtor to dispose of the property as his own.<sup>84</sup>

(4.) *Levy Must Be Public.* — The levying officer must place the property to be levied on under his immediate control and dominion in such an open, public, and unequivocal manner as to apprise everybody that the property has been taken in execution.<sup>85</sup> A secret levy is insufficient.<sup>86</sup>

(5.) *Necessity That Officer Take Possession.* — (a.) *In General.* — There is considerable confusion in the cases as to the seizure and possession of the personalty required in a valid levy. There must be a seizure of the property to be levied on<sup>87</sup> which generally may be either actual

stating, in response to a question, that he would probably never come after the property, and the officer assumes no control over the property by himself or another, the levy is insufficient. *Auby v. Rathbun*, 11 S. D. 474, 78 N. W. 952.

84. *Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262.

85. *Haw.*—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. *Ill.*—*Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206. *Kan.*—*Jones Stationery & Paper Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310. *Mich.*—*Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262. *Mo.*—*Douglas v. Orr*, 58 Mo. 573; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Yeldell v. Stemmons*, 15 Mo. 443; *Bilby v. Hartman*, 29 Mo. App. 125. *Neb.*—*Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. *N. Y.*—*Roth v. Wells*, 29 N. Y. 471; *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Minturn v. Stryker*, 1 Edm. Sel. Cas. 356. *Ohio.*—*Minor v. Smith*, 13 Ohio St. 79. *Pa.*—*Duncan's Appeal*, 37 Pa. 500; *Samuel v. Knight & Co.*, 9 Pa. Super. 352. *Tex.*—*Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

[a] Some public, open, unequivocal act should be done that would lead all persons to know that the property was no longer in the custody of its former owner, but in that of the law. *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206.

[b] The officer's acts should be so open and notorious that they can be proved if necessary. *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95.

[c] *Sufficient Publicity.*—“It answers all the purposes of giving notoriety to the levy, for the officer to take possession of the chattels on the premises, provided he remain there with them, so as to be in a situation to exercise over the things that dominion, which owners in possession usually exercise.” *Rives v. Porter*, 29 N. C. 74, followed in *Long v. Hall*, 97 N. C. 286, 2 S. E. 229.

[d] *Public Avowal.*—The omission of the officer, at the time of the levy, to make a public avowal of his doings will not per se affect the validity of the levy. *Butler v. Maynard*, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100.

[e] *A party having actual notice of the levy* of an execution upon a large amount of corn in the crib, and afterwards converting the same, is in no position to complain that sufficient publicity was not given of the levy. *Richardson v. Rardin*, 88 Ill. 124.

86. *N. Y.*—*Green v. Burke*, 23 Wend. 490, approving *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Price v. Shippis*, 16 Barb. 585; *Minturn v. Stryker*, 1 Edm. Sel. Cas. 356. *Ohio.*—*Minor v. Smith*, 13 Ohio St. 79. *Tex.*—*Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

87. *Miller v. Brooks*, 120 Ga. 232, 47 S. E. 646; *Yoemans v. Bird*, 81 Ga. 340, 6 S. E. 179; *Isam v. Hooks*, 46 Ga. 309; *Levy v. Shockley*, 29 Ga. 710; *Sheffield v. Key*, 14 Ga. 528, 537; *Russell v. State*, 13 Ga. App. 561, 79 S. E. 495; *Dean v. State*, 9 Ga. App. 303, 71 S. E. 597.

[a] *A levy on personalty implies a seizure of it.* *McIsaacs v. Hobbs*, 8 Dana (Ky.) 268.

[b] *Where an officer goes to the residence of the defendant in execution*

or constructive,<sup>88</sup> though some decisions and statutes seem to require that there be an actual seizure.<sup>89</sup>

(b.) *Where Defendant Is Entitled to Possession.*—Where the defendant is entitled to possession, it is necessary that the officer reduce the property to possession or, at least, bring the property within<sup>90</sup> his in-

for the purpose of making a levy, and, the defendant being absent, merely requests a member of the latter's family to inform the defendant that he has made a levy upon certain personalty which he has found and left therein, and does nothing else, not even making an entry of the levy upon the writ, there has been no seizure, and hence no valid levy. *Miller v. Brooks*, 120 Ga. 232, 47 S. E. 646.

[c] *Under Statute Relating to Loaned Chattels.*—Under a statute providing that as to purchasers and creditors the title to chattels loaned for two years without demand made is with the possession, a levy of an execution against the bailee must be made by seizure and not by notice. *Hunstock v. Roberts* (Tex. Civ. App.), 65 S. W. 675.

88. *Ark.*—See *Kennedy & Co. v. Clayton*, 29 Ark. 270. *Ga.*—*Stinson v. Hirsch*, 125 Ga. 149, 53 S. E. 1011; *Sanders v. Carter*, 124 Ga. 676, 52 S. E. 887; *Yoemans v. Bird*, 81 Ga. 340, 8 S. E. 179; *Isam v. Hooks*, 46 Ga. 309, 314; *Levy v. Shockley*, 29 Ga. 710; *Russell v. State*, 13 Ga. App. 561, 79 S. E. 495; *Dean v. State*, 9 Ga. App. 303, 71 S. E. 597. *Me.*—*Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285. *N. J.*—*Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943; *Lloyd v. Wyckoff*, 11 N. J. L. 218. *N. C.*—*Long v. Hall*, 97 N. C. 286, 2 S. E. 229; *State v. Poor*, 20 N. C. 519, 34 Am. Dec. 387.

89. *Mo.*—*Douglas v. Orr*, 58 Mo. 573; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Hobbs v. Williams*, 175 Mo. App. 409, 162 S. W. 334; *Hombs v. Corbin*, 20 Mo. App. 497. *Pa.*—*Titusville Novelty Iron Wks.' Appeal*, 77 Pa. 103; *Trovillo v. Tilford*, 6 Watts 468, 31 Am. Dec. 484. *S. C.*—*Moss v. Moore*, 3 Hill 276. *Tenn.*—*Harvey v. Berry*, *Demoville & Co.*, 1 Baxt. 252; *James v. Kennedy*, 10 Heisk. 607.

90. *U. S.*—*United States v. Chong Yock Ying*, 2 U. S. Dist. Ct. Hawaii 205. *Ala.*—*McConeghy v. McCaw*, 31

*Ala.* 447. *Ariz.*—*Satterwhite v. Melzer*, 3 Ariz. 162, 34 Pac. 184. *Colo.* *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. *Ga.*—*Roebuck v. Thornton*, 19 Ga. 149; *Russell v. State*, 13 Ga. App. 561, 79 S. E. 495. *Haw.*—*Everett v. Bolles*, 6 Haw. 153. *Ill.*—*Godfrey v. Brown*, 86 Ill. 454 (actual possession); *Havely v. Lowry*, 30 Ill. 446; *Montgomery v. Wayne*, 14 Ill. 373; *Taylor v. Crowe*, 122 Ill. App. 518; *Gaines v. Becker*, 7 Ill. App. 315; *Gates v. People*, 6 Ill. App. 383. *Ia.*—*Hanson v. Taper Sleeve Pulley Incor.*, 72 Iowa 622, 34 N. W. 448. *La.*—*Goubeau v. New Orleans & N. R. R. Co.*, 6 Rob. 345. *Miss.*—*Code*, 1906, §3964; *Willis v. Loeb*, 59 Miss. 169; *Butler v. Lee*, 54 Miss. 476; *Parker v. Dean*, 45 Miss. 408; *Gates & Pleasants v. Flint*, 39 Miss. 365; *Banks v. Evans*, 10 Smed. & M. 35, 48 Am. Dec. 734. *Mo.*—*Douglas v. Orr*, 58 Mo. 573; *Caffery v. Choctaw Coal & M. Co.*, 95 Mo. App. 174, 68 S. W. 1049; *Hombs v. Corbin*, 20 Mo. App. 497. *Neb.*—*Pitkin v. Burnham*, 62 Neb. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280. *N. Y.*—*Ray v. Harcourt*, 19 Wend. 495 (actual possession); *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Camp v. Chamberlain*, 5 Denio 198; *In the Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999. *N. C.*—*Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502. *Pa.*—*Hartman v. Heffelfinger*, 47 Pa. Super. 1. *S. C.* *Collins v. Montgomery*, 2 Nott & McC. 392. *S. D.*—*State v. Cassidy*, 4 S. D. 58, 54 N. W. 928. *Tex.*—*Vern. Sayle's Civ. St.*, 1914, art. 3740; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Cavanaugh v. Peterson*, 47 Tex. 197; *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95 (actual possession); *Bryan v. Bridge*, 6 Tex. 137. *Can.*—*Dickinson v. Robertson*, 11 Brit. Col. 155.

See *supra*, II, B, 4, g, (X), (C), (2).

[a] The officer must take possession of the goods in such a manner as to apprise everybody of the fact, though the removal to some place of security

mediate control, and that he have the right to exclusive possession.<sup>91</sup> The officer must do that which amounts to a change of possession,<sup>92</sup> or, to what is equivalent, a claim of dominion coupled with a power to exercise it.<sup>93</sup> The act of possession must, necessarily, be governed by the nature of the property.<sup>94</sup> The rule is sometimes stated to be

is optional with him. *Everett v. Bolles*, 6 Hawaii 153.

[b] **In levying on money**, the sheriff must reduce it to possession. *Satterwhite v. Melezer*, 3 Ariz. 162, 24 Pac. 184.

[c] **Thing Not in Existence at Time of Levy.**—A levy on the proceeds of the sale of certain property to be sold at a future day is invalid, for the reason that there being no proceeds until the sale, no possession can be taken thereof. *Goubeau v. New Orleans & N. E. R. Co.*, 6 Rob. (La.) 345.

[d] **Buried Chattel.**—Posting a notice of levy on a mound of dirt supposed to contain potatoes without seeing the potatoes or reducing them to possession is not a valid levy. *Russell v. State*, 13 Ga. App. 561, 79 S. E. 495.

Although the property is left with the defendant, the legal and actual possession is in the sheriff. See *infra*, II, B, 4, t, (II).

91. *Jones Stationery & Paper Co. v. Case*, 26 Kan. 299, 40 Am. Rep. 310.

[a] **The right of exclusive possession** is necessary to make a levy effectual. *Barrett v. McKenzie*, 24 Minn. 20.

92. *Colo.*—*Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. *Ill.*—*Minor v. Herriford*, 25 Ill. 304, 344; *Larsen v. Ditto*, 90 Ill. App. 384; *Persels v. McConnell*, 16 Ill. App. 526. *Ia.*—*Peppers v. Harris*, 145 Iowa 635, 124 N. W. 625; *Rix v. Silknitter*, 57 Iowa 262, 10 N. W. 653. *Ky.*—*Demint v. Thompson*, 80 Ky. 255, 3 Ky. L. Rep. 778. *Mass.*—*Wright v. Morley*, 150 Mass. 513, 23 N. E. 232. See *Lane v. Jackson*, 5 Mass. 157, the officer must have actual possession and custody. *Mich.*—*Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262. *Mo.*—*Douglas v. Orr*, 58 Mo. 573. *N. J.*—*Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943. *N. Y.*—*Camp v. Chamberlin*, 5 Denio 198. *Ohio.*—*Minor v. Smith*, 13 Ohio St. 79. *Pa.*—*Welsh v. Bell*, 32 Pa. 12.

[a] "Any act by which the sheriff, acting under a fieri facias, gets the defendant's property into his own hands, or any act by which he gets the defendant's property into the hands of any other, not excepting the defendant himself, as his, the sheriff's agent, amounts to a levy." *Roebuck v. Thornton*, 19 Ga. 149, 152.

[b] **Agreement To Hold for Officer.** It is sufficient if, the property being in the possession of a third person but in the power of the officer so that he can take possession, the third person agrees to hold it for the officer. *Evans v. Higdon*, 1 Baxt. (Tenn.) 245.

[c] **If a delivery bond is not executed**, to affect the rights of third persons, the officer must take the property into his possession, so as to notify the world that a levy has been made. *Havely v. Lowry*, 30 Ill. 446.

93. *Ill.*—*Chittenden v. Rogers*, 42 Ill. 100; *Minor v. Herriford*, 25 Ill. 304, 344; *Larsen v. Ditto*, 90 Ill. App. 384; *Persels v. McConnell*, 16 Ill. App. 526. *Ia.*—*Peppers v. Harris*, 145 Iowa 635, 124 N. W. 625; *Rix v. Silknitter*, 57 Iowa 262, 10 N. W. 653. *Mass.*—*Wright v. Morley*, 150 Mass. 513, 23 N. E. 232. *Mich.*—*Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262. *Neb.*—*Battle Creek Valley Bank v. First Nat. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124; *Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. *N. J.*—*Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943. *N. Y.*—*Camp v. Chamberlin*, 5 Denio 198. *Ohio.*—*Murphy v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79. *Pa.*—*Welsh v. Bell*, 32 Pa. 12.

94. *Haw.*—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. *Ill.*—*People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355. *Mo.*—*Hopke v. Lindsay*, 83 Mo. App. 85. *Ohio.*—*Murphy v. Swadener*, 33 Ohio St. 85; *Minor v. Smith*, 13 Ohio St. 79. *Tex.*—*Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95.

**Levy on bulky articles**, see *infra*, II, B, 4, g, (X), (E), (1).



that personal property capable of manual delivery must be levied on by taking it into the custody of the officer.<sup>95</sup> It is required at common law,<sup>96</sup> and in the United States,<sup>97</sup> that the officer take actual possession of the personalty so far as the case will admit of. This may be done either by manual acts or by other conduct calculated to reduce the property to the custody of the law.<sup>98</sup> It is not necessary, however,

95. Cal.—*Dutertre v. Driard*, 7 Cal. 549; *Smith v. Morse*, 2 Cal. 524. Minn. Rev. Laws, 1905, §4298; *Barber v. Amundsen*, 52 Minn. 358, 54 N. W. 733; *Leonard v. Maginnis*, 34 Minn. 506, 26 N. W. 733; *Wilson v. Powers*, 21 Minn. 193. Miss.—*Willis v. Loeb*, 59 Miss. 169. Wash.—*Cupples v. Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519; *Byrd v. Forbes*, 3 Wash. Ter. 318, 13 Pac. 715.

[a] This custody must be such as to enable the officer to retain and assert his control over the property. *Hemmenway v. Wheeler*, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; *Barber v. Amundsen*, 52 Minn. 358, 54 N. W. 733; *Wilson v. Powers*, 21 Minn. 193.

96. *Willis v. Loeb*, 59 Miss. 169; *Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 682, 5 L. R. A. 659.

[a] In England, the officer leaves one of his assistants in possession of the goods, or causes an inventory to be made and removes them. Ill.—*Minor v. Herriord*, 25 Ill. 344 (304). N. Y. *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707. Tenn.—*Bradley & Dortch v. Kesee*, 5 Coldw. 223, 94 Am. Dec. 246.

97. Ill.—*Godfrey v. Brown*, 86 Ill. 454. Compare, *Chittenden v. Rogers*, 42 Ill. 100, holding the officer must reduce the property to possession or, at least, bring it within his immediate control. La.—*Estate of Mille v. Hebert*, 19 La. Ann. 58; *Scott v. Niblett*, 6 La. Ann. 182; *Gaines v. Merchants' Bank*, 4 La. Ann. 369; *Fluker v. Bulard*, 2 La. Ann. 338; *Goubeau v. New Orleans & N. R. R. Co.*, 6 Rob. (La.) 345. Mass.—*Lane v. Jackson*, 5 Mass. 157. Mo.—*Douglas v. Orr*, 58 Mo. 573; *Hopke v. Lindsay*, 83 Mo. App. 85. N. Y.—*Ray v. Harcourt*, 19 Wend. 495; *Westervelt v. Pinckney*, 14 Wend. 123, 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Camp v. Chamberlain*, 5 Denio 198. Pa.—*Welsh v. Bell*, 32 Pa. 12, a

levy on goods cannot be made without having them in actual manuecapture or control. S. D.—*McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99. Tenn. *Evans v. Higdon*, 1 Baxt. 245. Tex. *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95.

[a] The very idea of a levy implies a manual taking of goods. *Goode & Ulrick v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309; *Brian v. Strait*, *Dudley* (S. C.) 19.

[b] Constructive possession is not sufficient where actual possession is feasible. *National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047.

98. *Green v. Burke*, 23 Wend. (N. Y.) 490.

[a] "He must take actual possession which, although the goods are present can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and are interested in the question." *Camp v. Chamberlain*, 5 Denio (N. Y.) 198, quoted in *Douglas v. Orr*, 58 Mo. 573.

[b] The property "must be seized manually or by assertion of control that may be made effectual, if necessary, and this to bring and keep it within the dominion of the law, for sale on execution, if needed, and for no other purpose." *Quackenbush v. Henry*, 43 Mich. 75, 3 N. W. 262.

[c] The true test as to what constitutes actual possession is, whether enough has been done to subject the officer to an action of trespass but for the protection of the writ. *Douglas v. Orr*, 58 Mo. 573.

[d] A levy good as against subsequent levies and subsequent purchasers and mortgagors "must be actual and with continued manual seizure by the officer, when such seizure is practicable, or if the property is within view or power of control by making such distinct, open, and unequivocal assertion of dominion over it, as the nature

that the officer interfere with the goods manually,<sup>99</sup> or even touch them.<sup>1</sup> Where the property is within his power, it is generally sufficient taking of possession for the officer to assert his right under the writ,<sup>2</sup> or to take an inventory of it,<sup>3</sup> to make a memorandum of the

and situation of the property and the circumstances will admit of, or as the judgment debtor may recognize and acquiesce in, and constituting such an interference with the possession, either actual or constructive, as that trespass would lie against the officer, but for the protection afforded by the writ. *Minor v. Smith*, 13 Ohio St. 82." *Murphy & Bros. v. Swadener*, 33 Ohio St. 85.

99. **Ga.**—*Sheffield v. Key*, 14 Ga. 528. **Mich.**—*Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262. **Mo.**—See *Douglas v. Orr*, 58 Mo. 573. *Compare*, *Hopke v. Lindsay*, 83 Mo. App. 85, holding the officer must take that degree of manual possession which the nature of the property admits of. **Neb.**—*Battle Creek Valley Bank v. First Nat. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124; *Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. **N. J.**—*Dean v. Thatcher*, 32 N. J. L. 470. **N. Y.**—*Walratt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063; *Bond v. Willett*, 31 N. Y. 102, 1 Abb. Dec. 165, 40 N. Y. 377, 29 How. Prac. 47; *Roth v. Wells*, 29 N. Y. 471; *Barker v. Binninger*, 14 N. Y. 270; *Dean v. Campbell*, 19 Hun 534; *Elias v. Farley*, 42 N. Y. 398, 2 Abb. Dec. 11, 5 Abb. Pr. (N. S.) 39. **S. C.**—*Brian v. Strait*, *Dudley* 19; *Moss v. Moore*, 3 Hill 276. **Tenn.**—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; *Etheridge v. Edwards*, 1 Swan 426; *Tyler v. Dunton*, 1 Tenn. Ch. 361. **Va.**—*Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927; *Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269.

1. **Ill.**—*Gaines v. Becker*, 7 Ill. App. 315. **Ind.**—*Hadley v. Hadley*, 82 Ind. 95. **Ky.**—*Hill v. Harris*, 10 B. Mon. 120, 50 Am. Dec. 542. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218. **N. Y.**—*Barker v. Binninger*, 14 N. Y. 270; *Green v. Burke*, 23 Wend. 490. **N. C.**—*Gilkey v. Dickerson*, 10 N. C. 293. **Ohio.**—*Pugh v. Calloway*, 10 Ohio St. 488. **S. C.**—*Moss v. Moore*, 3 Hill 276. **Tex.**—*Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889. **Va.**—*Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269.

[a] Actual taking of possession

does not imply an actual touching of the goods; but merely such a course of action as, in effect, is calculated to reduce them to the dominion of the law. *Green v. Burke*, 23 Wend. (N. Y.) 49; *Pugh v. Calloway*, 10 Ohio St. 488.

2. **Ark.**—*Whiting & Slark v. Beebe*, 12 Ark. 421, 539. **Ind.**—*Hadley v. Hadley*, 82 Ind. 95. **Md.**—*Horsely v. Knowles*, 74 Md. 602, 22 Atl. 1104. **Mo.**—*Douglas v. Orr*, 58 Mo. 573. **Neb.**—*Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. **N. Y.**—*Barker v. Binninger*, 14 N. Y. 270; *Camp v. Chamberlain*, 5 Denio 198. **Ohio.**—*Pugh v. Calloway*, 10 Ohio St. 488.

[a] In *Barker v. Binninger*, 14 N. Y. 270, it was held to be a sufficient levy for the officer to go into the stable where a horse stood, and, in the presence of the defendant, to produce the execution, and to declare that he levies and to forbid all interference with the horse.

3. **Del.**—*Polite v. Jefferson*, 5 Harr. 388; *Layton & Sipple v. Steel*, 3 Harr. 512; *Sipple v. Scotten*, 1 Harr. 107. **Ind.**—*Hadley v. Hadley*, 82 Ind. 95. **Mo.**—*Douglas v. Orr*, 58 Mo. 573. **N. J.**—*Dean v. Thatcher*, 32 N. J. L. 470; *Caldwell v. Fifield*, 24 N. J. L. 150; *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547; *Lloyd v. Wyckoff*, 11 N. J. L. 218. **N. Y.**—*Green v. Burke*, 23 Wend. 490; *Haggerty & Nobles v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321. See *Hendricks v. Robinson*, 2 Johns. Ch. 283, 312.

[a] But the mere taking an inventory without a removal is not a sufficient levy. *Techmeyer v. Waltz*, 49 Iowa 645.

[b] In Delaware, the practice is not to take the goods into possession. The inventory and appraisal is the levy. *Hargadine v. Ford*, 5 Houst. (Del.) 380, 391; *Polite v. Jefferson*, 5 Harr. (Del.) 388; *Layton & Sipple v. Steel*, 3 Harr. (Del.) 512; *Sipple v. Scotten*, 1 Harr. (Del.) 107.

[c] In New Jersey, it is a frequent practice for sheriffs to make levies by taking inventories furnished by the

levy,<sup>4</sup> or to threaten to remove the property unless a receiptor is given.<sup>5</sup>

A defendant may dispense with an actual seizure of his property, and thereby give the sheriff a constructive possession of the property, as against himself.<sup>6</sup> A written acknowledgment of a levy by a defendant is as effectual as an actual levy.<sup>7</sup>

A removal of the property is not necessary,<sup>8</sup> although generally if

defendant with the assent of the plaintiff, where the officer does not either see the goods or take them into actual custody. *Avon-by-the-Sea Land & I. Co. v. McDowell*, 71 N. J. Eq. 116, 62 Atl. 865; *Dean v. Thatcher*, 32 N. J. L. 470.

[d] That the list or inventory is furnished out of the county is immaterial where the goods are within the jurisdiction of the officer. *Dean v. Thatcher*, 32 N. J. L. 470.

4. **Ga.**—*Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55. **N. Y.** *Green v. Burke*, 23 Wend. 490; *Watts v. Cleaveland*, 3 E. D. Smith 553. **S. C.**—*Huger's Admrs. v. Osborne*, 1 Bay 319. **Tenn.**—*Bradley & Dortch v. Keesee*, 5 Coldw. 223, 94 Am. Dec. 246.

[a] "It is not necessary to a levy that the sheriff should actually seize and keep possession of the goods. It is sufficient if, the goods being in the possession of the defendant, and the sheriff having power to take them, with the consent of the defendant, he indorses a levy on the execution." *Corniff v. Cook*, 95 Ga. 61, 67, 22 S. E. 47, 51 Am. St. Rep. 55. To same effect, *Huger's Admrs. v. Osborne*, 1 Bay (S. C.) 319.

**Mere Paper Levy Insufficient.**—See *supra*, II, B, 4, g, (X), (A).

5. *Hadley v. Hadley*, 82 Ind. 95; *Douglas v. Orr*, 58 Mo. 573.

6. **Ill.**—*McGirr v. Hunter*, 13 Ill. App. 195. **N. Y.**—*Mills v. Thursby*, 11 How. Pr. 121. **Ohio.**—*Murphy v. Swadener*, 33 Ohio St. 85. **Pa.**—*Stuckert v. Keller*, 105 Pa. 386; *Lowry v. Coulter*, 9 Pa. 349; *Trovillo v. Tilford*, 6 Watts 468, 31 Am. Dec. 484.

[a] Where a party who is a defendant in an execution furnishes an officer with a list of property to be levied upon, and the officer accordingly enters them on the execution as levied upon, and at the defendant's request the goods are permitted to remain for a short time in his possession, the levy is sufficient and this conduct is equiv-

alent to actual seizure. It is an admission of the levy by the defendant in the execution, and he cannot be heard to deny it. *Jayne v. Dillon*, 28 Miss. 283.

7. *Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55; *Rhame v. McRoy*, 7 Rich. L. (S. C.) 37; *Weatherby v. Covington*, 3 Strobb. (S. C.) 27, 49 Am. Dec. 623.

8. **U. S.**—*United States v. Chong Yock Wing*, 2 U. S. Dist. Ct., Hawaii 205. **Ark.**—*Fenno v. Coulter*, 14 Ark. 38; *Whiting & Slark v. Beebe*, 12 Ark. 421, 539. *Contra*, *Field v. Lawson*, 5 Ark. 376. **Del.**—*Polite v. Jefferson*, 5 Harr. 388. **Haw.**—*Everett v. Bolles*, 6 Hawaii 153. **Ill.**—*Logsdon v. Spivey*, 54 Ill. 104; *Trimble v. Hunt*, 169 Ill. App. 259; *Gaines v. Becker*, 7 Ill. App. 315. **Ind.**—*Hadley v. Hadley*, 82 Ind. 95. See *Dawson v. Sparks*, 77 Ind. 88. **Ky.**—*Hill v. Harris*, 10 B. Mon. 120, 50 Am. Dec. 542. **Me.**—*Ames v. Taylor*, 49 Me. 381. **Md.**—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104. **N. J.**—*Fox v. Cronan*, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190; *Caldwell v. Fifield*, 24 N. J. L. 150, 160; *Cumberland Bank v. Hann*, 19 N. J. L. 166; *Lloyd v. Wyckoff*, 11 N. J. L. 218; *Cliver v. Applegate*, 5 N. J. L. 479; *Casher v. Peterson*, 4 N. J. L. 317. **N. Y.**—*Roth v. Wells*, 29 N. Y. 471; *Ray v. Harcourt*, 19 Wend. 495; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Dean v. Campbell*, 19 Hun 534. **N. C.**—*Gilkey v. Dickerson*, 10 N. C. 293. **Pa.**—*McGinnis v. Prieson*, 85 Pa. 111; *Com. Ins. Co. v. Berger*, 42 Pa. 285. **S. C.**—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623; *Moss v. Moore*, 3 Hill 276. **Tenn.** *Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; *Etheridge v. Edwards*, 1 Swan 426. **Tex.**—*Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889. **Va.**—*Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269.



the property is such that it may be removed, the officer should do so.<sup>9</sup>

(c.) *Where Defendant Is Not Entitled to Possession.* — If the property to be levied on is in the hands of a third person and the defendant is not entitled to possession, a manual taking of the goods is not authorized.<sup>10</sup> The manner of levy in such case is frequently regulated by statute,<sup>11</sup> which sometimes provide that the levy shall be made by giving notice thereof to the person who is entitled to possession, and without seizure.<sup>12</sup>

(6.) *Acquiescence of Debtor.* — It is never necessary that the debtor or owner of the goods should acquiesce in the levy.<sup>13</sup>

(D.) *SEIZURE OF A PART FOR THE WHOLE.* — A seizure of a part of a parcel of goods may be made in the name of the whole.<sup>14</sup> In such case the remainder is not actually seized and may not be seen, yet the levy is good as to the whole.<sup>15</sup>

(E.) *ON PARTICULAR KINDS OF PERSONALTY.* — (1.) *Bulky and Ponderous Property.* — Where the property is such that the officer cannot take possession thereof, he may allow it to remain where he finds it.<sup>16</sup> In making the levy, the officer must assert dominion over the property by

Leaving property with the defendant, see *infra*, II, B, 4, t, (II).

9. **Mo.**—*Bilby v. Hartman*, 29 Mo App. 125. **N. C.**—*Sawyer v. Bray*, 102 N. C. 79, 8 S. E. 885, 11 Am. St. Rep. 713; *Bland v. Whitfield*, 46 N. C. 122. **Pa.**—*Titusville Novelty Iron Wks.' Appeal*, 77 Pa. 103. **Tenn.**—*Etheridge v. Edwards*, 1 Swan 426.

10. **Ala.**—*Goode & Ulrick v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309. **Cal.**—*Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770. **N. J.**—*Avon-by-the-Sea Land & I. Co. v. McDowell*, 71 N. J. Eq. 116, 62 Atl. 865. **Ore.**—*Spaulding v. Kennedy*, 6 Ore. 208. **Pa.**—*Welsh v. Bell*, 32 Pa. 12. See *Stuckert v. Keller*, 105 Pa. 386.

[a] **Execution Against Remainderman.**—But a sheriff who has an execution against a remainderman in a chattel has a right to seize the property in possession of the tenant for life and bring it to the place of sale. *Blanton v. Morrow*, 42 N. C. 47, 53 Am. Dec. 391.

**As to levy on mortgaged and pledged property**, see *infra*, II, B, 4, g, (X), (E), (2).

11. Consult the various statutes.

12. *Dufur Oil Co. v. Enos*, 59 Ore. 528, 117 Pac. 597; *Spaulding v. Kennedy*, 6 Ore. 209; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Hunstock v. Roberts* (Tex. Civ. App.), 65 S. W. 675; *Sumner v. Crawford* (Tex. Civ. App.), 41 S. W. 825.

[a] **An attempted levy by assuming to take possession instead of complying with the statute**, creates no lien upon the property. *Dufur Oil Co. v. Enos*, 59 Ore. 528, 117 Pac. 457; *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994.

[b] **Where the debtor is in possession although he is not entitled thereto**, a levy upon his interest is not made by seizure of the property but by notice. *Willis & Bro. v. Thompson*, 85 Tex. 301, 20 S. W. 155.

13. *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553, 559.

14. **Ala.**—*Cobb v. Cage*, 7 Ala. 619. **Ga.**—*Roebuck v. Thornton*, 19 Ga. 149. **N. Y.**—*Haggerty & Nobles v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321. **Pa.**—*Schuylkill County's Appeal*, 30 Pa. 358; *Lewis v. Smith*, 2 Serg. & R. 142; *Trovillo v. Tilford*, 6 Watts 468, 31 Am. Dec. 484; *Samuel v. Knight & Co.*, 9 Pa. Super. 352. **S. C.**—*Moss v. Moore*, 3 Hill 276; *Brian v. Strait*, *Dudley* 19. **Eng.**—*Gladstone v. Padwick*, L. R. 6 Exch. 203; *Cole v. Davies*, 1 Ld. Raym. 724, 91 Eng. Reprint 1383.

15. *Roebuck v. Thornton*, 19 Ga. 149.

16. **Ill.**—*Tieknor v. McClelland*, 84 Ill. 471; *Davidson v. Waldron*, 31 Ill. 120, 130, 83 Am. Dec. 206. **Ohio.**—*Minor v. Smith*, 13 Ohio St. 79. **Wis.**—*Johnson v. Iron Belt Mining Co.*, 78 Wis. 159, 47 N. W. 363; *Gallagher v.*

virtue of his process,<sup>17</sup> and make some notorious act as nearly equivalent to actual seizure as practicable.<sup>18</sup> Some statutes have provisions prescribing the manner of levy on bulky and ponderous articles.<sup>19</sup>

(2.) *Mortgaged or Pledged Personal Property*.—A levy upon mortgaged or pledged personal property is made subject to the mortgage or pledge as the case may be.<sup>20</sup> If the mortgaged property is in the possession of the debtor, the sheriff levying the writ may take the property into his possession for the purpose of selling it.<sup>21</sup> Where chattels of the defendant are in the actual possession of the mortgagee or pledgee

Bishop, 15 Wis. 276. **Can.**—Huxtable v. Conn, 14 Manitoba 713.

17. Gallagher v. Bishop, 15 Wis. 276.

18. Hopke v. Lindsay, 83 Mo. App. 85; Long v. Hall, 97 N. C. 286, 2 S. E. 229; State v. Poor, 20 N. C. 519, 34 Am. Dec. 387.

[a] If personal property cannot be actually seized, the officer must take what possession he can and evidence his seizure by posting notices on the property that it is levied on or by attaching to it some other marks indicating a levy. Hopke v. Lindsay, 83 Mo. App. 85. And see Huxtable v. Conn, 14 Manitoba (Can.) 713.

[b] It is a sufficient levy on a stack of grain to go to it, levy upon it and forbid the defendant from touching it. Gallagher v. Bishop, 15 Wis. 276.

[c] **Piles of Timber**.—In Johnson v. Iron Belt Mining Co., 78 Wis. 159, 47 N. W. 363, it was held a sufficient levy upon certain piles of timber where the officer did not move them but forbade the defendants to use or interfere with them and thereafter until sale was present every day where the timbers were located.

[d] **Attaching notices to different piles of wood** is sufficient to constitute a levy thereon. Huxtable v. Conn, 14 Manitoba (Can.) 713.

[e] **In levying upon brick in a kiln**, it is not necessary for an officer to separate the bricks levied on from the remainder, but he may at his peril leave them where he found them. It is sufficient that they were in his power and that he indicated the levy by word or deed, or entered it on the execution. Hill v. Harris, 10 B. Mon. (Ky.) 120, 50 Am. Dec. 542.

19. See the statutes.

[a] In Massachusetts, Rev. L., c. 167, §45, relative to the attachment of goods or property which cannot be

immediately removed by reason of its bulk, does not apply to the seizure of goods on execution. Field v. Fletcher, 191 Mass. 494, 78 N. E. 107.

20. **Ill.**—Durfee v. Grinnell, 69 Ill. 371. **Ind.**—Byram v. Stout, 127 Ind. 195, 26 N. E. 687; Foster v. Bringham, 99 Ind. 505. **Mich.**—Friyer v. McNaughton, 110 Mich. 22, 67 N. W. 978; Smith v. Menominee Cir. Judge, 53 Mich. 560, 19 N. W. 184; Baldwin v. Talbot, 46 Mich. 19, 8 N. W. 565. **Minn.**—Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791; Mower v. Stickney, 5 Minn. 397. **N. Y.**—See Freeman v. Friedman, 133 N. Y. Supp. 458. **Tex.**—Vern. Sayle's Civ. St., 1914, art. 3744; Sparks v. Pace, 60 Tex. 298; Gammage v. Silliman, 2 Wills. Civ. Cas., §14. **Wis.**—Cotton v. Marsh, 3 Wis. 221, 241.

**Necessity for levy upon the whole of the mortgaged property**, see *infra*, II, B, 4, h.

[a] **An indorsement of a levy upon an equity of redemption**, made without seeing the property or having it within the officer's control is not a sufficient levy. Minter v. Swain, 52 Miss. 174.

21. **Ala.**—McConeghy v. McCaw, 31 Ala. 447. **Ill.**—People v. Johnson, 15 Ill. App. 153. See Durfee v. Grinnell, 69 Ill. 371. **Ind.**—Foster v. Bringham, 99 Ind. 505; Sparks v. Compton, 70 Ind. 393; Olds v. Andrews, 66 Ind. 147. **Ky.**—Fugate v. Clarkson, 2 B. Mon. 41, 36 Am. Dec. 589; Phillips v. Morris, 7 J. J. Marsh. 279. **Mich.**—First Nat. Bank v. Summers, 75 Mich. 107, 42 N. W. 536; Wilson v. Montague, 57 Mich. 638, 24 N. W. 851; Nelson v. Ferris, 30 Mich. 497; Macomber v. Saxton, 28 Mich. 516; Cary v. Hewitt, 26 Mich. 228. **Minn.**—Galde v. Forsyth, 72 Minn. 248, 75 N. W. 219; Barber v. Amundson, 52 Minn. 358, 54

thereof, the sheriff cannot take them from his possession,<sup>22</sup> but in some jurisdictions the sheriff may take possession of the property temporarily in such a case.<sup>23</sup> Statutes sometimes provide for a levy by leaving with the mortgagee or pledgee a notice of levy and a copy of the writ.<sup>24</sup>

**Tender or Payment of Mortgage Debt.**—Under the statutes in some jurisdictions, before the officer can take mortgaged personal property on execution, he must pay or tender to the mortgagee the amount of the mortgage or deposit it with a designated officer.<sup>25</sup>

N. W. 733. **Miss.**—Butler v. Lee, 54 Miss. 476. **N. J.**—Fox v. Cronan, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190. **N. Y.**—Goulet v. Asseler, 22 N. Y. 225; Hull v. Carnley, 11 N. Y. 501, 1 Abb. Pr. 158.

[a] On default the mortgagee is entitled to possession as against the officer. Rankine v. Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751; Butler v. Lee, 54 Miss. 476.

[b] Although the mortgage is past due, (1) the sheriff may take possession of the property, if the mortgagee has not actually foreclosed. Macomber v. Saxton, 28 Mich. 516; Cary v. Hewitt, 26 Mich. 228. (2) But where, by the mortgage, the title is in the mortgagee on default, the sheriff cannot levy an execution against the mortgagor upon the chattel. *Ex parte* Lorenz, 32 S. C. 365, 11 S. E. 206. As to property subject to levy, see *supra*, II, B, 3.

22. **Cal.**—Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770. **Minn.** Mower v. Stickney, 5 Minn. 397. **N. J.** Avon-by-the-Sea Land & I. Co. v. McDowell, 71 N. J. Eq. 116, 62 Atl. 865; Fox v. Cronan, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190. **Pa.** Srodes v. Caven, 3 Watts 258. **Wis.** Cotton v. Watkins, 6 Wis. 629; Cotton v. Marsh, 3 Wis. 221, 242.

[a] But if the pledgee deliver the property to the officer, the pledgor cannot complain. Mower v. Stickney, 5 Minn. 397.

[b] **Indorsing List of Chattels as Inventory.**—Taking from the chattel mortgage a list of the chattels mortgaged and annexing this list as the inventory is, in New Jersey, sufficient as a constructive seizure for the purpose of a legal levy. Avon-by-the-Sea Land & I. Co. v. McDowell, 71 N. J. Eq. 116, 62 Atl. 865.

[c] The interest of a pledgor can only be reached by serving a garnish-

ment on the pledgee. It cannot be reached by a seizure of the pledge. Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

23. Horner v. Dennis, 34 La. Ann. 389 (pledged property); First Nat. Bank v. Summers, 75 Mich. 107, 42 N. W. 536; Wilson v. Montague, 57 Mich. 638, 24 N. W. 851; Nelson v. Ferris, 30 Mich. 497; Cary v. Hewitt, 26 Mich. 228 (even though the mortgage is past due).

[a] **Showing Property for Sale.**—(1) The sheriff may require the mortgagee to expose the goods to the view of the bidders at the sale by virtue of his execution and levy. Fox v. Cronan, 47 N. J. L. 493, 508, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190. (2) And in McConeghy v. McCaw, 31 Ala. 447, it is held that where an absolute sale is made as security, the sheriff levying an execution against the debtor has a right to take the property into his possession and exhibit it at the sale.

24. Spaulding v. Kennedy, 6 Ore. 208.

25. **Dak.**—Keith v. Haggart, 4 Dak. 438, 33 N. W. 465. **Ind.**—State *ex rel.* Jessup v. Milligan, 106 Ind. 109, 5 N. E. 871 (the purchaser shall be entitled to possession on complying with the conditions of the mortgage or pledge); Kackley v. State, 91 Ind. 437. **Ia.** Blotcky Bros. v. O'Neill, 83 Iowa 574, 49 N. W. 1029. **Mich.**—See Wilson v. Montague, 57 Mich. 638, 24 N. W. 851. **Okla.**—Osborne & Co. v. Hughey, 14 Okla. 29, 76 Pac. 146; Moore v. Calvert, 8 Okla. 358, 58 Pac. 627. **Wis.** St., 1898, §2988; Mendelson v. Paschen, 71 Wis. 591, 37 N. W. 815; Cotton v. Watkins, 6 Wis. 629; Cotton v. Marsh, 3 Wis. 221. See also Sayle's Tex. Civ. St., 1897, art. 2353.

See *supra*, II, B, 3, b, (IV), (B).

[a] A seizure without a payment or tender constitutes the officer a tres-



**Rolling Stock of Railroad.** — In the absence of statute making rolling stock part of the realty, the rolling stock covered by a railroad mortgage may be levied on as other mortgaged personal property.<sup>26</sup>

(3.) *Property Within Buildings.* — The mere taking charge of the building from the outside is not a levy upon the goods within it,<sup>27</sup> particularly where the building is closed or locked and the officer does not gain access to the inside.<sup>28</sup> The officer must see the goods and,

passer. *Keith v. Haggart*, 4 Dak. 438, 33 N. W. 465.

[b] **A tender after the levy** does not validate a levy made without tender. *Blotcky Bros. v. O'Neill*, 83 Iowa 574, 49 N. W. 1029.

[c] **Fraudulent and Illegal Mortgage.**—In *Jewett v. Sundback*, 5 S. D. 111, 120, 58 N. W. 20, the court in construing a statute which provided "before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county treasurer, payable to the order of the mortgagee," said: "But we are of the opinion that that section has no application to a mortgage which the creditor claims to be fraudulent and void as against the creditors of a mortgagor. The object of that section evidently is to prevent an officer from attaching and levying upon personal property included in a valid chattel mortgage before the amount due upon such a mortgage is paid or tendered as therein provided. But it has no application to a void or fraudulent instrument denominated a 'chattel mortgage.' Such an instrument, fraudulent and void as to the creditors of the mortgagor is not in law a 'mortgage' as to them, though it may be so called."

[d] **Tender by purchaser** before obtaining possession, see *infra*, II, B, 7.

26. *Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212.

[a] **Under a statute** providing that, rolling stock and personal property belonging to the road shall be deemed a part of the road, an execution creditor cannot, as against the mortgagee in a railroad mortgage or deed of trust levy on an item of rolling stock and sell it to satisfy his execution. His remedy must, as to the mortgagee, be against the road as an entirety.

*Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212.

27. *Rix & Stafford v. Silknitter*, 57 Iowa 262, 10 N. W. 653; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889; *Lynch v. Payne* (Tex. Civ. App.), 49 S. W. 406.

28. *Meyer v. Missouri Glass Co.*, 65 Ark. 286, 45 S. W. 1062. But see *McDonald v. Moore*, 8 Ben. 579, 1 Abb. N. C. 53, 16 Fed. Cas. No. 8,763.

[a] **Making Inventory.**—Where an officer goes to a factory and finding it closed, he looks through a broken window and makes an incomplete inventory without otherwise gaining access to the building, there is no valid levy. *Nelson v. Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943.

[b] **Nailing Up Door.**—In *Lynch v. Payne* (Tex. Civ. App.), 49 S. W. 406, it was held that there is no levy where the officer goes to the store Saturday night when locked, nails strips across the door, reads the writ and notifies the defendant but does not enter the store until later.

29. See generally *supra*, II, B, 4, g, (X), (C).

[a] **It is a sufficient levy** to go to the store of the defendant, see the goods, and assert title by virtue of the levy, in the hearing of one of the defendants, and to subsequently endorse the levy on the execution. *Roth v. Wells*, 29 N. Y. 471; *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

[b] **"A levy, made in view of a stock of goods in gross,** is a good levy, and the sheriff would be entitled to the necessary time to make his invoice." *Grove v. Harris*, 35 Tex. 320, 323.

[c] **Grain in Granary.**—Where an officer, in making a levy upon a large quantity of grain in a granary, forces open the doors, levels off and estimates the quantity of grain and serves notice upon defendant, he has made a valid levy, at least as against

having them in his control, assert title by virtue of the writ,<sup>29</sup> but a manual interference with the goods is not required.<sup>30</sup>

(4.) *Contents of Sealed Packages.*—A levy on a sealed package, such as a safe, describing its contents, is a sufficient levy on the contents.<sup>31</sup>

(5.) *Property Owned in Common.*—At common law and in the absence of special statute, the officer levying an execution against one tenant in common on property owned in common is permitted to seize and take possession of the whole.<sup>32</sup> But although the possession of the entire property may be taken, the levy, of course, is made only upon the defendant's interest in the property.<sup>33</sup> But statutes have been enacted in some jurisdictions providing for a levy without the taking of actual possession, by giving notice thereof.<sup>34</sup>

the defendant having notice. *State v. Cassidy*, 4 S. D. 58, 54 N. W. 928.

[d] **Levy on Crib of Corn.**—It is a sufficient levy upon corn in a crib to claim the corn, in the presence of a witness, by virtue of the writ, to post a notice on the crib and to nail up the crib. *Richardson v. Rardin*, 88 Ill. 124; *Stanley v. Moynihan*, 45 Ill. App. 192.

30. *Bond v. Willett*, 31 N. Y. 102, 1 Keyes 377, 1 Abb. Dec. 165, 29 How. Pr. 47.

31. *Smith v. Clark*, 100 Iowa 605, 69 N. W. 1011.

[a] **A levy on a safe**, which is locked, and its contents, described in the return as "notes and money and books," is a good levy on notes payable to the execution defendant, contained in the safe. *Smith v. Clark*, 100 Iowa 605, 69 N. W. 1011.

32. *Ala.*—*Goode & Ulrick v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309. But see *Code*, 1907, §4106. *Cal.*—*Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Waldman v. Broder*, 10 Cal. 378. *Haw.*—*Tillman v. Spencer*, 2 Hawaii 178. *Ill.*—See *Neary v. Cahill*, 20 Ill. 214. *Mass.*—*Melville v. Brown*, 15 Mass. 82. *Minn.*—*Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515. *N. H.*—*Pettingill v. Bartlett*, 1 N. H. 87. *N. Y.*—*Smith v. Orser*, 42 N. Y. 132; *Ray v. Birdseye*, 5 Denio 619; *Walsh v. Adams*, 3 Denio 125; *Waddell v. Cook*, 2 Hill 48; *Phillips v. Cook*, 24 Wend. 389; *Henderson v. Brennecke*, 26 App. Div. 309, 49 N. Y. Supp. 681. *N. C.*—*Blanton v. Morrow*, 42 N. C. 47, 53 Am. Dec. 391; *Blevins v. Baker*, 33 N. C. 291; *Islay v. Stewart*, 20 N. C. 297. *Ohio.*—*Nixon & Chatfield v. Nash*, 12 Ohio St. 647, 80

*Am. Dec.* 390. *Tenn.*—*Haskins v. Everett*, 4 Sneed 531. *Vt.*—*Welch v. Clark*, 12 Vt. 681; *Whitney v. Ladd*, 10 Vt. 165. *Wash.*—*Graden v. Turner*, 15 Wash. 136, 45 Pac. 733.

[a] **The reason** that a sheriff may seize the whole of the common property on an execution against one of the joint owners is that a joint owner has severally the right to the possession of the entire property, and the sheriff by taking possession does no more than the joint owner could do. *Goode & Ulrick v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309.

[b] **Effect of Levy.**—A levy upon personal property held by the execution debtor jointly with another, accompanied with a statement of the facts connected with the levy and the claim of the joint owner, gives to the plaintiff a lien upon the debtor's interest in it. The enforcement of this lien can only be had in equity, where the rights of all parties in interest can be determined. *Vicory v. Strausbaugh*, 78 Ky. 425.

33. See cases in preceding note.

[a] **A levy upon and sale of the entire right and title to the property** as that of the defendant exclusively is improper. *Neary v. Cahill*, 20 Ill. 214.

34. *Ky.*—*Vicory v. Strausbaugh*, 78 Ky. 425; *Farmer v. Slack*, 12 Ky. L. Rep. 319; *Jones v. Martin*, 5 Ky. L. Rep. 227. *Miss.*—*Code*, 1906, §3967. And see *Blumenfield v. Seward*, 71 Miss. 342, 14 So. 442; *Willis v. Loeb*, 59 Miss. 168. *Tex.*—*Hubert v. Hubert*, 46 Tex. Civ. App. 503, 102 S. W. 948; *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63.

[a] **But a levy in the usual way**,

(6.) *Partnership Property*. — The manner of levying on property of a partnership will be treated in a subsequent article.<sup>35</sup>

(7.) *Corporate Property*. — The manner of levying on property of a corporation is treated elsewhere in this work.<sup>36</sup>

(8.) *Choses in Action*. — Choses in action being incorporeal cannot be levied upon by a seizure of them.<sup>37</sup> To make a valid levy it is generally necessary to give notice to the debtor.<sup>38</sup> It is sometimes required in addition thereto that a certified copy of the writ be left with the debtor.<sup>39</sup> But if the debt be evidenced by a negotiable promissory note,<sup>40</sup> draft,<sup>41</sup> or bond,<sup>42</sup> the sheriff must take actual possession of the evidence of debt; the seizure of a copy is nugatory.<sup>43</sup>

**Judgments**. — Not being the subject of levy upon execution at common law,<sup>44</sup> judgments must be levied on in the manner provided by statute.<sup>45</sup>

by seizing the property instead of by giving the statutory notice is not void. *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63. See *Hamburg v. Wood & Co.*, 66 Tex. 163, 18 S. W. 623.

35. See the title "Partnership."

36. See 5 STANDARD PROC. 671.

37. *Wilson v. Munday*, 5 La. 483.

As to garnishment of debts and choses in action, see the title "Garnishment."

38. *Black Hills Brew. Co. v. Middle West F. Ins. Co.*, 31 S. D. 318, 140 N. W. 687.

[a] A notice to the general agent of an insurance company authorized to write risks and issue policies is a notice to the "managing agent" within a statute regulating levies upon things in action. *Black Hills Brew. Co. v. Middle West Fire Ins. Co.*, 35 S. D. 130, 151 N. W. 44.

39. *Harris v. Bank of Mobile*, 5 La. Ann. 538; *Swart v. Thomas*, 26 Minn. 141, 1 N. W. 830.

[a] This is the mode of levying on all debts except those which pass by delivery of the instrument upon which they rest, such as promissory notes, bills of exchange and negotiable bonds. *Swart v. Thomas*, 26 Minn. 141, 1 N. W. 830.

[b] A levy upon a book account must be made in the mode provided for levying upon debts generally. It cannot be made by seizing the books containing the account. *Swart v. Thomas*, 26 Minn. 141, 1 N. W. 830; *Tullis v. Brawley*, 3 Minn. 277.

40. Ark.—*Field v. Lawson*, 5 Ark. 376. Cal.—*Hoxie v. Bryant*, 131 Cal. 85, 63 Pac. 153. La.—*Pleasants & Sons*

*v. Kemp*, 23 La. Ann. 124 ("actual corporeal possession"); *Estate of Mille v. Hebert*, 19 La. Ann. 58; *Miller v. Streeder*, 18 La. Ann. 56 ("actual possession"); *Scott v. Niblett*, 6 La. Ann. 182; *Gaines v. Merchants' Bank*, 4 La. Ann. 369; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Taylor v. Stone*, 2 La. Ann. 910; *Fluker v. Ballard*, 2 La. Ann. 338. Compare, *Wilson v. Munday*, 5 La. 483.

[a] If the evidence of the debt be non-negotiable, the seizure of the debt by notification to the debtor or keeper of the subject of the right, is valid against the subsequent assignee of the debt or right. *Harris v. Bank of Mobile*, 5 La. Ann. 538.

41. *Estate of Mille v. Hebert*, 19 La. Ann. 58.

42. *Lockhart v. Harrell*, 6 La. Ann. 530; *Gaines v. Merchants' Bank*, 4 La. Ann. 369; *Offut v. Monquit*, 2 La. Ann. 785; *Simpson v. Allain*, 7 Rob. (La.) 500.

43. *Estate of Mille v. Hebert*, 19 La. Ann. 58; *Gaines v. Merchants' Bank*, 4 La. Ann. 369; *Galbraith v. Snyder*, 2 La. Ann. 492.

44. Liability of judgments to seizure on execution, see *infra*, II, B, 3, b, (III), (B).

45. *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99.

As to garnishment of judgment, see 10 STANDARD PROC. 426.

[a] "The proper mode of seizing a debt existing in the form of a judgment is a notification of seizure by the sheriff to the judgment debtor." *Monticon v. Mullen*, 12 La. Ann. 275; *Hanna v. Bry*, 5 La. Ann. 651, 656, 52



(9.) *Shares of Stock.* — The manner in which shares of stock may be levied on is usually regulated by statute,<sup>46</sup> which must be followed.<sup>47</sup> In some states stock of a corporation may be levied on by leaving a notice thereof with a designated officer,<sup>48</sup> or by leaving an attested or certified copy of the writ with the officer named in the statute,<sup>49</sup> or

Am. Dec. 606. See *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48, holding a service of the writ of execution upon the judgment debtor and a notice of levy upon a certain judgment is what is usually called a process of garnishment. See the title "Garnishment."

[h] **Notice to Attorney or Court.**

(1) Neither the attorney of the defendant in the judgment sought to be levied upon nor the judge can be considered as holding the judgment. Therefore a service of a copy of the writ and notice upon the attorney will not constitute a valid levy. *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99. (2) Under a statute which requires that a copy of the writ be served upon the "person holding the property" the service of a copy of the execution upon the clerk of the court is not necessary in levying upon a judgment. *Wheaton v. Spooner*, 52 Minn. 417, 54 N. W. 372.

46. Consult the various statutes.

[a] **Notice in some form to the defendant** seems to be indispensable, but in a majority of the cases, a pursuit of the statutory method of levy will give him sufficient notice. *Voorhis v. Terhune*, 50 N. J. L. 147, 13 Atl. 391, 7 Am. St. Rep. 781; *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

[b] **A levy by mere inventory**, without applying to the company, is not sufficient to defeat the rights of a bona fide purchaser of the defendant. *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

[c] **In New Jersey**, shares in any bank, insurance company or other joint stock company may be taken in virtue of an execution in the same manner as goods and chattels. 2 Comp. Sts., p. 2244, §4; *Voorhis v. Terhune*, 50 N. J. L. 147, 13 Atl. 391, 7 Am. St. Rep. 781. See also *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

[d] **In Pennsylvania**, no particular formality is legally necessary to constitute a levy upon stocks. The officer

may announce to the debtor his levy on the stocks in the list furnished by the creditor enumerating certain stocks to be levied on, and then inclose the list with his writ to be afterwards attached or more securely made a part of it. *Braden's Estate*, 165 Pa. 184, 30 Atl. 746.

**As to garnishment of corporate stock** see 10 STANDARD PROC. 433.

47. **Ga.**—*Weaver v. Tuten*, 144 Ga. 8, 85 S. E. 1048. **Idaho.**—*Wells v. Price*, 6 Idaho 490, 56 Pac. 266. **Ill.**—*Goss & Phillips Mfg. Co. v. People*, 4 Ill. App. 510. **Mich.**—*Blair v. Compton*, 33 Mich. 414. **Mo.**—*Caffery v. Choctaw Coal & M. Co.*, 95 Mo. App. 174, 68 S. W. 1049.

48. **Ia.**—*Croft v. Colfax E. L. & P. Co.*, 113 Iowa 455, 85 N. W. 761; *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750. **La.**—*Parker v. Sun Ins. Co.*, 42 La. Ann. 1172, 8 So. 618; *Harris v. Bank of Mobile*, 5 La. Ann. 538. **Tex.**—*Vern. Sayle's Civ. St.*, 1914, art. 3742; *Keating v. Stone & Sons Live Stock Co.*, 83 Tex. 467, 18 S. W. 797; *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

[a] **When the notice has been given**, the levy is made. *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750.

[b] **If no notice is left with an officer**, the levy is void. *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

[c] **The Notice Must Be in Writing.** *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750. But see *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 382, 9 So. 423, holding the notice under the Alabama statute may be oral.

[d] **The fact that the notice is in the past tense** does not invalidate the levy. *Croft v. Colfax E. L. & P. Co.*, 113 Iowa 455, 85 N. W. 761.

49. **Ill.**—*Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842; *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355. **Mich.**—*Blair v. Compton*, 33 Mich. 414, 425. **Tenn.**—*Young v. South*

by leaving both such copy of the writ and notice.<sup>50</sup> Some statutes require notice to be given to the defendant as well as a designated officer.<sup>51</sup> Manual possession of the certificate is not required,<sup>52</sup> and a levy cannot be made by taking possession of the certificates.<sup>53</sup> In a number of states the means by which the officer can ascertain the number of shares owned by a debtor is prescribed by statute,<sup>54</sup> but in others no such provision is made.<sup>55</sup>

(10.) *Confused Goods.*—When one permits his goods to be so intermingled with those of a debtor that an officer, having a writ of execution against such debtor, after making reasonable inquiry and effort, is unable to distinguish the one from the other, the officer is justified

Tredegart Iron Co., 85 Tenn. 189, 2 S. W. 202. See Memphis Appeal Pub. Co. v. Pike, 9 Heisk. 697.

[a] Leaving a copy with the secretary is sufficient under a statute requiring that a copy be left with the "clerk." People v. Goss & Phillips Mfg. Co., 99 Ill. 355.

[b] The copy may be attested by the officer levying the writ. People v. Goss & Phillips Mfg. Co., 99 Ill. 355.

[c] An unsigned attestation clause in the first person indorsed on a copy of a writ addressed to a particular sheriff is sufficient. People v. Goss & Phillips Mfg. Co., 99 Ill. 355.

[d] A mere clerical error in the copy of the writ will not invalidate the levy if no one can be misled thereby. Perkins v. Webb, 67 Ill. App. 474.

[e] Waiver of Service of Copy of Writ.—People v. Goss & Phillips Mfg. Co., 99 Ill. 355.

50. Ala.—See Code, 1907, §4105. Cal.—West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. Colo.—Pullen v. Headberg, 53 Colo. 502, 127 Pac. 954. Idaho.—Wells v. Price, 6 Idaho 490, 56 Pac. 266. Minn.—Rev. Laws, 1905, §4300. Mo.—Rev. St., 1909, §2202; Foster v. Potter, 37 Mo. 525; Smith v. Pilot Min. Co., 47 Mo. App. 409. Wyo. Wyoming Fair Assn. v. Talbott, 3 Wyo. 244, 21 Pac. 700.

51. Weaver v. Tuten, 144 Ga. 8, 85 S. E. 1048.

52. Cal.—West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171. Ind.—Boone v. Van Gorder, 164 Ind. 499, 74 N. E. 4. Mich.—Blair v. Compton, 33 Mich. 414, 438.

53. Caffery v. Choctaw Coal & M. Co., 95 Mo. App. 174, 68 S. W. 1049.

[a] Certificates of stock are not the

stock itself but are only the evidence of it and stock cannot be levied on by taking into possession the certificates. Caffery v. Choctaw Coal & M. Co., 95 Mo. App. 174, 68 S. W. 1049; Young v. South Tredegart Iron Co., 85 Tenn. 189, 2 S. W. 202. See People v. Goss & Phillips Mfg. Co., 99 Ill. 355. But see Parker v. Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618; Harris v. Bank of Mobile, 5 La. Ann. 538.

54. Ala.—Code, 1907, §4105. Ill. People v. Goss & Phillips Mfg. Co., 99 Ill. 355. Ind.—Boone v. Van Gorder, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314. Minn.—Rev. Laws, 1905, §4301. Mo.—Rev. Sts., 1909, §2202; Foster v. Potter, 37 Mo. 525; Smith v. Pilot Min. Co., 47 Mo. App. 409. N. J.—Voorhis v. Terhune, 50 N. J. L. 147, 13 Atl. 391, 7 Am. St. Rep. 781.

[a] A compliance with the provisions of the statute as to ascertaining from the officer appointed by the corporation to keep the record thereof, the number of shares subjected to the levy by the service of the required notice, is not absolutely necessary to a valid execution sale, provided the sheriff ascertains from any source the actual number of shares owned by the judgment debtor, and puts them up and makes sale thereof. Blair v. Compton, 33 Mich. 414.

55. See Keating v. Stone & Sons Live Stock Co., 83 Tex. 467, 18 S. W. 797.

[a] "If by any proper means the officer who levies the execution can ascertain the number of shares owned by the debtor, we have no doubt about his authority to levy an execution upon so many of them as may be proper to satisfy it, as in other cases . . . ; but when he neither possesses nor can acquire such knowledge we do not think

in taking and selling the whole as the property of the debtor,<sup>56</sup> but the officer should separate them if possible,<sup>57</sup> and if the mingling or confusion is without fault on the part of the owner of the other goods, the officer is not justified in taking the mass but is bound at his peril to correctly separate the goods of the debtor.<sup>58</sup>

(11.) *On Cattle.*—(a.) *At Large.*—In levying upon live stock running at large, an absolute manucaption is not required,<sup>59</sup> but there must be a seizure or something equivalent thereto.<sup>60</sup> This matter has been specially provided for by statute in some states.<sup>61</sup>

he can make a lawful levy or sale." *Keating v. Stone & Sons' Live Stock Co.*, 83 Tex. 467, 18 S. W. 797.

56. *Cal.*—*Wellington v. Sedgwick*, 12 Cal. 469, 476; *Daumiel v. Gorham*, 6 Cal. 43. *Ill.*—*Tuttle v. Hemenway*, 92 Ill. App. 53. *Mass.*—*Shumway v. Rutter*, 8 Pick. 443, 19 Am. Dec. 340. *Mich.*—*McCausey v. Hoek*, 159 Mich. 570, 124 N. W. 570. *N. H.*—*Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Wilson v. Lane*, 33 N. H. 466; *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466. *N. Y.*—*Roth v. Wells*, 29 N. Y. 471. See *Duke v. Welsh*, 16 Jones & S. 516. *Tex.*—*Brown v. Bacon*, 63 Tex. 595.

57. *McCausey v. Hoek*, 159 Mich. 570, 124 N. W. 570.

58. *Sharp v. Lamy*, 37 App. Div. 136, 55 N. Y. Supp. 784.

[a] Where the defendant, to prevent a levy on his sheep drove them into a pasture of sheep owned by a stranger, the sheriff levied on the combined flocks. It was held that as the sheep of the stranger had become mixed without his fault, the officer was bound at his peril to see that he took no sheep except those of the debtor. *Kingsbury v. Pond*, 3 N. H. 511.

[b] If the claimant is in possession at the time of levy, it is his duty to point out the goods he claims. *Sharp v. Lamy*, 37 App. Div. 136, 55 N. Y. Supp. 784.

[c] It is the duty of the sheriff to restore the goods improperly taken, after notice from the claimant. But the notice must be specific, apprising the sheriff of and designating the particular goods improperly seized. *Wellington v. Sedgwick*, 12 Cal. 469, 476.

59. *Sheffield v. Key*, 14 Ga. 528.

60. *Sheffield v. Key*, 14 Ga. 528.

[a] A levy upon a stock of cattle "as they now run, marks and brands not known, but known as the Sheffield

stock," is insufficient as there was no seizure or anything equivalent thereto, no herding and collecting and taking possession. There must be some sort of custody and control which will serve to designate the extent of the intention to seize and take possession. *Sheffield v. Key*, 14 Ga. 528.

61. *Vern. Sayle's Tex. Civ. St.*, 1914, art. 3741; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Rice v. Miller*, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; *Sparks v. McHugh* (Tex. Civ. App.), 43 S. W. 1045; *Davis v. Dallas Nat. Bank*, 7 Tex. Civ. App. 41, 26 S. W. 222. See *Portis v. Parker*, 8 Tex. 23, 28, 58 Am. Dec. 95.

[a] *Statute Cumulative.*—The words "may be" in the statute are permissive and admit of the construction that the remedy is cumulative with that of the common law, and were intended to give the plaintiff the option of making the levy in the mode indicated by the statute or by an actual seizure of the property. *Middlebrook & Bros. v. Zapp*, 79 Tex. 321, 15 S. W. 258.

[b] *Cattle Not Within County.*—(1) *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848, distinguished in *Davis v. Dallas Nat. Bank*, 7 Tex. Civ. App. 41, 26 S. W. 222. (2) Where it is not shown that the range extends beyond the limits of the sheriff's county, a levy upon cattle "running at large on the range in Motley county, Texas," is presumptively sufficient. *Sparks v. McHugh* (Tex. Civ. App.), 43 S. W. 1045.

[c] *Effect of Levy on Possession.* The case of *Donald & Cobb v. Carpenter*, 8 Tex. Civ. App. 321, 27 S. W. 1053, has construed this statute in so far as it relates to the custody of the stock so levied on, in the following words: "We therefore construe the statute to mean this: by a range levy the entire herd is placed in custodia legis, so as to prevent the owner from



(b.) *In Pastures.* — In levying upon live stock confined in pens and pastures of moderate size, the officer levying upon them should follow the method prescribed as ordinarily necessary to the validity of a levy upon personal property, that is he must take possession and control of the stock.<sup>62</sup> He is allowed a reasonable time in which to reduce his levy to actual possession.<sup>63</sup>

(12.) *Leaseholds.* — In making a levy on a leasehold a pen and ink levy is sufficient.<sup>64</sup> A levy upon a leasehold can only be by description of the realty out of which it issues.<sup>65</sup> The officer need not be in view of the premises,<sup>66</sup> nor make an actual seizure.<sup>67</sup> The sheriff cannot oust the tenant in possession,<sup>68</sup> or exercise any dominion or control over it, founded upon the idea of a right to possession.<sup>69</sup> He

selling or otherwise disposing of any part thereof in such manner as will interfere with the right of selection given the purchaser by article 2314; and it is the duty of the officer to exercise such supervision as may be necessary to see that this is not done. Should the owner sustain damage from being deprived of such right of disposition of his property, he can, in a proper case, recover therefor. But for the purpose of feeding, branding, and caring for his herd upon the range, the owner is still left in control; and for his own neglect, neither the officer nor the plaintiff in attachment would be liable. Of course, what is here said would have no application in case the officer should go further than the law authorizes, as above construed, and take actual possession of the stock and exclude the owner from the control and management thereof.”

[d] *Constructive Possession.* — Though stock levied upon in this manner is not brought within the immediate control of the officer, the property nevertheless, is in the constructive possession of the officer by the levy of the writ, and it becomes his duty to prevent their removal, and, if removed without his knowledge, to pursue and recapture them. *Rice v. Miller*, 70 Tex. 613, 615, 8 S. W. 317.

62. *Lindsey v. Cope*, 91 Tex. 463, 43 S. W. 29, 44 S. W. 276 (where one of the pastures contained 1280 acres); *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889. But in *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848, the pasture contained from 293,000 acres to 430,000 acres of land, and it was held that the range levy statute applied. And see *Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312.

[a] The statute providing for levying upon cattle at large on the range does not apply where the cattle are in pastures of moderate size under fence. *Lindsey v. Cope*, 91 Tex. 463, 43 S. W. 29, 44 S. W. 276. See *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

[b] *Sufficient Levy.* — Entering the inclosure of the defendant and driving the cattle to a point for the purpose of counting them while armed with the writ makes the sheriff a trespasser but for the writ. *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

63. *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

64. *Steers v. Daniel*, 4 Fed. 587.

[a] *Levy Upon Leasehold With Improvements.* — A levy upon the defendant's title in a leasehold with the improvements consisting of certain fixtures, may be made in the manner and form of levying on real estate, without an actual seizure and without being in view of the property. *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154; *Titusville Novelty Iron Works' Appeal*, 77 Pa. 103. See also *Steers v. Daniel*, 4 Fed. 587; *Hopke v. Lindsay*, 83 Mo. App. 85.

65. *Titusville Novelty Iron Works' Appeal*, 77 Pa. 103.

66. *Titusville Novelty Iron Works' Appeal*, 77 Pa. 103.

67. *Acklin v. Waltermier*, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629. See *Titusville Novelty Iron Wks.' Appeal*, 77 Pa. 103.

68. *Steers v. Daniel*, 4 Fed. 587.

69. *Steers v. Daniel*, 4 Fed. 587.

[a] The sheriff has no right to place a watchman on the premises. *Steers v. Daniel*, 4 Fed. 587, 596.

should proclaim his levy to those in charge of the premises.<sup>70</sup>

A levy upon a term for years has received special statutory attention in some states.<sup>71</sup>

(XI.) **Levy on Real Property.**—(A.) **PREREQUISITE INDORSEMENT OF NO PERSONALTY.**—In some states before a levy is made upon real property it is required that the officer indorse on the execution “no goods,” or “no personal property.”<sup>72</sup> The omission of this entry merely renders the levy defective, but it is not void,<sup>73</sup> and it may be made *nunc pro tunc*,<sup>74</sup> or it may be supplied by amendment.<sup>75</sup>

(B.) **MANNER OF LEVY GENERALLY.**—In many states there are no special statutory directions as to the method of levying on land and the cases are not entirely in accord as to the details of such procedure.<sup>76</sup>

(C.) **IN THE ABSENCE OF STATUTE** regulating the manner of levying upon real property owned by a debtor in severalty, it is sufficient if the officer holding an execution does some overt act indicative of his intention to levy upon the property in satisfaction of the writ.<sup>77</sup> This

70. *Steers v. Daniel*, 4 Fed. 587.

71. *Chapman v. Gray*, 15 Mass. 439.

72. **Ga.**—On justice's *feri facias*. *Robinson v. Burge*, 71 Ga. 526; *Williams v. Moore*, 68 Ga. 585; *Hopkins v. Burch*, 3 Ga. 222 (or that defendant pointed out the land to be levied upon); *Daniel v. Justices of the Inferior Court*, *Dudley* 2. **Kan.**—*Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451. **Ohio.**—*The Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 250, 45 N. E. 630. **S. D.**—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

[a] **One Entry Is Sufficient.**—(1) *Beck v. Bower*, 68 Ga. 738; *Carmichael v. Strawn*, 27 Ga. 341. (2) Where an entry of “no property to be found” is made by the constable, and seven days later the debtor points out a horse which is levied upon and sold, and the proceeds are applied to older executions, the constable may, without a further entry, levy upon realty. *Beck v. Bower*, 68 Ga. 738.

[b] The exact expression “no goods” need not be indorsed on the execution. *Treptow v. Buse*, 10 Kan. 170.

73. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193. But see *Robinson v. Burge*, 71 Ga. 526; *Hopkins v. Burch*, 3 Ga. 222, holding that a sheriff's deed under a justice's court *feri facias* is void where there is no entry on the *feri facias* “no personal property to be found.”

[a] As against a purchaser with notice of the levy, the omission of this entry will not invalidate the levy. The

*Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 252, 45 N. E. 630.

74. *Williams v. Moore & Watkins*, 68 Ga. 585; *Gwinn v. Smith*, 55 Ga. 145; *Hopkins v. Burch*, 3 Ga. 222.

[a] After the sale and after an ejectment suit for the property has been brought. *Williams v. Moore & Watkins*, 68 Ga. 585.

75. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Williams v. Moore*, 68 Ga. 585.

76. **Colo.**—*Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 349; *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. **Mass.**—*Hall v. Crocker*, 3 Mete. 245. **Wis.**—*Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236.

As to manner of levy under statute, see *infra*, II, B, 4, (g), (XI), (D).

**Necessity for levy where judgment is a lien upon the premises**, see *supra*, II, B, 4, b, (I).

77. **Ky.**—*McBurnie v. Overstreet*, 8 B. Mon. 300. **Miss.**—*Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358. **N. Y.**—*Rodgers v. Bonner*, 55 Barb. 9, 24; *Mills v. Thursby*, 11 How. Pr. 121. **Wis.**—*Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236.

[a] Any act done by the officer in pursuance of a direction to levy upon the debtor's realty is a beginning to execute the writ and constitutes a seizure. *Hall v. Crocker*, 3 Mete. (Mass.) 245.

[b] A levy on land seems to be nothing more than a specific declaration by the sheriff that the land is

overt act may consist of the making of some entry or memorandum of the levy,<sup>78</sup> giving notice to the defendant of an intention to levy,<sup>79</sup> or advertising the property for sale.<sup>80</sup> The manner of levying on real estate most frequently required and followed in the United States, is, without going upon the premises, by simply indorsing a description

liable to a specific lien and that the sheriff has asserted his legal authority to sell it. *Gassaway v. Hall*, 3 Hill (S. C.) 289.

[c] **Promise of Sheriff To Levy.**—A delivery of the writ to the sheriff with instructions to levy immediately and a promise by the sheriff to do so is not equivalent to a levy. *Redlick v. Williams* (Tex.), 5 S. W. 375.

[d] **In Arkansas** one of the first steps towards a levy is to ascertain and identify the property of the defendant; and when this is done the levy is complete as to the land, and may be entered on the writ, without the officer actually going upon the land. *Fenno v. Coulter*, 14 Ark. 38.

[e] **In Kentucky** to make a valid levy upon the land it is only necessary for the officer to go to or upon the land and actually levy upon it and indorse the levy upon the execution. It is not necessary in such case to personally notify the owner or occupant of the land of the levy. The officer may make a valid levy without going to or upon the land in either of two ways: First, by seeing the owner or agent and getting his consent to the levy upon the particular estate; or, second, by apprising the owner or agent of the particular estate that he intends levying on. In each case he must make within a reasonable time an official and specific entry upon the execution. But when the officer goes to or upon the land and levies on the same and notifies the owner or occupant of the levy, such levy may be established by parol evidence. *Leath v. Deweese*, 162 Ky. 227, 172 S. W. 516; *Jones v. Allen*, 88 Ky. 381, 10 Ky. L. Rep. 962, 11 S. W. 289; *McBurnie v. Overstreet*, 8 B. Mon. 300; *Demint v. Ringo's Admr.*, 5 Ky. L. Rep. 514. See also *Vallandigham v. Worthington & Co.*, 85 Ky. 83, 2 S. W. 772.

[f] **In Maryland**, (1) in every case where an officer sells under execution, it is necessary that he first effect a seizure. *Dorsey's Lessee v. Dorsey*, 28 Md. 388. (2) A schedule of the prop-

erty seized and a notice thereof to the party will be sufficient without going upon the land. *Busey v. Tuck*, 47 Md. 171. See also *Berry v. Griffith*, 2 Harr. & G. 337, 18 Am. Dec. 309.

[g] **In Rhode Island** the intention to levy on the land followed a sale in the manner provided by law, constitutes a levy. *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763.

[h] **In Tennessee** the sheriff need not by virtue of a *feri facias* enter upon land, and make an actual seizure; but may return the lands which he has selected for advertisement and sale, and may sell them afterwards. *Russell v. Stinson*, 3 Hayw. 1.

78. **Ky.**—See *Dermint v. Thompson*, 80 Ky. 255, 3 Ky. L. Rep. 778. **Mass.** *Hall v. Crocker*, 3 Mete. 245. **N. J.** *Rodgers v. Bonner*, 55 Barb. 9, 24. **Wis.**—*Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236.

[a] **A memorandum on a register, official journal of the sheriff, or on a separate piece of paper is as effective as a memorandum on the writ in the absence of an express provision of law requiring a memorandum upon the execution.** *Hall v. Crocker*, 3 Mete. (Mass.) 245.

79. **Hamblen v. Hamblen**, 33 Miss. 455, 69 Am. Dec. 358.

[a] **Posting copies of the execution on the land is not required.** *Jones v. Allen*, 88 Ky. 381, 11 S. W. 289.

80. **Cal.**—See *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 540, 76 Pac. 243, holding on the authority of *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195, that as there was no levy, the sale, if otherwise valid, took effect on the day of its date and not before, or at all events, not before posting of the notices of sale. **Colo.** *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. **Miss.**—*Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358. **Wis.**—*Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236; *Gates v. Boomer*, 17 Wis. 455.



of the property upon the writ and stating it is levied on for the purposes thereof.<sup>81</sup> The fact of the levy should not rest in the breast of the officer alone,<sup>82</sup> but should be embodied in some visible memorial.<sup>83</sup>

Generally the officer cannot enter into possession of real property, or in any manner interfere with or disturb the possession of the debtor,<sup>84</sup> nor is it necessary for him to go upon the real estate,<sup>85</sup> or that the property be within the view of the sheriff at the time of the levy,<sup>86</sup> or that he take possession or make an actual seizure,<sup>87</sup> as in

81. **U. S.**—United States *v.* Hess, 5 Saw. C. C. 533, 26 Fed. Cas. No. 15,358; *Armstrong v. Rickey*, 1 Fed. Cas. No. 546, under Ohio practice. **Ga.**—Keaton *v.* Farkas, 136 Ga. 188, 70 S. E. 1110; *Anderson v. Lee*, 53 Ga. 189; *Isam v. Hooks*, 46 Ga. 309. **Ky.**—Randall *v.* Ewell, 21 Ky. L. Rep. 1425, 55 S. W. 552. **Minn.**—Hutchins *v.* Carver Co., 16 Minn. 13. **N. C.**—Seawell *v.* Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722, the sheriff makes no seizure. **Ohio.** The Coal Co. *v.* First Nat. Bank, 55 Ohio St. 233, 251, 45 N. E. 630; *Morgan v. Kinney*, 38 Ohio St. 610. **Tex.** Vern. Sayle's Civ. Sts., 1914, art. 3739; *Redlick v. Williams*, 5 S. W. 375; *Sanger Bros. v. Trammell*, 66 Tex. 361, 1 S. W. 378; *Cavanaugh v. Peterson*, 47 Tex. 197; *Hancock v. Henderson*, 45 Tex. 479. **Wis.**—Hyman *v.* Landry, 135 Wis. 598, 116 N. W. 236.

[a] "No entry by an officer on real estate is necessary to constitute a levy. The officer may remain in his own office and not even go within view of the land: he need not seize upon any twig, turf, or other part thereof as symbolical of the whole. His indorsement upon the execution of a levy will constitute one to all intents and purposes." *Morgan v. Kinney*, 38 Ohio St. 610, quoting Gwynne on Sheriffs, 308.

**Indorsement is not the levy itself**, see *infra*, II, B, 4, i, (II).

[b] **In Rhode Island**, this indorsement is not essential although it is better to make an indorsement of the fact of levy. *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763.

82. *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300. Compare, *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763.

83. *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70; *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808.

**As to indorsement of levy**, see *infra*, II, B, 4, i.

84. *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70.

[a] **But in Kentucky** the officer may go to or upon the premises and make an actual levy and indorse that fact on the execution. *Leath v. De-weese*, 162 Ky. 227, 172 S. W. 516; *Jones v. Allen*, 88 Ky. 381, 10 Ky. L. Rep. 962, 11 S. W. 289; *McBurnie v. Overstreet*, 8 B. Mon. 300; *Demint v. Ringo's Admr.*, 5 Ky. L. Rep. 514.

**Effect of levy upon possession of debtor**, see *infra*, II, B, 4, s, (II).

85. **U. S.**—*Armstrong v. Rickey*, 1 Fed. Cas. No. 546. **Ark.**—Fenno *v.* Coulter, 14 Ark. 38. **Ky.**—See Central Nat. Bank *v.* Bailey, 5 Ky. Opin. 186. **Mo.**—Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575. **N. Y.**—*Rodgers v. Bonner*, 55 Barb. 9. **N. C.**—*Perry v. Hardison*, 99 N. C. 21, 5 S. E. 230; *Bland v. Whitfield*, 46 N. C. 122. **Ohio.** The Coal Co. *v.* First Nat. Bank, 55 Ohio St. 233, 251, 45 N. E. 630; *Morgan v. Kinney*, 38 Ohio St. 610. **R. I.** *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763. **S. C.**—*Martin v. Bowie*, 37 S. C. 102, 114, 15 S. E. 736. **Tenn.**—*Russell v. Stinson*, 3 Hayw. 1. **Tex.**—Vern. Sayle's Civ. Sts., 1914, art. 3739; *Sanger Bros. v. Trammell & Co.*, 66 Tex. 361, 1 S. W. 378; *Cavanaugh v. Peterson*, 47 Tex. 197; *Cundiff v. Teague*, 46 Tex. 475; *Hancock v. Henderson*, 45 Tex. 479. **Can.**—*Doe on the demise of Hazen v. Hazen*, 8 N. Brunsw. 87.

86. **U. S.**—*Armstrong v. Rickey*, 1 Fed. Cas. No. 546. **N. Y.**—*Rodgers v. Bonner*, 55 Barb. 9. **N. C.**—*Bland v. Whitfield*, 46 N. C. 122. **Pa.**—*Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154. **R. I.** *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763.

87. **U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268; *Armstrong v. Rickey*, 1 Fed. Cas. No. 546. **Cal.** *Smith v. Morse*, 2 Cal. 524. **Colo.** *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. **Ga.**—*Dorminey*

the case of a levy upon personal property. And he need make no vocal proclamation of the fact.<sup>88</sup> The levy by the sheriff may be made without leaving his office if he has the proper information.<sup>89</sup>

(D.) UNDER STATUTE. — Statutes prescribing the manner of levying upon real property differ somewhat.<sup>90</sup> It is provided by some that a levy shall be made by recording a copy of the writ and notice of levy,<sup>91</sup> or by appraisement, by sale or by extent.<sup>92</sup>

*v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Delooch & Wilcoxson v. Myrick*, 6 Ga. 410; *Ansley v. Wilson*, 50 Ga. 418, 423. **N. Y.** *Catlin v. Jackson*, 8 Johns. 520, 549. **N. C.**—*Perry v. Hardison*, 99 N. C. 21, 5 S. E. 230; *Bland v. Whitfield*, 46 N. C. 122. **Ohio.**—*Morgan v. Kinney*, 38 Ohio St. 610. **Pa.**—*Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154. **B. I.**—*Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763. **Tenn.** *Russell v. Stinson*, 3 Hayw. 1. **Tex.** *Cavanaugh v. Peterson*, 47 Tex. 197. **Wis.**—*Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236. **Can.**—*Doe on the demise of Hazen v. Hazen*, 8 N. Brunsw. 87.

88. *Rodgers v. Bonner*, 55 Barb. (N. Y.) 9.

89. **Colo.**—*Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. **N. C.**—*Bland v. Whitfield*, 46 N. C. 122. **Ohio.**—*Morgan v. Kinney*, 38 Ohio St. 610.

90. See the statutes.

91. See Cal. Code Civ. Proc., §688; *Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Mo. Rev. St.*, 1909, §2199.

[a] **In New York** (1) by filing with the county clerk a notice of the execution and levy and having the same recorded. *Code Civ. Proc.*, §1252. (2) No formal levy is required. *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595; *Van Gelder v. Van Gelder*, 26 Hun 556; *Wood v. Colvin*, 5 Hill 228.

[b] **In Vermont** the officer lodges "in the office where by law a deed of such real estate is required to be recorded, a certified copy of the execution, with a certificate thereon, under his hand, stating that he is directed to levy the same on such real estate." *Pub. St.*, 1906, §2172; *Bank of Newbury v. Baldwin*, 31 Vt. 311.

92. See the statutes.

[a] **In Maine**, (1) real estate which is attachable may be taken to satisfy

an execution by appraisement. *Me. Rev. Sts.*, 1903, ch. 78, §1; *Glidden v. Philbrick*, 56 Me. 222; *Jones v. Buck*, 54 Me. 301; *Howe v. Wildes*, 34 Me. 566; *Fitch v. Tyler*, 34 Me. 463; *Mansfield v. Jack*, 24 Me. 98. (2) No particular ceremony is required in seizing real estate on an execution by an officer. It is not essential that he should enter upon the land during any stay of the proceedings in the levy. *Fitch v. Tyler*, 34 Me. 463. (3) The statute requires him to give seisin and possession to the creditor or his attorney. "This formality is a necessary prerequisite to constitute a valid levy." *Bingham v. Smith*, 64 Me. 450.

[b] **In Massachusetts**, (1) under statute a "levy by sale" can only be made in case of rights to redeem mortgaged lands. *Mass. Rev. Laws*, 1902, pp. 1604, 1607; *Mansfield v. Dyer*, 133 Mass. 374; *Bell v. Walsh*, 130 Mass. 163; *Grover v. Flye*, 5 Allen 543. See also *Hackett v. Buck*, 128 Mass. 369. (2) Any interest in real estate which might, previous to the statute, have been levied on by extent, may under the statute be levied on by sale. *Bell v. Walsh*, 130 Mass. 163. (3) In all other cases the levy must be made by appraisement and setting off. *Bell v. Walsh*, 130 Mass. 163; *Grover v. Flye*, 5 Allen 543. See also *Cowles v. Dickinson*, 140 Mass. 373, 5 N. E. 302; *Woodward v. Sartwell*, 129 Mass. 210; *Dewey v. Tobey*, 126 Mass. 93; *Cowdrey v. Sheldon*, 122 Mass. 267; *Richardson v. Payne*, 114 Mass. 429; *Kinsman v. Warner*, 113 Mass. 347; *Brown v. Washington*, 110 Mass. 529; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182.

As to appraisements generally, see *infra*, I, B, 7.

[c] The mode of levying an execution, it seems, must be determined by the nature of the debtor's title at the time of the levy, not at the time of the attachment. *Freeman v. M'Gaw*, 15 Pick. (Mass.) 82.

In Louisiana, an actual taking into possession of immovable property is necessary to a valid seizure of it.<sup>93</sup>

**Statutes Directory.** — These statutes are sometimes held to be directory merely.<sup>94</sup>

Where the judgment is a lien on the realty the manner of levy is probably the same as where the judgment is not a lien,<sup>95</sup> unless regulated by statute.<sup>96</sup> No levy is required, however, in some jurisdictions where the judgment is a lien on the realty.<sup>97</sup>

(E.) ESTATE TO BE LEVIED ON. — A creditor must levy upon the whole estate which the defendant in execution has in the premises.<sup>98</sup>

[d] A levy by sale is made at the time of first giving the notice of sale. *Bell v. Walsh*, 130 Mass. 163.

[e] The requirement (1) that the officer give the creditor or the purchaser such momentary seisin as will enable him to bring an action therefor upon his own seisin (Mass. Rev. Laws, 1902, p. 1606, §20), applies only to levies upon land by extent. *Owen v. Neveau*, 128 Mass. 427; *Howe v. Bishop*, 3 Mete. (Mass.) 26. (2) A compliance with this statute may be presumed from a return that the sheriff extended the execution. *Atkins v. Bean*, 14 Mass. 404.

[f] **Treating Building as Personalty.** If a building is excluded from a levy on realty on the supposition that it is personal property when in fact it is a part of the realty, the levy is void. *Hemenway v. Cutler*, 51 Me. 407; *Jewett v. Whitney*, 51 Me. 233, *affirming* 43 Me. 242.

93. *Major v. Hewes*, 135 La. 354, 65 So. 487; *Pipkin v. Sheriff*, 36 La. Ann. 781; *Morgan v. Johnson*, 27 La. Ann. 539; *Gordon v. Gilfoil*, 27 La. Ann. 265; *Cronan v. Cochran*, 27 La. Ann. 120; *Corse v. Stafford*, 24 La. Ann. 262; *Leverich v. Toby*, 6 La. Ann. 462.

[a] The sheriff (1) must have the property in his own possession and under his control or in the possession and under the control of some person duly appointed by him. *Gordon v. Gilfoil*, 27 La. Ann. 265; *Williams v. Douglas*, 11 La. Ann. 632. (2) He is not required for the time being to proceed further and actually eject the occupant from the premises but the possession which he acquires is a legal possession nevertheless. *Major v. Hewes*, 135 La. 354, 65 So. 487.

[b] A seizure by giving notice of seizure merely is insufficient. *Morgan v. Johnson*, 27 La. Ann. 539.

[c] **Exception.**—In the parish of Orleans and perhaps Jefferson, the officer may make a valid seizure of immovable property by recording the seizure in the mortgage office. *Major v. Hewes*, 135 La. 354, 65 So. 487.

[d] **Where the land is leased** (1) or rented, the sheriff is not required or permitted to take the property into his custody. Due notice to the owner and judgment debtor is all that the law requires. *Pipkin v. Sheriff*, 36 La. Ann. 781. (2) The failure of the sheriff to collect the rents does not affect the seizure but it may render the sheriff liable therefor to the creditor. *Pipkin v. Sheriff*, 36 La. Ann. 781. See also *White, Richards & Co. v. Waggaman*, 36 La. Ann. 984.

[e] **Failure To Seize as Ground for Injunction.**—But the fact that the sheriff did not make an actual seizure is not ground for an injunction against the execution. *Lambeth v. Sentell*, 38 La. Ann. 691.

94. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

[a] **The purchaser may rely upon the presumption that the officer has duly performed the acts required of him.** *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441. Presumptions as to performance of officer's duty, see *infra*, II, B, 4, q.

95. *Cundiff v. Teague*, 46 Tex. 475; *Hancock v. Henderson*, 45 Tex. 479.

96. Minn. Rev. Laws, 1905, §4297.

97. **As to necessity for levy where judgment is a lien**, see *supra*, II, B, 4, b, (1).

[a] **The giving of notice of the sale of real property under execution is a sufficient levy where the judgment is a lien on the property to be sold.** *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56. 51 Pac. 195.

98. *Howe v. Blanden*, 21 Vt. 315.



He cannot carve out a less estate, leaving a reversion in the debtor.<sup>96</sup>

(F.) **LEVY UPON DEBTOR'S INTEREST.**—It is generally held that a levy, upon a defendant's right and interest in a designated piece of property without specifying the particular interest, is valid,<sup>1</sup> but some cases hold that the levy must be on the land, not the debtor's interest in it.<sup>2</sup> The levy should not include land in which the debtor has no interest.<sup>3</sup>

(G.) **BY METES AND BOUNDS.**—In some states, it is required that the levy be made by metes and bounds where the debtor is seized of real estate which cannot be divided without injury to the whole.<sup>4</sup> But where the subject-matter will not admit of a levy by metes and bounds, a levy upon an undivided proportion of the property is valid.<sup>5</sup>

99. *Howe v. Blanden*, 21 *Vt.* 315.

[a] Where a debtor had an estate in fee simple in an undivided half of certain premises, and an estate as tenant by the curtesy in the remainder, and the creditor levied upon a portion of the premises by metes and bounds, treating it as an estate by the curtesy, it was held, that the levy was void and passed no title, as against a creditor of the same debtor, who acquired title to the land by a subsequent valid levy. *Howe v. Blanden*, 21 *Vt.* 315.

1. *Ky.*—*Humphrey's Exr. v. Wade*, 84 *Ky.* 391, 1 *S. W.* 648; *Davis v. Dyer*, 29 *Ky. L. Rep.* 430, 93 *S. W.* 629; *Galot v. Pearce*, 18 *Ky. L. Rep.* 1004, 38 *S. W.* 892; *Brown v. Smith*, 7 *B. Mon.* 361. *Me.*—*Millett v. Blake*, 81 *Me.* 531, 18 *Atl.* 293, 10 *Am. St. Rep.* 275. *Md.*—*Balch v. Zentmeyer*, 11 *Gill & J.* 267. *Mo.*—*Parks v. Watson*, 29 *Mo.* 108. *Pa.*—*Conniff v. Doyle*, 8 *Phila.* 630. *Tenn.*—*Davis v. Goforth*, 1 *Lea* 31; *Swan's Lessee v. Parker*, 7 *Yerg.* 490, 27 *Am. Dec.* 522. *Tex.* *Smith v. Crosby*, 86 *Tex.* 15, 23 *S. W.* 10, 40 *Am. St. Rep.* 818, 4 *Tex. Civ. App.* 251, 22 *S. W.* 1042. *Wis.*—*Vilas v. Reynolds*, 6 *Wis.* 214.

[a] But compare, *Simms v. Phillips*, 51 *Ga.* 433, and *Rawson v. Lowell*, 34 *Me.* 201, holding a levy without specifying the debtor's interest is insufficient where others beside the defendant have an interest in the property levied on.

2. *Ga.*—*Williams v. Baynes*, 84 *Ga.* 116, 10 *S. E.* 541; *Whatley v. Newsum*, 10 *Ga.* 74. *Kan.*—*De Jarnette v. Verner*, 40 *Kan.* 224, 19 *Pac.* 666. *Vt.*—See *Hyde v. Barney*, 17 *Vt.* 280, 44 *Am. Dec.* 335; *Paine v. Webster*, 1 *Vt.* 101.

3. *Logan v. Hale*, 42 *Cal.* 645.

4. *Conn.*—*Beers v. Botsford*, 13 *Conn.* 146. *Me.*—*Hilton v. Hanson*, 18 *Me.* 397. *Mass.*—*Bartlet v. Harlow*, 12 *Mass.* 348, 7 *Am. Dec.* 76. *Vt.*—*Morgan v. Armington*, 33 *Vt.* 13; *Edwards v. Allen*, 27 *Vt.* 381; *Kimball, Jewett & Co. v. Smith*, 21 *Vt.* 449; *Sleeper v. Newbury Seminary*, 19 *Vt.* 451; *Paine v. Webster*, 1 *Vt.* 101.

[a] Where the judgment debtor has exclusive ownership of a parcel of land, a levy on an undivided portion of it is invalid. *Me.*—*Littlewood v. Wardwell*, 67 *Me.* 212; *Brown v. Clifford*, 38 *Me.* 210; *Merrill v. Burbank*, 23 *Me.* 538. *Mass.*—*Pickering v. Reynolds*, 111 *Mass.* 83. *Vt.*—*Morgan v. Armington*, 33 *Vt.* 13; *Edwards v. Allen*, 27 *Vt.* 381; *Sleeper v. Newbury Seminary*, 19 *Vt.* 451.

[b] But where several creditors simultaneously levy their separate executions upon the defendant's land each taking an undivided fraction thereof and all unitedly taking the whole, the levies are valid. *Littlewood v. Wardwell*, 67 *Me.* 212.

[c] A levy upon the estate of a tenant by curtesy may be made on the rents and profits instead of by metes and bounds. *Sturdivant v. Frothingham*, 10 *Me.* 100.

[d] The fact that a tract of land is laid off into town lots does not interfere with the right of the sheriff to levy upon it as a whole and treat it as one tract. *Conley v. Redwine*, 109 *Ga.* 640, 35 *S. E.* 92, 77 *Am. St. Rep.* 398.

5. *Conn.*—*Giddings v. Canfield*, 4 *Conn.* 482, 493. *Ga.*—See *Wallace v. Atlanta Medical College*, 52 *Ga.* 164. *Me.*—*Gregory v. Tozier*, 24 *Me.* 308;

(H.) EFFECT OF MISTAKE AS TO AMOUNT OF DEFENDANT'S INTEREST. A levy is not vitiated by an inaccurate description of the interest of the defendant in the property levied upon.<sup>6</sup> Thus although a levy is made as upon a greater interest in or upon a greater amount of property than is owned by the debtor, the levy is valid as to the interest or amount owned by him.<sup>7</sup>

(I.) ON PARTICULAR KINDS OF REALTY.—(1.) *Mortgaged Property.* A mortgaged estate may be levied upon in the same manner as if it were not encumbered.<sup>8</sup> In levying on an equity of redemption, the execution creditor may levy upon the equity of redemption itself *eo nomine*,<sup>9</sup> or he

Mansfield *v.* Jack, 24 Me. 98. **Vt.** Edwards *v.* Allen, 27 Vt. 381; Sleeper *v.* Newbury Seminary, 19 Vt. 451.

**Levy upon interest of tenant in common**, see *infra*, II, B, 4, g, (XI), (J), (2).

6. A levy upon common property as the sole property of a tenant in common is valid. See *infra*, II, B, 4, g, (XI), (J), (2).

**Levy upon mortgaged premises as unincumbered**, see *infra*, II, B, 4, g, (XI), (J), (1).

7. **Me.**—Virgie *v.* Stetson, 77 Me. 520, 1 Atl. 481; Swanton *v.* Crooker, 49 Me. 455; Howe *v.* Wildes, 34 Me. 566. **Mass.**—Pettee *v.* Peppard, 125 Mass. 66; Atkins *v.* Bean, 14 Mass. 404. **Mo.**—Barber Asphalt Pav. Co. *v.* Kiene, 99 Mo. App. 528, 74 S. W. 872. **N. H.**—Marston *v.* Stickney, 58 N. H. 609; Coos Bank *v.* Brooks, 2 N. H. 148.

But see Logan *v.* Hale, 42 Cal. 645.

[a] **Designating land (1) in a levy as so many acres** is merely descriptive and is no more than saying it is supposed to contain that many acres. Pemberton *v.* McRae, 75 N. C. 497. (2) If a levy be made upon one hundred acres, and the debtor have title to but fifty, the levy is good for the fifty. Atkins *v.* Bean, 14 Mass. 40.

8. **Me.**—Brown *v.* Snell, 46 Me. 490; Brown *v.* Clifford, 38 Me. 210; Bulard *v.* Hinkley, 6 Greenl. 289, 20 Am. Dec. 304. **Mass.**—Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302 (notwithstanding the statute authorizing the sale of the equity of redemption on execution); Pettee *v.* Peppard, 125 Mass. 66; Shepard *v.* Pratt, 15 Pick. 32; Litchfield *v.* Cudworth, 15 Pick. 23; White *v.* Bond, 16 Mass. 400. **N. H.** Hovey *v.* Bartlett, 34 N. H. 278.

[a] **The existence of the mortgage will not prevent the debtor's freehold estate and interest in the land from**

passing by the levy. Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302; Pettee *v.* Peppard, 125 Mass. 66; Shepard *v.* Pratt, 15 Pick. (Mass.) 32; Hovey *v.* Bartlett, 34 N. H. 278.

[b] **If the mortgagee is not entitled to possession**, the creditor will obtain by the levy the legal seisin, and actual occupation and the right to take the profits until the mortgagee enters. Shepard *v.* Pratt, 15 Pick. (Mass.) 32. See Bayne *v.* Patterson, 40 Mich. 658, holding that a levy upon mortgaged property is in law only a levy upon the right of redemption.

[c] **The levy where the mortgage covers several tracts of land** is made in the same manner as where the mortgage is upon a single piece of land. The creditor cannot select one or more of the tracts sufficient to satisfy his execution. Beers *v.* Botsford, 13 Conn. 146.

[d] **The amount of the mortgage must be stated in the levy by virtue of statute.** Swift *v.* Dean, 11 Vt. 323, 34 Am. Dec. 693; Collins *v.* Gibson, 5 Vt. 243.

9. Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652; Ebelharr *v.* Tennelly, 118 Ky. 43, 80 S. W. 459.

[a] **Incidents of Levy Upon Land and Upon the Equity Itself.**—If the levy is restricted to the equity of redemption, "the purchaser acquires no greater interest, than specially defined in the levy. He is estopped to dispute the validity of the incumbrance; and if in fact there is no mortgage, though supposed and believed, there is no equity of redemption, and no interest passes by the levy and sale; he cannot take the entire estate unincumbered. But if he desires to contest the validity of the incumbrance, because it has been removed by payment and satisfaction, or otherwise, or because fraudulent, or on any other

may levy upon the land of the debtor which is mortgaged.<sup>10</sup> Where the debt is not sufficiently great to swallow up the whole equity of redemption, the levy upon the equity *eo nomine* must be made on an undivided part in such proportion as the sum of the execution and costs bear to the value of the equity,<sup>11</sup> and this may be done even where the debt is greater than the equity of redemption.<sup>12</sup>

(2.) *Interest of Tenant in Common.*—A creditor of a tenant in common cannot levy on a part of the whole property by metes and bounds, or

sufficient ground, he may cause his execution to be levied on the land, and a sale thereunder will pass whatever interest the defendant may have—the equity of redemption, if there be a valid existing mortgage, the purchaser being subrogated to the rights of the mortgagor. The purchaser acquires all the estate of the defendant in execution, legal or equitable, subject to levy and sale; the greater includes the less.” *Gassenheimer v. Molton*, 80 Ala. 521, 2 So. 652. To same effect, *Me.*—*Brown v. Snell*, 46 Me. 490. *Mass.*—*Cowles v. Dickinson*, 140 Mass. 373, 5 N. E. 302; *Russell v. Dudley*, 3 Met. 147. *N. H.*—*Bartlett v. Gilcreast*, 72 N. H. 145, 55 Atl. 189.

[b] *There Must Be a Mortgage.* Where the levy is by sale of the equity of redemption, it is necessary that the land be subject to a mortgage, or the sale is void. *Mansfield v. Dyer*, 133 Mass. 374; *Hackett v. Buck*, 128 Mass. 369; *Grover v. Flye*, 5 Allen (Mass.) 543; *Forster v. Mellen*, 10 Mass. 421.

[c] *Sufficient Levy.*—A levy of execution upon an equity of redemption is good, when described as all the debtor's equity of redemption in the premises, stating also the nature and amount of the incumbrance, if the execution cannot be satisfied with less than the whole of such equity of redemption. *Collins & Hanney v. Gibson & Sargeant*, 5 Vt. 243.

[d] *In Massachusetts*, rights of redeeming mortgaged real estate, if the creditor prefer it, may be levied by sale instead of by appraisal and set-off. *Mansfield v. Dyer*, 133 Mass. 374; *Bell v. Walsh*, 130 Mass. 163; *Grover v. Flye*, 5 Allen 543; *Russell v. Dudley*, 3 Met. 147.

10. *Ala.*—*Gassenheimer v. Molton*, 80 Ala. 521, 2 So. 652. *Mass.*—*Cowles v. Dickinson*, 140 Mass. 373, 5 N. E. 302; *Shepard v. Pratt*, 175 Pick. 32; *White v. Bond*, 16 Mass. 400. *N. H.*

*Coos Bank v. Brooks*, 2 N. H. 148. *Vt.*—*Perrin v. Reed*, 35 Vt. 2, holding a levy upon the real estate without noticing the mortgage is a matter of which the debtor cannot complain. And compare, *Bell v. Roberts*, 13 Vt. 582, holding such a levy defective in substance.

[a] *Dependent Upon State of Title.* The manner of levy, whether on the equity of redemption or upon the land by appraisal depends upon the state of the debtor's title at the time of levy. *Bagley v. Bailey*, 16 Me. 151; *Freeman v. McGaw*, 15 Pick. (Mass.) 82.

[b] *Where the legal title is in the mortgagee* a levy on the land is ineffectual; it must be on the equity of redemption. *Scripture v. Johnson*, 3 Conn. 211.

[c] *By Extending Execution Over Whole Estate.*—An equity of redemption as such cannot be taken by extending the execution upon the whole estate by an appraisal of its full value. *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23. Compare, *Pettee v. Peppard*, 125 Mass. 66, where a levy was upon several tracts some of which were mortgaged.

11. *Beers v. Botsford*, 13 Conn. 146; *Sumner v. Lyon*, 7 Conn. 281; *Hobart v. Frisbie*, 5 Conn. 592; *Swift v. Dean*, 11 Vt. 323, 34 Am. Dec. 693; *Collins v. Gibson*, 5 Vt. 243.

[a] *By Metes and Bounds.*—A levy on a part of the equity described by metes and bounds is void. *Kimball, Jewett & Co. v. Smith*, 21 Vt. 449; *Swift v. Dean*, 11 Vt. 323, 34 Am. Dec. 693.

[b] A levy upon “one undivided 12956-21900th part” of an equity of redemption “subject to the B. levy” is not void for uncertainty. *Ross v. Shurtleff*, 55 Vt. 177.

12. *Kimball, Jewett & Co. v. Smith*, 21 Vt. 449.



on an undivided interest in a part of the tract.<sup>13</sup> But such a levy is not wholly void.<sup>14</sup> It is valid as against the defendant,<sup>15</sup> but voidable at the election of the other tenant.<sup>16</sup> A levy should be made upon a certain undivided portion of the whole of the land held in common.<sup>17</sup> If the debt is less than the tenant's interest, the levy must be upon such an undivided part of the whole premises as the amount of the execution and costs bear to the value of the whole premises.<sup>18</sup> The procedure with respect to a levy on such estates is sometimes regulated by statute.<sup>19</sup>

(3.) *Life Estate*.—A levy of an execution in the manner prescribed for taking real estate is sufficient in levying upon an estate for life.<sup>20</sup>

(4.) *Remainder*.—A vested estate in remainder in land may be levied upon by a levy upon the defendant's interest in the land.<sup>21</sup>

13. Conn.—*Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268; *Hinman v. Leavenworth*, 2 Conn. 244, note. Me.—*Staniford v. Fullerton*, 18 Me. 229. Mass.—*Peabody v. Minot*, 24 Pick. 329; *Blossom v. Brightman*, 21 Pick. 283; *Baldwin v. Whiting*, 13 Mass. 57; *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87; *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76. Tenn.—*Earles v. Meaders*, 1 Baxt. 248. Vt.—*Bell v. Roberts*, 13 Vt. 582; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614.

As to levy by metes and bounds, see *supra*, II, B, 4, g, (XI), (H).

14. *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Howe v. Blanden*, 21 Vt. 315.

15. Me.—*Godwin v. Gregg*, 28 Me. 188, 48 Am. Dec. 489. Mass.—*Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87. Vt.—*Howe v. Blanden*, 21 Vt. 315.

16. Me.—*Godwin v. Gregg*, 28 Me. 188, 48 Am. Dec. 489. Mass.—*Baldwin v. Whiting*, 13 Mass. 57; *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87. Vt.—*Howe v. Blanden*, 21 Vt. 315; *Galusha v. Sinclear*, 3 Vt. 394.

17. Conn.—*Fish v. Sawyer*, 11 Conn. 545; *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268; *Hinman v. Leavenworth*, 2 Conn. 244, note. Me.—See *Gregory v. Tozier*, 24 Me. 308. See *Rawson v. Clark*, 38 Me. 223, holding that if the judgment debtor is owner in common of one undivided half of an estate in reversion, a levy by his creditor upon one undivided third is valid. Mass.—*Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76. N. H.—*Martin v. Colleston*, 38 N. H. 455. Vt.—*Galusha v. Sinclear*, 3 Vt. 394.

[a] **Must Specify Interest**.—The levy on an undivided part of a debtor's interest in an estate held jointly with others must specify what interest the debtor held. *Rawson v. Lowell*, 34 Me. 201.

[b] **Where there are two or more distinct tracts** held by the debtor as tenant in common by distinct titles, the creditor must levy upon the whole of the debtor's right in one tract before he takes any portion of another. *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268.

[c] **A partition** before a levy is not required. *Braden v. Gose*, 57 Tex. 37.

[d] **If a levy is made upon the whole** of the common property as the sole property of a tenant in common, the levy is valid as against the defendant's interest. *Glidden v. Philbrick*, 56 Me. 222; *Swanton v. Crooker*, 49 Me. 455; *Atkins v. Bean*, 14 Mass. 404.

18. Conn.—*Hinman v. Leavenworth*, 2 Conn. 244, note. Me.—*Brown v. Clifford*, 38 Me. 210. Vt.—*Galusha v. Sinclear*, 3 Vt. 394.

19. *Payne v. Pollard*, 3 Bush (Ky.) 127.

20. *Chapman v. Gray*, 15 Mass. 439. As to manner of levying upon real estate, see *supra*, II, B, 5, g, (XI).

[a] **An execution against a tenant by courtesy** may be extended on the land by metes and bounds, or on the rents and profits. *Roberts v. Whiting*, 16 Mass. 186; *Barber v. Root*, 10 Mass. 260.

21. *Davis v. Goforth*, 1 Lea (Tenn.) 31, *disapproving* headnote in *Kissom v. Nelson*, 2 Heisk. (Tenn.) 4. And see *Kelly v. Morgan's Lessee*, 3 Yerg. (Tenn.) 437.

(XII.) Growing Crops. — In levying upon growing crops, manual possession by the officer is impossible and is not necessary even as to intervening purchasers and creditors.<sup>22</sup> But as to just what acts will constitute a valid and effectual levy, the cases are not clear. Some jurisdictions have statutes regulating the manner of levy.<sup>23</sup> In the absence of statute it has been held that it is only necessary that the officer go to the premises and there do some open and unequivocal act which as nearly as practicable amounts to a seizure, and indorse the levy on the writ.<sup>24</sup> But some action on the premises seems to be essential,<sup>25</sup> though it has been held that a proper notification to the party and an indorsement of the levy is sufficient.<sup>26</sup> Witnesses to the levy are not absolutely necessary.<sup>27</sup> The rule requiring the officer to

22. Haw.—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. Ill.—*Godfrey v. Brown*, 86 Ill. 454; *Ticknor v. McClelland*, 84 Ill. 471; *McGirr v. Hunter*, 13 Ill. App. 195. Ia.—*Barr v. Cannon*, 69 Iowa 20, 28 N. W. 413. Kan.—*National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047. Mo.—*Bilby v. Hartman*, 29 Mo. App. 125. Neb.—*Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639. N. Y. *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442.

[a] Upon a levy upon an unsevered crop, the officer must either take possession of the land to gather the crop or sell it ungathered. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725.

As to the right to levy on growing crops, see *supra*, II, B, 4, g, (XII).

23. *Howard v. Rugland*, 35 Minn. 388, 29 N. W. 63, by filing a copy of the execution and return with the town clerk.

24. Haw.—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. Ill.—See *Godfrey v. Brown*, 86 Ill. 454, where the officer exercised acts of dominion over the corn and all parties treated it as being in his possession. Kan. *National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047.

[a] It is a sufficient levy upon a field of standing corn for the officer to go to the neighborhood of the corn, read the execution to one of the defendants and tell him that he intended to levy on the corn, go to the cornfield with a witness and post at a public corner of the field a notice of levy and then indorse the levy on the writ. *National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047.

[b] Where a sheriff levied an execu-

tion on standing corn by going into the field for that purpose and notifying persons interested that he made a levy, the levy is valid. *Barr v. Cannon*, 69 Iowa 20, 28 N. W. 413.

[c] The least that an officer levying on a growing crop can do is to go on the premises and there announce that he seizes the same by virtue of his writ. *State v. Poor*, 20 N. C. 384, 34 Am. Dec. 387, followed in *Long v. Hall*, 97 N. C. 286, 2 S. E. 229.

[d] He must notify all present at the time of the levy. *Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639.

[e] Levy on growing crops should be by some notorious act as by going upon property and making endorsements in the presence of a witness, though a witness not absolutely necessary. *Bilby v. Hartman*, 29 Mo. App. 125.

25. *Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745; *Cupples v. Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519. See also cases in preceding note.

[a] Where the officer merely read the writ to the defendant and posted the usual notices of sale in public places, but did not go to the premises nor indorse the writ until the sale, there is not a sufficient levy upon a crop of sugar cane. *Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. See also *Cupples v. Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519.

26. *Wilson v. Fowler*, 88 Md. 601, 609, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. Rep. 452. See also *Pierce v. Roche*, 40 Ill. 292.

27. *Bilby v. Hartman*, 29 Mo. App. 125.

[a] But a prudent officer will call in some one or more of the neighbor-

do some act which would render him liable as a trespasser but for the writ does not apply.<sup>28</sup> The sheriff may retain possession by pursuing such a course as owners usually take to retain possession.<sup>29</sup> It is not necessary that a guard be stationed or kept over the field,<sup>30</sup> and it is not required that the officer shall, after the crop matures, harvest and remove it so as to bring it into his possession.<sup>31</sup>

(XIII.) **Fixtures.**—While fixtures which are removable as personalty may of course be levied upon as such, it has been held that if they are trade fixtures, placed on the premises under a lease which still continues, they should not be severed from the realty by the levying officer if to do so would destroy or greatly decrease their value when left upon the premises and levied upon and sold with the lease.<sup>32</sup> A levy upon the realty alone does not cover fixtures which are not part of the realty.<sup>33</sup> Actual possession by the officer is not essential to a levy upon ponderous fixtures not readily susceptible of removal.<sup>34</sup>

(XIV.) **Levy on Property Already Levied on.**—(A.) **BY SAME OFFICER.** Where a sheriff has taken property by virtue of an attachment in the case,<sup>35</sup> or by virtue of a writ of execution against the defendant in

hood to witness the levy and endorse that fact on the writ. *Davidson v. Waldron*, 31 Ill. 120, 130, 83 Am. Dec. 206.

28. *National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047; *Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639.

29. *Barr v. Cannon*, 69 Iowa 20, 28 N. W. 413.

30. *Barr v. Cannon*, 69 Iowa 20, 28 N. W. 413; *National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1074.

31. *Bilby v. Hartman*, 29 Mo. App. 125.

32. *Steers v. Daniel*, 2 Flip. 310, 4 Fed. 587, 598.

33. *Hopke v. Lindsay*, 83 Mo. App. 85.

34. *Steers v. Daniel*, 2 Flip. 310, 4 Fed. 587, 598.

[a] **To keep alive a levy on the lessee's interest in the fixtures which cannot be removed without much labor and expense, it is not necessary that the officer retain actual possession.** *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. ed. 141.

35. *Cal.*—See *McFall v. Buckeye, etc. Assn.*, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195. *Ill.*—*Union Nat. Bank v. Byram*, 131 Ill. 92, 102, 22 N. E. 842. *Mo.*—*Smith ex rel. McElhaney v. Rogers*, 99 Mo. App. 252, 73 S. W. 243.

*Vt.*—*Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312; *Bliss v. Stevens*, 4 Vt. 88; *Enos v. Brown*, 1 D. Chip. 280.

[a] But see *Bank of Santa Fe v. Haskell Co. Bank*, 59 Kan. 354, 53 Pac. 132, where the receipt of the execution and an indorsement by the officer that he found no property liable to satisfy the judgment, was held not a constructive levy upon personal property in the officer's custody by virtue of a previous attachment.

[b] **Where stock in a corporation has been attached, no levy beyond giving a notice of sale is necessary.** *McFall v. Buckeye Grangers' W. Assn.*, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47. See also *Union Nat. Bank v. Byram*, 131 Ill. 92, 102, 22 N. E. 842.

**As to necessity for levy where property has been attached, see *supra*, II, B, 4, b, (I).**

[c] **Where Property Is With "Custodian."**—Where property seized under an attachment is placed in the hands of a custodian provided by statute, it is in the actual possession of the custodian and the constructive possession of the officer. When an execution comes into the hands of the officer, it is not enough that he makes a mere memorandum of the property, it not being present, with intent to attach it, but he should go to the custodian and there, in sight of the property, make the levy, indorse it on the writ, and notify the custodian of his act. *Chittenden v. Rogers*, 42 Ill. 100.



favor of another creditor,<sup>36</sup> no overt act is necessary to constitute a levy; the receipt of the execution to be levied will constitute a constructive seizure of the property held by the first writ. If, however, the first levy was ineffective or has been abandoned, the second writ should be levied as though there had been no prior levy.<sup>37</sup> Such would be the rule also if the property taken under the first writ has been taken from the officer by legal process.<sup>38</sup>

(B.) BY A DIFFERENT OFFICER. — A levy upon property in the hands of one officer under judicial process, by another officer holding a writ of execution, where allowed, will be at most constructive in nature.<sup>39</sup> The levy may be made sub modo by notifying the officer in possession that the additional levy has been made,<sup>40</sup> or by going where the

36. **Ill.**—*Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Field v. Macullar*, 20 Ill. App. 392; *Goodheart v. Bowen*, 2 Ill. App. 578. **Ind.**—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. **La.** *Patterson v. Spaulding*, 5 La. Ann. 171. **Mass.**—*Turner v. Austin*, 16 Mass. 181. **Miss.**—*Cahn v. Person*, 56 Miss. 360. **Mo.**—*Patterson v. Stevenson*, 77 Mo. 329; *State v. Doan*, 39 Mo. 44; *Smith v. Rogers*, 99 Mo. App. 252, 73 S. W. 243; *State v. Curran*, 45 Mo. App. 142. **N. J.**—*Millville National Bank v. Shaw*, 42 N. J. L. 550; *Lloyd v. Wyck-off*, 11 N. J. L. 218, 236. **N. Y.**—*Wehle v. Conner*, 83 N. Y. 231; *Ryder v. Gilbert*, 16 Hun 163; *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Slade v. Van Vechten*, 11 Paige 21; *Cresson v. Stout*, 17 Johns. 116; *Van Winkle v. Udall*, 1 Hill 559. **N. C.**—*Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38. **Ohio.**—*Ryan v. Root & McBride Bros.*, 56 Ohio St. 302, 47 N. E. 51; *Murphy & Bro. v. Swadener*, 33 Ohio St. 85. **Pa.**—*Winegardner v. Hafer*, 15 Pa. 144; *Wattmough v. Francis*, 7 Pa. 206. **Vt.** *Bliss v. Stevens*, 4 Vt. 88. **Wash.** *Meacham Arms Co. v. Strong, Hackett & Co.*, 3 Wash. Ter. 61, 13 Pac. 245. **Eng.**—*Sawle v. Poynter*, 1 Dowl. & R. 307.

**Duty of officer in levying several writs in his hands**, see *supra*, II, B, 4, e, (VI).

[a] **Where the first execution is dormant**, the rule that the second levy need not be made is nevertheless applicable. *Peck v. Tiffany*, 2 N. Y. 451.

[b] **Notwithstanding the removal of the property to another state after the first levy and before delivery of the second execution to the sheriff**, the

property being allowed to remain there till after the return day of the second execution. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

[c] **In the Hands of Different Deputies.**—A levy on a fieri facias by a deputy of a sheriff is a constructive levy on the same property of a subsequent fieri facias delivered to another deputy of the same sheriff. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

37. **Ky.**—*Tucker v. Helm*, 7 Ky. Opin. 205. **N. Y.**—*Bank of Lansingburgh v. Crary*, 1 Barb. 542. **N. C.** *Brazier v. Thomas*, 44 N. C. 28. **Ohio.** *Murphy v. Swadener*, 33 Ohio St. 85. **Vt.**—*Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312.

38. *Merrill v. Wedgwood*, 25 Neb. 283, 41 N. W. 149.

39. *Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

[a] **Where Bond Is Given To Try Title.**—When an execution has been levied on property and a bond given to try the right thereto in conformity with statute, a second levy under a junior execution cannot be made upon the same property before the claim is disposed of. *McLemore v. Benbow*, 19 Ala. 76, on the authority of *Langdon & Co. v. Brumby*, 7 Ala. 53, and *Kemp & Buckley v. Porter*, 7 Ala. 138.

[b] **Where property has been attached by one officer and the execution is delivered to another officer**, the property attached is not charged in execution without a demand for the property of the attaching officer. *Blodgett v. Adams*, 24 Vt. 23; *Collins v. Smith*, 16 Vt. 9; *Ayer v. Jameson*, 9 Vt. 363; *Clark v. Washburn*, 9 Vt. 302.

40. *Daniels v. Solomon*, 11 App. Cas. (D. C.) 163, 172; *Patterson v. Steven-*

property is and making an indorsement upon the execution.<sup>41</sup> A levy may sometimes be made by agreement between the officers or by consent of the first officer.<sup>42</sup> The second officer has no right to touch the property,<sup>43</sup> or take it out of the hands of the officer who has already levied upon it,<sup>44</sup> and he acquires only a right to the property after the first execution is satisfied.<sup>45</sup>

**h. Amount of Property To Be Levied on. — (I.) Where Execution Is General. — (A.) IN GENERAL.**<sup>46</sup> — The officer levying a general writ of execution is required to levy upon property sufficient to satisfy the execution,<sup>47</sup> but the officer is not bound to take exactly enough prop-

son, 77 Mo. 329; *Allen v. Davis*, 53 Mo. App. 15; *State v. Curran*, 45 Mo. App. 142, 149.

41. *Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38; *Bland v. Whitfield*, 46 N. C. 122; *Doe ex dem. Brazier v. Thomas*, 44 N. C. 28.

[a] There is no levy under the second execution where the officer did not endorse the levies on the execution or reduce them to writing. *Doe ex dem. Brazier v. Thomas*, 44 N. C. 28.

42. *Tyler Davidson & Co. v. Kuhn*, 1 Disney 405, 12 Ohio Dec. 699; *Benedict v. Deckand*, 4 Ohio Dec. (Reprint) 163, 1 Clev. L. Rep. 83.

[a] **Levy by Sheriff by Agreement With Constable.**—Where a constable has seized property by the levy of a justice's execution, the sheriff may, by agreement with the constable, make a valid levy of a court execution against the common debtor on the same property, in subordination of the first. *Tyler v. Dunton*, 1 Coop. Ch. (Tenn.) 261.

[b] **Levy by Constable by Agreement With Sheriff.**—But in *Townsend & Co. v. Corning*, 40 Ohio St. 335, a sheriff who made a levy promised a constable that he would hold the balance above the amount necessary to satisfy his executions for the constable. The constable copied the inventory made by the sheriff and made it part of his return. Subsequently the sheriff received another execution and made a levy upon the goods in his hands. It was held the constable's levy was void and the promise of the sheriff gave it no effect.

43. *Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38; *Bland v. Whitfield*, 46 N. C. 122.

44. **III.**—*Leach v. Pine*, 41 Ill. 65, 69 Am. Dec. 375; *White v. Cutler*, 12

Ill. App. 38. **Mo.**—*Allen v. Davis*, 53 Mo. App. 15; *State v. Curran*, 45 Mo. App. 142. **N. C.**—*Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

45. **Mo.**—*Allen v. Davis*, 53 Mo. App. 15; *State v. Curran*, 45 Mo. App. 142. **N. C.**—*Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38; *Bland v. Whitfield*, 46 N. C. 122. **Ohio.**—*Tyler Davidson & Co. v. Kuhn*, 1 Disney 405, 12 Ohio Dec. 699.

46. **As to officer's duty to make equal portions out of several joint execution defendants**, see *supra*, II, B, 4, e, (V).

47. **Ala.**—*Governor v. Powell*, 9 Ala. 83; *Powell v. Governor*, 9 Ala. 36; *Levens v. State*, 3 Ala. App. 45, 57 So. 497. **Ark.**—*Fenno v. Coulter*, 14 Ark. 38; *Whiting & Slark v. Beebe*, 12 Ark. 421, 542; *Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. **Cal.**—*Code Civ. Proc.*, §691. **Conn.**—*Sumner v. Lyon*, 7 Conn. 281; *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268. **Ga.**—*Landrum v. Broadwell*, 110 Ga. 538, 35 S. E. 638; *Barfield v. Barfield*, 77 Ga. 83; *Wallace v. Atlanta Medical College*, 52 Ga. 164. **Ind.**—*Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23. **Ia.**—*Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Cook v. Jenkins & Co.*, 30 Iowa 452. **Ky.**—*Com. v. Lightfoot*, 7 B. Mon. 298. **Me.**—*Boyd v. Page*, 30 Me. 460. See *Pierce v. Strickland*, 26 Me. 277, 292. **Neb.**—*Runge v. Brown*, 29 Neb. 116, 45 N. W. 271. **N. H.**—*Bartlett v. Gilreast*, 72 N. H. 145, 55 Atl. 189. **N. M.**—*Bachelor Bros. v. Chaves*, 5 N. M. 562, 25 Pac. 783. **Tenn.**—*Tyler v. Dunton*, 1 Coop. Ch. 361. **Tex.**—*Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[a] **No more can be levied by an execution, on a judgment upon a bond,**

erty and no more, as a general rule.<sup>48</sup> It is the duty of an officer to levy on property sufficient to make the debt in his hands amply secure against all probable contingencies,<sup>49</sup> but he should not make a levy that is extravagant or oppressive,<sup>50</sup> nor on the other hand, one that is insufficient.<sup>51</sup>

**Illegal Fees.** — A levy in which illegal fees have been included is not invalid on that account merely.<sup>52</sup>

**Mortgaged property** should, where possible, be levied upon as a whole.<sup>53</sup>

than the sum due on the condition and costs. *Bergen v. Boerum*, 2 Caines (N. Y.) 256.

[b] **Where Endorsement and Amount Named in Body Vary.**—A sheriff in executing a writ of fieri facias is to be governed in the amount to be levied by the sum endorsed on the back of the writ, not that named in the body which is often nominal. *Com. v. McCoy*, 8 Watts (Pa.) 153, 34 Am. Dec. 445.

48. **Ark.**—*Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. **Conn.**—*Marcy v. Kinney*, 9 Conn. 394. **Ga.**—*Hunt v. Lavender*, 140 Ga. 157, 78 S. E. 805; *Landrum v. Broadwell*, 110 Ga. 538, 35 S. E. 638; *Allagood v. Cook*, 92 Ga. 570, 17 S. E. 920. **Tex.**—*Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

But compare, *Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690; *Thayer v. Mayo*, 34 Me. 139; *Chenery v. Stevens*, 97 Mass. 77; *Pickett v. Breckenridge*, 22 Pick. (Mass.) 297.

49. **Ia.**—*Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Cook v. Jenkins & Co.*, 30 Iowa 452. **Nev.**—*Rev. Laws*, 1912, §5289. **Tenn.**—*Brown v. Allen*, 3 Head 429.

[a] **The officer should levy on such property and in such quantities** as will be likely to bring the exact amount required to be raised as nearly as practicable. *N. D. Rev. Code*, 1905, §7110; *S. D. Code Civ. Proc.*, 1910, ch. 13, §339.

50. **Ala.**—*Governor v. Powell*, 9 Ala. 83; *Powell v. Governor*, 9 Ala. 36; *Levens v. State*, 3 Ala. App. 45, 57 So. 497. **Ga.**—*Thompson v. Selcer*, 142 Ga. 809, 83 S. E. 965; *Landrum v. Broadwell*, 110 Ga. 538, 35 S. E. 638; *Forbes v. Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. Rep. 152. **Ill.**—*French v. Snyder*, 30 Ill. 339, 33 Am. Dec. 193. **Ind.**—*Drake v. Murphy*, 42 Ind. 82

(holding levy not excessive); *Jarratt v. Gwathmey*, 5 Blackf. 237. **Ia.**—*Mullaney v. Cutting*, 154 N. W. 893. **Kan.**—*Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. **Ky.**—*Com. v. Lightfoot*, 7 B. Mon. 298. **La.**—*Lambeth v. Sentell*, 38 La. Ann. 691. **Mich.**—*Handy v. Sheriff*, 50 Mich. 355, 15 N. W. 507; *Campau v. Godfrey*, 18 Mich. 27, 44, 10 Am. Dec. 133. **Minn.**—*Sharvy v. Cash*, 66 Minn. 200, 68 N. W. 1070. **Mo.**—*Silver v. McNeil*, 52 Mo. 513. **N. H.**—*Moore v. Kidder*, 58 N. H. 115. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218. **Ohio.**—*Pugh v. Calloway*, 10 Ohio St. 488. **Tenn.**—*Brien v. Robinson*, 102 Tenn. 157, 52 S. W. 802. **Tex.**—*Dewitt v. Oppenheimer*, 51 Tex. 103; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[a] **Excessive Levy.**—In levying an execution an officer has no right to seize, and hold the whole of the debtor's property to satisfy a debt, which, even if all exemptions were allowed, would be more than secured by the remainder; and if he thereby preclude the debtor from engaging in his customary business, and even from keeping house, his action is oppressive and unjustifiable. *Handy v. Clippert*, 50 Mich. 355, 15 N. W. 507.

51. **Ala.**—*Governor v. Powell*, 9 Ala. 83. **Ark.**—*Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218. **S. C.**—*Collins v. Montgomery*, 2 Nott. & M. 392. **Tex.**—*Dewitt v. Oppenheimer & Co.*, 51 Tex. 103; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

52. *Wilson v. Gannon*, 54 Me. 384; *Sturdivant v. Frothingham*, 10 Me. 100.

53. *Baldwin v. Talbot*, 46 Mich. 19, 8 N. W. 565. See *Harvey v. McAdams*, 32 Mich. 472.

[a] But in the absence of any finding indicating that the mortgagee's



(B.) DETERMINATION OF AMOUNT OF LEVY. — In determining what is a sufficient levy, the officer is left to his own reasonable judgment and discretion, free from the restraint or control of the plaintiff or defendant.<sup>54</sup> In the performance of his duty the officer must keep in view the purpose of the writ,<sup>55</sup> the security and satisfaction of the plaintiff's debt,<sup>56</sup> and he must avoid all acts of oppression toward the defendant.<sup>57</sup> The propriety of the officer's action is determined by the peculiar facts and circumstances of each particular case.<sup>58</sup> A levy is not excessive where the sale is insufficient to satisfy the execution.<sup>59</sup>

In determining the amount of property necessary to be levied upon, it is necessary to take into account the probable sacrifice to which the property would be subjected at a public sale,<sup>60</sup> and to make allowance for incumbrances and lien,<sup>61</sup> for depreciation naturally incident to the

interests are jeopardized by a failure to seize all the mortgaged property, a levy on a part is valid. *Galde v. Forsyth*, 72 Minn. 248, 75 N. W. 219.

54. **U. S.**—*Buck v. Colbath*, 3 Wall. 334, 344, 18 L. ed. 257. **Ala.**—Governor v. Powell, 9 Ala. 83; *Levens v. State*, 3 Ala. App. 45, 57 So. 497. **Ark.**—*Lawson v. State*, 10 Ark. 28, 50 Am. Dec. 238. **Conn.**—*Marcy v. Kinney*, 9 Conn. 394. **Ga.**—*Barfield v. Barfield*, 77 Ga. 83. **Ky.**—*Com. v. Lightfoot*, 7 B. Mon. 298. **Tex.**—*De Witt v. Oppenheimer & Co.*, 51 Tex. 103; *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309; *Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[a] The officer must exercise a prudent, reasonable and cautious discretion. He is to be governed by the rules influencing the conduct of discreet and prudent men in the management of their own affairs. **Ill.**—*French v. Snyder*, 30 Ill. 339. **Ky.**—*Com. v. Lightfoot*, 7 B. Mon. 298. **Tex.**—*Dewitt v. Oppenheimer & Co.*, 51 Tex. 103; *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[b] The officer should act fairly with a due regard to the rights of the debtor and the convenience of the creditor, keeping in mind, that the motives which influenced him, and the tendency of his conduct may all be investigated by a jury. *Marcy v. Kinney*, 9 Conn. 394.

55. *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

56. **Com. v. Lightfoot, 7 B. Mon. (Ky.) 298; *Fatheree v. Williams*, 13**

Tex. Civ. App. 430, 35 S. W. 324.

57. **Com. v. Lightfoot**, 7 B. Mon. (Ky.) 298; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

58. *De Witt v. Oppenheimer & Co.*, 51 Tex. 103; *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309; *Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

[a] The mere fact that the value of land is considerably more than the amount of the execution does not render the levy void. The land may be incapable of subdivision or such that it can be levied on only in its entirety. *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97.

[b] Where land is sold as the property of a tenant for life, the value of the life estate, not of the fee, is the test of an excessive levy. *Clower v. Fleming*, 81 Ga. 247, 7 S. E. 278.

59. *Ingram v. Belk*, 2 Strobb. (S. C.) 207, 47 Am. Dec. 591.

60. **Ala.**—Governor v. Powell, 9 Ala. 83; *Levens v. State*, 3 Ala. App. 45, 57 So. 497. **Ill.**—*French v. Snyder*, 30 Ill. 339; *Mills v. Larrance*, 111 Ill. App. 140, 141. **Ky.**—*Com. v. Lightfoot*, 7 B. Mon. 298. **Tex.**—*Atcheson v. Hutchison*, 51 Tex. 223; *Dewitt v. Oppenheimer & Co.*, 51 Tex. 103; *Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

61. **Ala.**—Governor v. Powell, 9 Ala. 83, query whether sheriff is bound to examine the record. **Ga.**—*Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97; *Mullings v. Bothwell*, 29 Ga. 706. **La.**—*Hefner v. Hesse & Vergez*, 29 La. Ann. 149.

property seized,<sup>62</sup> and for costs and other incidental expenses.<sup>63</sup>

(C.) EFFECT OF EXCESSIVE LEVY.<sup>64</sup>—In some states the fact that a levy is excessive will not invalidate the levy,<sup>65</sup> the process,<sup>66</sup> or the sale.<sup>67</sup> But a levy and sale so disproportioned in value to the amount to be raised as to create a presumption of fraud or reckless indifference to the obligations of the officer's trust is void.<sup>68</sup>

In some of the New England states it has been held that a levy on realty is void if the value of the land taken exceeds the amount due by the value of any legal tender coin.<sup>69</sup>

[a] *Compare*, *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. 666, holding the officer must have the land appraised and sold without reference to any lien or incumbrance upon it as it is not for him to inquire whether or not the land is subject to a mortgage.

[b] Where after levy the sheriff learns of the existence of an incumbrance upon the property levied on, it is his duty to make a further levy unless the property could be reasonably expected to sell for sufficient to satisfy the execution and the prior lien. *Governor v. Powell*, 9 Ala. 83.

62. *Dewitt v. Oppenheimer*, 51 Tex. 103; *Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661.

63. *Bergen v. Boerum*, 2 Caines (N. Y.) 256; *Dewitt v. Oppenheimer*, 51 Tex. 103; *Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661.

64. Remedy against officer, see the title "*Sheriffs, Constables and Marshals*."

65. *Ark.*—*Black v. Nettles*, 25 Ark. 606. *Conn.*—*Marcy v. Kinney*, 9 Conn. 394. *Compare*, *Sumner v. Lyon*, 7 Conn. 281. *Mich.*—*Backus v. Barber*, 107 Mich. 468, 65 N. W. 379; *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. *N. H.*—*Moore v. Kidder*, 58 N. H. 115. *N. Y.*—*Green v. Burke*, 23 Wend. 490; *Dezell v. Odell*, 3 Hill 215, 38 Am. Dec. 628. *Ohio.*—*Pugh v. Caloway*, 10 Ohio St. 488. *Pa.*—*Donaldson v. Bank of Danville*, 20 Pa. 245. *Tenn.*—*Brown v. Allen*, 3 Head 429. *Tex.*—*Cook v. De la Garza*, 13 Tex. 431. *Wash.*—*McConnell v. Kaufman*, 5 Wash. 686, 32 Pac. 782.

[a] Where several levies are made for separate sums, only such levies will be void as are made to satisfy the amount in excess of the judgment. *Hightower v. Handlin & Vennys*, 27 Ark. 20.

[b] The fact that the officer has taken possession of a large quantity

of goods with the intention of levying on and separating a certain portion will not invalidate the levy. *Morgan v. Spangler*, 14 Ohio St. 102.

[c] A mere levy upon real property can do no harm. When the sheriff comes to sell the property it is his duty to sell only so much as may be necessary to satisfy the execution. *Drake v. Murphy*, 42 Ind. 82.

66. *Barfield v. Barfield*, 77 Ga. 83; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793.

67. *Doe v. Rue*, 4 Blackf. 263; *Crain v. Hogan* (Tex.), 16 S. W. 1019. See *Livingston v. Lamb*, 1 Kan. 221.

68. *Ia.*—*Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Cook v. Jenkins & Co.*, 30 Iowa 452. *Mo.*—*Silver v. McNeil*, 52 Mo. 518; *Hannibal & St. J. R. Co. v. Brown*, 43 Mo. 294. *N. Y.*—*Tiernan v. Wilson*, 6 Johns. Ch. 411. *Tex.*—*Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309. *Utah.* *Young v. Schroeder*, 10 Utah 155, 37 Pac. 252.

[a] Illustrations.—(1) A levy of an execution for \$63 upon a tract of land worth from \$200 to \$300 is not so excessive as to render a sale thereunder void. *Landrum v. Broadwell*, 110 Ga. 538, 35 S. E. 638. To same effect see *Allagood v. Cook*, 92 Ga. 570, 17 S. E. 920. (2) A levy on a steamboat, worth forty thousand dollars under an execution for one hundred and nine dollars held excessive where the execution could have been satisfied by levying upon a small part of the furniture of the boat. *Silver v. McNeil*, 52 Mo. 518. (3) In *Brien v. Robinson*, 102 Tenn. 157, 52 S. W. 802, the court said: "We think the levy was excessive. The judgment was for only \$750, and the property levied on was worth \$3000 or \$4000."

69. See *Wilson v. Gannon*, 54 Me. 384; *Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690; *Thayer v. Mayo*, 34 Me.

(D.) REMEDY.<sup>70</sup> — Where the officer makes an excessive levy, relief may be had by applying to the court to release a portion of the property,<sup>71</sup> by motion to set aside the levy,<sup>72</sup> by an action for damages against the officer,<sup>73</sup> or by *audita querela*.<sup>74</sup> Relief may be had in chancery also in some cases.<sup>75</sup> An affidavit of illegality is not a remedy for an excessive levy.<sup>76</sup>

The right to have a levy reduced to an amount sufficient to satisfy the judgment and costs is personal to the debtor,<sup>77</sup> but he may be stopped from raising the objection.<sup>78</sup>

139; *Boyd v. Page*, 30 Me. 460; *Chenery v. Stevens*, 97 Mass. 77; *Whitted v. Mallory*, 4 Cush. (Mass.) 138; *Pickett v. Breckenridge*, 22 Pick. (Mass.) 297.

[a] Illustrations.—(1) On an execution for \$119.11 a levy exceeding the amount of execution by \$5.89 is invalid. *Chenery v. Stevens*, 97 Mass. 77, 83. (2) And on an execution for \$47.83 a levy of land appraised at \$50.83 is invalid. *Pickett v. Breckenridge*, 22 Pick. (Mass.) 297.

[b] *De Minimis Non Curat Lex*. (1) A levy which is excessive by one cent and three mills is within the maxim *de minimis non curat lex* and valid. *Dwinel v. Soper*, 32 Me. 119, 52 Am. Dec. 643. (2) But an excess of fourteen cents (*Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690), (3) of fifty-two cents (*Thayer v. Mayo*, 34 Me. 139), (4) or of three dollars (*Pickett v. Breckenridge*, 22 Pick. [Mass.] 297), is not within the maxim and the levy is void. But some cases hold such small sums within the maxim. *Spencer v. Champion*, 9 Conn. 536 (fourteen cents). See also *Hathaway v. Hemingway*, 20 Conn. 191; *Huntington v. Winchell*, 8 Conn. 45, 20 Am. Dec. 84 (where excess was ten and seventeen cents); *Avery v. Bowman*, 40 N. H. 453, 77 Am. Dec. 728, excess of seventy-seven cents.

70. As to wrongful execution, see *infra*, II, D.

Remedies against enforcement of judgment, see *infra*, IV.

As to abuse of process generally, see the titles "Malicious Prosecution;" "Process."

71. *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793.

Plaintiff May Release a Part of the Levy.—See *infra*, II, B, 4, n, (I).

72. *Campau v. Godfrey*, 18 Mich. 27, 10 Am. Dec. 133.

As to vacation of levy generally, see *infra*, IV, A.

73. *Ga.*—*Barfield v. Barfield*, 77 Ga. 83. *Minn.*—*Sharvy v. Cash*, 66 Minn. 200, 68 N. W. 1070. *N. Y.*—*Dezell v. Odell*, 3 Hill 215, 38 Am. Dec. 628. *Tex.*—*Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324. *Vt.*—*Hopkins v. Hayward*, 34 Vt. 474.

As to actions against the officer, see the title "Sheriffs, Constables and Marshals."

74. *Hopkins v. Hayward*, 34 Vt. 474.

As to *audita querela* generally, see 3 STANDARD PROC. 875.

75. See *infra*, IV.

[a] Where by mistake more land is taken than is necessary to satisfy the execution, the proper remedy is in equity and the proper relief is for the creditor to reconvey so much of the land as is more than sufficient to pay his debt. *Fitch v. Ayer*, 2 Conn. 143. And see *Hathaway v. Hemingway*, 20 Conn. 191; *Avery v. Bowman*, 40 N. H. 453, 77 Am. Dec. 728.

[b] Doing Equity.—One seeking aid in equity from an oppressive levy upon an execution, a part of which admitted to be justly due, must pay into court the amount admitted to be due. *Wilkinson v. Holton*, 119 Ga. 557, 46 S. E. 620.

76. *Pinkston v. Harrell*, 106 Ga. 102, 31 S. E. 808, 71 Am. St. Rep. 242; *Rogers v. Felker*, 77 Ga. 46; *Zachry v. Zachry*, 68 Ga. 158; *Manry v. Sheperd*, 57 Ga. 68; *Georgia Northern Ry. Co. v. Cone*, 17 Ga. App. 786, 88 S. E. 701; *Georgia Northern Ry. Co. v. Home Mere. Co.*, 17 Ga. App. 755, 88 S. E. 413.

As to use of affidavit of illegality to attack the writ, see *infra*, IV, D.

77. *Brown v. Cougot*, 8 Rob. (La.) 14.

78. *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309, by himself pointing out the property to be levied on.



(II.) Where Execution Is Specific. — If the execution is one that requires the levy to be made on specific property, the officer is required only to follow the mandate of the writ.<sup>79</sup> And an execution in rem against specific property may be levied on the entire property, though the value of the property may greatly exceed the amount of the execution.<sup>80</sup>

i. *Record of Levy and Indorsement.* — (I.) *Necessity for.* — Generally speaking, it is the duty of an officer who has made a levy, whether upon real or personal property, to indorse that fact on the writ,<sup>81</sup> and indorse a memorandum of the property seized.<sup>82</sup> If the property consists of so many articles that it is inconvenient to indorse the memorandum, the officer should make an inventory of the property and file it with the writ.<sup>83</sup> According to some authorities an indorsement is not absolutely indispensable to a levy upon real estate,<sup>84</sup> but it has been held that a levy upon realty is not complete until the indorsement has been made.<sup>85</sup> Of course, if no levy is re-

79. U. S.—*Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. ed. 1018. Ga.—*Wallace v. Holly*, 13 Ga. 389. Mo.—*State to use of Ross v. Cave*, 49 Mo. 129; *State v. Hailey*, 71 Mo. App. 200. Wis.—*Watkins v. Page*, 2 Wis. 92.

80. *Cooney v. City of Atlanta*, 136 Ga. 118, 70 S. E. 950; *Wilkinson v. Holton*, 119 Ga. 557, 46 S. E. 620.

81. Ala.—*Code*, 1907, §4104; *White v. Farley*, 81 Ala. 563, 8 So. 215; *Moore v. Barclay*, 18 Ala. 672; *Toulmin v. Lesesne*, 2 Ala. 359. Ga.—*Code*, 1910, §5421. Ill.—*Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Douglas v. Whiting*, 28 Ill. 362. Kan.—*National Bank v. Duff*, 77 Kan. 248, 94 Pac. 260, 16 L. R. A. (N. S.) 1047. Ky.—*Leath v. Deweese*, 162 Ky. 227, 172 S. W. 516; *Jones v. Allen*, 88 Ky. 381, 11 S. W. 289; *Demint v. Thompson*, 80 Ky. 255, 3 Ky. L. Rep. 778; *Com. v. Hurt*, 4 Bush 64; *McBurnie v. Overstreet*, 8 B. Mon. 300; *Greer v. Howard*, 4 Ky. L. Rep. 350; *Demint v. Ringa's Admr.*, 5 Ky. L. Rep. 514; *Greer v. Howard*, 4 Ky. L. Rep. 350. Mich.—*Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808. Pa.—*M'Clelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224. S. C.—*Maddox v. Sullivan*, 2 Rich. Eq. 4, 44 Am. Dec. 234. Tenn.—*Code*, §4755; *Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736.

As to sufficiency of indorsement as a levy, see *infra*, II, B, 4, i, (II).

[a] It is the duty of an officer who has levied upon real property to attest

his act of levying by some written memorial. This record usually takes the form of an indorsement upon the writ but it is not necessary that it exist in this particular form. *Shepard v. Schrutt*, 163 Mich. 485, 28 N. W. 772; *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 818.

82. *Toulmin v. Lesesne*, 2 Ala. 359; *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298.

83. *Toulmin v. Lesesne*, 2 Ala. 359. As to inventory, see *infra*, II, B, 4, j.

84. Colo.—*Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. Mich.—*Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808. Pa.—*Weidensaul v. Reynolds*, 49 Pa. 73. R. I.—*Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763.

[a] When the proper notice of levy is recorded, a levy cannot be regarded as imperfect for want of an indorsement of levy. *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808.

[b] *Failure To Indorse.*—"It is certainly the duty of the sheriff to enter upon the execution the nature of his levy, showing the particular estate levied upon; but the fact that he fails to make this entry at the time or on the day of the levy does not render the levy invalid, whether made upon real or personal estate." *Demint v. Thompson*, 80 Ky. 255.

85. Ia.—*Mullaney v. Cutting*, 154 N. W. 893. Ky.—*Leath v. Deweese*, 162 Ky. 227, 172 S. W. 516; *Jones v. Al-*

quired, no indorsement of levy need be made in such a case.<sup>86</sup>

(II.) Purpose and Character of Indorsement. — The indorsement generally is for the purpose of furnishing evidence of the levy, the date and the property taken, and is for the prevention of fraud,<sup>87</sup> although it is sometimes considered as constituting the levy.<sup>88</sup> It is not the officer's return,<sup>89</sup> but after a return is made, it constitutes a portion of it.<sup>90</sup>

(III.) When Made. — The officer should make the endorsement at the time the levy is made,<sup>91</sup> but the failure to make it at that time does not render the levy invalid, whether on real<sup>92</sup> or personal estate.<sup>93</sup> It is sufficient if made within a reasonable time after levy,<sup>94</sup> or before the return of the writ,<sup>95</sup> and it has been permitted at a later time.<sup>96</sup>

len, 88 Ky. 381, 11 S. W. 289. *Tex.* Redlick v. Williams, 5 S. W. 375; Sanger Bros. v. Trammel, 66 Tex. 361, 1 S. W. 378.

[a] But when the officer goes upon the land and levies on the same and notifies the owner of the levy, such levy may be established by parol. *Jones v. Allen*, 88 Ky. 381, 11 S. W. 289; *McBurnie v. Overstreet*, 8 B. Mon. 300, 304. And see *Greer v. Howard*, 4 Ky. L. Rep. 350; *Steele v. Com.*, 5 Ky. Opin. 437.

[b] Purchaser's Title Not Affected. In *Davis v. Harnbell* (Tex. Civ. App.), 24 S. W. 972, it was held that the indorsement of a levy is not necessary to the validity of a purchaser's title acquired at the execution sale.

86. *Van Gelder v. Van Gelder*, 26 Hun (N. Y.) 356.

As to necessity for levy, see *supra*, II, B, 4, b.

87. *Ill.*—*Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375; *Stanley v. Moynihan*, 45 Ill. App. 192. *Ky.*—*Com. v. Hurt*, 4 Bush 64. *Pa.*—*Schuykill County's Appeal*, 30 Pa. 358.

[a] The indorsement of the levy (1) is prima facie evidence of it. *Price v. Shipps*, 16 Barb. (N. Y.) 585; *Cornell v. Cook*, 7 Cow. (N. Y.) 310, and (2) sufficient to authorize the sheriff to maintain an action of trespass or trover for the goods levied on. *Tucker v. Bond*, 23 Ark. 268.

[b] It is not the levy itself but is merely the evidence that a levy was made. *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70.

88. *Keaton v. Farkas*, 136 Ga. 188, 70 S. E. 1110; *Seolly & Co. v. Butler*, 59 Ga. 849; *Anderson v. Lee*, 53 Ga. 189; *Ansley v. Wilson*, 50 Ga. 418, 423;

*Isam v. Hooks*, 46 Ga. 309; *Hutchins v. Carver Co.*, 16 Minn. 13.

89. *Nelson v. Cook*, 19 Ill. 440.

[a] Indorsement and Return Distinguished.—“The indorsement of the officer is one thing, and the return another. The action of the officer upon the writ is not the return, strictly speaking. It does not become the return or bear that character, until, as the word imports, it be actually returned to the office out of which it issued. Being indorsed, and remaining in the hands of the officer, it is under his control, and he can erase the indorsement and substitute another at his pleasure. He is not concluded by anything he may have written upon it, until it has left his possession, and has been returned to the proper office.” *Nelson v. Cook*, 19 Ill. 440.

90. *Nelson v. Cook*, 19 Ill. 440; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

91. *Greer v. Howard*, 4 Ky. L. Rep. 350.

[a] Presumption.—Until the contrary appears the entry of levy will be presumed to have been made at the proper time. *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73.

92. *Demint v. Thompson*, 80 Ky. 255, 3 Ky. L. Rep. 778.

93. *Ky.*—*Demint v. Thompson*, 80 Ky. 255, 3 Ky. L. Rep. 778. *Mo.* *Bilby v. Hartman*, 29 Mo. App. 125. *Tenn.*—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736.

94. *Toulmin v. Lesesne*, 2 Ala. 359; *Jones v. Allen*, 88 Ky. 381, 11 S. W. 289.

95. *Bilby v. Hartman*, 29 Mo. App. 125.

96. *Shepard v. Schruett*, 163 Mich.

(IV.) **Requisites of Indorsement or Memorandum.**—(A.) **GENERALLY.** Obviously the entry, indorsement or memorandum of levy must be in writing.<sup>97</sup>

(B.) **WHERE MADE.**—The entry or record of the levy is not required to be made upon the writ itself.<sup>98</sup> It may be made elsewhere provided it is equally public and permanent.<sup>99</sup>

(C.) **BY WHOM MADE.**—The entry, indorsement or memorandum must be made by the sheriff making the levy,<sup>1</sup> or under his immediate directions.<sup>2</sup>

(D.) **CONTENTS.**—(1.) *Should Be Dated.*—The indorsement or entry should be dated.<sup>3</sup>

(2.) *Statement of Levy.*—The statement of the levy must be definite and certain.<sup>4</sup> It is not necessary to state the particular acts done in making the levy, a general statement that he "levied" is sufficient.<sup>5</sup>

485, 128 N. W. 772, at the hearing of a bill in aid of execution. But see *Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519.

97. *Anderson v. Lee*, 53 Ga. 189; *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298.

98. *Colo.*—*Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. *Pa.*—*Braden's Estate*, 165 Pa. 184, 30 Atl. 746; *M'Clelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224. *S. C.* *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298.

[a] An indorsement upon a paper pasted on the writ is sufficient where there is insufficient space on the writ. *Stanley v. Moynihan*, 45 Ill. App. 192; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300.

99. *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70; *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841.

1. *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 380, 31 S. E. 298.

2. *Cox v. Montford*, 66 Ga. 62.

[a] When the officer making a levy cannot write, an entry thereof by another, in his presence and by his procurement, and signed by him with his mark is good. *Cox v. Montford*, 66 Ga. 62.

3. An undated indorsement is not

insufficient where it appears from other dated indorsements to have been timely made. *Rightlinger's Appeal*, 101 Pa. 540.

4. *U. S.*—*Gault v. Woodbridge*, 4 McLean 329, 10 Fed. Cas. No. 5,275. *Ala.*—*Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290. *Ga.*—*Western Union Tel. Co. v. Hill*, 86 Ga. 500, 12 S. E. 877. *Ill.*—*Davidson v. Waldron*, 31 Ill. 120, 134, 83 Am. Dec. 206.

[a] A return on an execution of a levy "upon the books" of the judgment debtor, does not show a levy upon, or right to sell, the accounts and debts entered in the books. *Tullis v. Brawley*, 3 Minn. 277.

[b] A copying of defendant's acknowledgment of the levy on the execution is a sufficient indorsement of the levy. *Weatherby v. Covington*, 3 Strobb. (S. C.) 27, 49 Am. Dec. 623.

5. *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *Tullis v. Brawley*, 3 Minn. 277.

[a] Failure to show that defendant was called on to point out property is immaterial. *Crabtree v. Whiteselle*, 65 Tex. 111.

[b] **Of Levy on Realty Standing in Name of Another.**—It has not been customary in Massachusetts to insert the word "fraudulently" in the return of the officer upon a levy on an execution. See *Berry v. Gates*, 175 Mass. 373, 56 N. E. 581; *Cowles v. Dickinson*, 140 Mass. 373, 5 N. E. 302; *Woodward v. Sartwell*, 129 Mass. 210.

[c] Where a levy has been made on the share of a joint tenant, the entire estate should be described and a statement made concerning the fact that



(3.) *Time of Levy.*—The time when the levy is made must be shown.<sup>6</sup>

(4.) *Description of Property Seized.*—(a.) *In General.*—The entry should plainly describe the property levied on whether the property be real or personal.<sup>7</sup>

An error or misdescription does not invalidate the levy if the property can be identified notwithstanding the error.<sup>8</sup>

the debtor owns such share but the return need not state that the estate is held in joint-tenancy and not in common. *Chase v. Williams*, etc., 71 Me. 190.

[d] A return of the certificate of the corporation given in a levy upon shares of stock is not required. *Thompson v. Wells*, 57 Ill. App. 436.

6. Ill.—*Davidson v. Waldron*, 31 Ill. 120, 134, 83 Am. Dec. 206. S. C. *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298. Tenn.—Code, §4755.

[a] That the exact day of the month is not stated is not ground for dismissal of the levy. *Solomon & Son v. Harp*, 99 Ga. 238, 25 S. E. 402.

[b] An indorsement showing a levy previous to the issuance of the execution is a mere irregularity which might render the sale voidable on seasonable motion to set it aside, but it does not render the sale void. *White v. Farley*, 81 Ala. 563, 8 So. 215.

7. Ala.—*Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290. Ga.—*Humphrey v. Johnson*, 143 Ga. 703, 85 S. E. 830 (description held sufficient); *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Scolly & Co. v. Butler*, 59 Ga. 849; *Oatis v. Brown*, 59 Ga. 711; *Anderson v. Lee*, 53 Ga. 189. Ill.—*Davidson v. Waldron*, 31 Ill. 120, 134, 83 Am. Dec. 206. Ia.—*Payne v. Billingham*, 10 Iowa 360. Ky.—*Demint v. Thompson*, 80 Ky. 255, 31 Ky. L. Rep. 778; *Low v. Skaggs*, 31 Ky. L. Rep. 1292, 105 S. W. 439; *Humpich v. Drake*, 19 Ky. L. Rep. 1782, 44 S. W. 632. S. C.—*Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841; *Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298. Tex.—*Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042. Va.—*Eckhols v. Graham*, 1 Call 492, the names of slaves levied on should be endorsed.

[a] The sheriff before indorsing the levy should resort to the deeds of the defendant for a description of the

property. *Wildasin v. Bare*, 171 Pa. 387, 33 Atl. 365.

[b] The indorsement must particularly specify (1) the different articles levied on (*Todd v. Hoagland*, 36 N. J. L. 352; *Watson v. Hoel*, 1 N. J. L. 136; *Hustick v. Allen*, 1 N. J. L. 168); (2) or refer to an attached schedule where they may be found. *State v. Curran*, 45 Mo. App. 142.

[c] In a levy upon lumber, (1) it is necessary to describe the quality and quantity, and so designate its locality and position with reference to other lumber in the same yard that it can with reasonable certainty be identified. *Payne v. Billingham*, 10 Iowa 360. (2) An indorsement showing a levy "on 175,000 feet of lumber at Arlington," is insufficient. *Davidson v. Waldron*, 31 Ill. 120, 133, 83 Am. Dec. 206.

[d] *Personalty in a House.*—An indorsement of a levy upon personalty in a house describing certain items and then embracing all other goods therein is sufficiently descriptive of the levy. *Hart v. Thomas & Co.*, 75 Ga. 529.

[e] *Indorsement on List of Shares.* A pen or pencil indorsement "levied" upon a list furnished by the creditor enumerating certain stocks to be levied upon and produced with the writ is a sufficient indorsement of levy. *Braden's Estate*, 165 Pa. 184, 30 Atl. 746.

[f] *Steamboat.*—A return is sufficient, which shows a levy upon a steamboat by seizing her hull and other parts of the boat as then lying at the wharf, partly taken to pieces, and in the process of being broken up. *Gaty v. Garrison*, 14 Mo. 33.

[g] *Oxen.*—A levy upon "one fawn colored oxen, one dunn-pided oxen," is not void for indefinite description. *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672.

8. *Bogges v. Lowrey*, 78 Ga. 539, 3 S. E. 771, 6 Am. St. Rep. 279; *Watson v. McClane*, 18 Tex. Civ. App. 212, 45 S. W. 176.

[a] A mistake in the name of the

(b.) *Manner of Describing Real Property.*—(AA.) *Generally.*—The indorsement or entry of a levy upon real property should so describe the property that it can be identified or that it can be claimed and taken possession of,<sup>9</sup> and that the purchaser at the sale can ascertain

township will not vitiate a levy upon growing wheat. *Perkins v. Spaulding*, 2 Mich. 157.

[b] An obvious mistake in the return will not defeat the levy. *Frazer v. Nelson*, 179 Mass. 456, 61 N. E. 40.

[c] *Variance between the levy and mortgage*, in the description, will not render the levy illegal where both are fairly applicable to the property. *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539; *Cornell v. Cook*, 7 Cow. (N. Y.) 310.

9. **U. S.**—*Reed v. Munn*, 148 Fed. 737, 80 C. C. A. 215. **Ala.**—*Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290. **Del.** *Swiggett v. Roe*, 3 Houst. 326. **Ga.** *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285; *Elwell v. New England Mort. Co.*, 101 Ga. 496, 28 S. E. 833; *Bird v. Burgsteiner*, 100 Ga. 486, 28 S. E. 219; *Wiggins v. Gillette*, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123; *Belk v. Estes & Co.*, 82 Ga. 238, 8 S. E. 867; *Brown v. Moughon*, 70 Ga. 756. **Ill.**—*Stout v. Cook*, 37 Ill. 283; *Fitch v. Pinckard*, 5 Ill. 69. **Me.** *Rollins v. Mooers*, 25 Me. 192. **Md.** *Dorsey's Lessee v. Dorsey*, 28 Md. 388. **N. H.**—*Smith v. Smith*, 66 N. H. 611, 27 Atl. 222. **N. J.**—*Canfield v. Browning*, 69 N. J. L. 553, 55 Atl. 101; *Wills v. McKinney*, 41 N. J. L. 120. **Ohio.** *Matthews v. Thompson*, 3 Ohio 272. **Tenn.**—*Easley v. McLaren*, 1 Baxt. 1; *Howard v. Horner*, 11 Humph. 529, 532; *Helms v. Alexander*, 10 Humph. 44; *Parker v. Swan*, 1 Humph. 80; *Taylor's Lessee v. Cozart*, 4 Humph. 433, 40 Am. Dec. 655. **Tex.**—*Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

[a] "There must also be, by description, such ascertainment of identity as shall prevent one piece of land from being sold and a distinct one conveyed." *Gibbs v. Thompson*, 7 Humph. (Tenn.) 179; *Taylor's Lessee v. Cozart*, 4 Humph. (Tenn.) 433, 40 Am. Dec. 655.

[b] A description as "one law office and lot of ground" is void for uncertainty. *Dorsey's Lessee v. Dorsey*, 28 Md. 388,

[c] A levy on land is sufficiently certain which describes it in such manner as to distinguish it from all other tracts owned by the same person. *Vance's Heirs v. M'Nairy*, 3 Yerg. (Tenn.) 171, 24 Am. Dec. 553.

[d] The true principle, says the court in *Easley v. McLaren*, 1 Baxt. (Tenn.) 1, is that the land shall be so described in the levy that it can be identified and ascertained by the ordinary mode of identifying lands, that is, by giving the county, the civil district in which it lies, such natural objects, if there be any, as will serve to guide the party to the locality, and such metes and bounds as shall include the land, or such other description of boundaries as by reference to other adjoining tracts, as will distinguish the tract sold from any other tract of land owned by the same party in that vicinity, and for this purpose the name of the owner should be given.

[e] Where a debtor uses two pieces of real estate as one farm, it is sufficient for the sheriff to describe them generally as one tract of land. *Wildasin v. Bare*, 171 Pa. 387, 33 Atl. 365; *Buckholder v. Sigler*, 7 Watts & S. (Pa.) 154.

[f] For cases holding description to be insufficient, see the following: **Ga.**—*Edenfield v. Milner*, 138 Ga. 402, 75 S. E. 319; *Gunn v. Jones*, 67 Ga. 398; *Few v. Walton*, 62 Ga. 447. **Ill.** *Stout v. Cook*, 37 Ill. 283. **Mich.**—*Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293. **Ohio.**—*Douglass v. McCoy*, 5 Ohio 522; *Matthews v. Thompson*, 3 Ohio 272. **Tenn.**—*Huddleston v. Garrett*, 3 Humph. 629; *Brown v. Dickson*, 2 Humph. 395, 37 Am. Dec. 560, 566.

[g] For cases holding the description sufficient, see the following: **Ga.** *Humphrey v. Johnson*, 143 Ga. 703, 85 S. E. 830; *Young v. Germania Sav. Bank*, 132 Ga. 490, 64 S. E. 552; *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285; *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272; *Belk v. Estes & Co.*, 82 Ga. 238, 8 S. E. 867; *Thomas v. Dockins*, 75 Ga. 347; *Sears v. Bagwell*, 69 Ga. 429; *Phillips v. White*, 66 Ga. 753; *Longworthy v. Featherston*, 65 Ga.

the nature and value of the property he is buying.<sup>10</sup> It is not sufficient that the particular purchaser knew the boundaries. The property should be so described that the world may know them.<sup>11</sup> A description which is recognized in the neighborhood is sufficient.<sup>12</sup> It need not be as certain as that required in deeds,<sup>13</sup> although any description or mode of description sufficient to identify the land in a deed of conveyance will be good in a levy.<sup>14</sup> A reasonable certainty,<sup>15</sup> or a certainty to a common or reasonable intent is all that is required.<sup>16</sup>

165; *Smith v. Outlaw*, 64 Ga. 677. **Ky.** *Sayers v. Hahn*, 5 Ky. L. Rep. 319; *Watson v. Turner*, 5 Ky. L. Rep. 245. **La.**—*Henderson v. Hoy*, 26 La. Ann. 156. **N. C.**—*Pemberton v. McRae*, 75 N. C. 497. **Ohio.**—*Douglass v. McCoy*, 5 Ohio 522. **Tenn.**—*Christian v. Mynatt*, 11 Lea 615; *Howard v. Horner*, 11 Humph. 532; *Parker v. Swan*, 1 Humph. 80. **Tex.**—*Alexander v. Miller's Exrs.*, 18 Tex. 893, 70 Am. Dec. 314; *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

10. **U. S.**—*Gault v. Woodbridge*, 4 McLean 329, 10 Fed. Cas. No. 5,275. **Ga.**—*Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285; *Bird v. Burgsteiner*, 100 Ga. 486, 28 S. E. 219. **Ill.**—*Fitch v. Pinecard*, 5 Ill. 69. **Ohio.**—*Matthews v. Thompson*, 3 Ohio 272. **Tenn.** *Stephens v. Taylor*, 6 Lea 307; *Easley v. McLaren*, 1 Baxt. 1; *Lafferty v. Conn*, 3 Sneed 221; *Gibbs v. Thompson*, 7 Humph. 179; *Huddleston v. Garrett*, 3 Humph. 629. **Tex.**—*Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280.

[a] The description must be such that the intending purchaser can, with the aid of the particulars given, find the land by proper inquiry of those familiar with it. *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280.

11. *Brinson v. Lassiter*, 81 Ga. 40, 6 S. E. 468, in order that all may knowingly bid and that the land may bring the highest market price.

[a] The description is sufficient if so definite as to enable the bidder to ascertain without unreasonable trouble the precise piece of land intended. This means not that a mere inspection of the description itself would show what land is intended but such an indication of the premises as would enable one to identify them by references to records and other means resorted to for that purpose. *Focke v. Garcia* (Tex. Civ. App.), 41 S. W. 187.

[b] But the rights of the purchaser are not affected by a failure to properly describe the land. *Galot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892; *Reid v. Heasley*, 9 Dana (Ky.) 324; *Fitch v. Boyer*, 51 Tex. 336, 346. *Compare, Donnebaum v. Tinsley*, 54 Tex. 362, holding the purchaser's title depends upon a valid judgment, levy and execution sale and the payment of the money.

12. *Christian v. Mynatt*, 11 Lea (Tenn.) 615.

See *infra*, II, B, 4, i, (IV), (D), (4), (b), (GG).

13. **Pa.**—*Inman v. Kutz*, 10 Watts 90. **S. C.**—*Manning v. Dove*, 10 Rich. L. 395. **Tenn.**—*Vance's Heirs v. M'Nairy*, 3 Yerg. 171, 24 Am. Dec. 553.

[a] But *compare, Johnson v. Rowe*, 1 Ky. L. Rep. 274, 10 Ky. Opin. 682, holding the levy must identify the property so as to enable the officer to make a conveyance.

14. *McCormick v. McCormick Harvesting Co.*, 120 Iowa 593, 95 N. W. 181; *Rollins v. Mooers*, 25 Me. 192.

15. **N. H.**—*Smith v. Smith*, 66 N. H. 611, 27 Atl. 222. **Pa.**—*Hyskill v. Given*, 7 Serg. & R. 369. **Tenn.**—*Brown v. Dickson*, 2 Humph. 395, 37 Am. Dec. 560, 566; *Pound v. Pullen's Lessee*, 3 Yerg. 338. **Tex.**—*Buckner v. Vancleave*, 34 Tex. Civ. App. 312, 78 S. W. 541; *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

16. **U. S.**—*Reed v. Munn*, 148 Fed. 737, 80 C. C. A. 215. **Me.**—*Rollins v. Mooers*, 25 Me. 192. **Tenn.**—*Trotter v. Nelson*, 1 Swan 7. **Vt.**—*Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714.

[a] A certainty to every intent is not required in the description of land levied on. It is sufficient if the description is certain to a general intent such as would put the owner and purchasers on inquiry. *Swan's Lessee v. Parker*, 7 Yerg. (Tenn.) 490, 27 Am.



A levy is sufficient if it identifies the property so that the court can understand from it what property is subjected.<sup>17</sup> If, however, the description is so vague and uncertain that the land levied on cannot be identified, the levy is void.<sup>18</sup> And a levy which is applicable to two or more tracts of land is insufficient.<sup>19</sup>

**Levy on Part of Tract.** — Where the levy is made on part of a tract of land, the part levied on must be designated.<sup>20</sup>

Where a levy is made upon several tracts of land, some of which are insufficiently described, the levy will be upheld as to those tracts sufficiently described.<sup>21</sup>

That the improvements are not sufficiently described is not a valid objection to a levy upon the land.<sup>22</sup>

(BB.) *By Metes and Bounds.* — A levy may describe the property by metes and bounds.<sup>23</sup>

(CC.) *By Abutments.* — The description of the real property may be by abutments.<sup>24</sup>

(DD.) *By Reference to Recorded Plat.* — If there is a recorded plat, it is better to describe the property by reference thereto, and by the

Dec. 522; *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

17. *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028.

[a] **Where a decree is against specific property**, an indorsement which describes the property as the decree describes it, although the description may be loose, is not void for uncertainty. *Western Union Telegraph Co. v. Hill*, 86 Ga. 500, 12 S. E. 877.

18. *Chadbourn v. Mason*, 48 Me. 389; *Smith v. Smith*, 66 N. H. 611, 27 Atl. 222.

19. *Brown v. Dickson*, 2 Humph. (Tenn.) 395, 37 Am. Dec. 560, 566; *Pound v. Pullen's Lessee*, 3 Yerg. 338.

[a] **At Street Intersection Without Designating Which Corner.**—A levy on "a certain lot situated on the angle of S. and S. streets in the town of A." is void for uncertainty. *Fitch v. Pinecard*, 5 Ill. 69; *Johnson v. Rowe*, 10 Ky. Opin. 682, 1 Ky. L. Rep. 274.

20. *U. S.*—*Gault v. Woodbridge*, 4 McLean 329, 10 Fed. Cas. No. 5,275. Ga.—*Keaton v. Forrester*, 63 Ga. 206. Ill.—*Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777. Md.—*Langley v. Jones*, 33 Md. 171; *Waters v. Duvall*, 6 Gill & J. 76. Tenn.—*Brigance v. Erwin's Lessee*, 1 Swan 375, 57 Am. Dec. 779. Tex.—*Wooters v. Arledge*, 54 Tex. 395.

21. *Cleaveland v. Allen*, 4 Vt. 176.

22. *Donaldson v. Bank of Danville*, 20 Pa. 245.

23. Me.—*Chadbourn v. Mason*, 48

Me. 389; *Warren v. Ireland*, 29 Me. 62. Mass.—*Jenks v. Ward*, 4 Met. 404. Tenn.—*Easley v. McLaren*, 1 Baxt. 1. Vt.—*Barnard's Admr. v. Russell*, 19 Vt. 334.

[a] **The courses and monuments** must be definitely described. *Forbes v. Hall*, 51 Me. 568.

[b] **The monument governs** where there is a mistake as to courses and distances. *Barnard's Admr. v. Russell*, 19 Vt. 334.

[c] **One Boundary Undetermined.** A levy which describes three boundaries of a tract and leaves the fourth unenclosed is sufficient as the fourth is easily ascertainable. *Stephens v. Taylor*, 6 Lea (Tenn.) 307.

24. Ky.—*Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028. Mich.—*Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293. Tenn.—*Easley v. McLaren*, 1 Baxt. 1.

[a] **Insufficient Indorsement.**—An indorsement stating that the officer levied on a tract of land adjoining the lands of McD., C. and others, containing one hundred and sixty acres, is insufficient. *Helms v. Alexander*, 10 Humph. (Tenn.) 44. To same effect, *Edenfield v. Milner*, 138 Ga. 402, 75 S. E. 319; *McLean v. Paul*, 27 N. C. 22.

[b] **Sufficient Indorsement.**—A levy upon "one house and one-half lot No. 12 in the town of W., adjoining T. W.

number of the lot and block as given thereon, with such other descriptive facts as may be necessary to identify the property.<sup>25</sup>

(EE.) *By Reference to Other Descriptions.*—An entry of levy which embraces in general terms a description of the land levied on and refers for a more accurate description to a public record is sufficient,<sup>26</sup> unless it be shown that the reference still leaves the description uncertain.<sup>27</sup> References to descriptions in papers not filed of record have been adjudged sufficient.<sup>28</sup>

(FF.) *By Name of Owner or Resident.*—A description of a tract of land as the land where a designated person resides, is sufficient to identify the property,<sup>29</sup> but it has been held that a description of a certain tract of land of a certain acreage as the property of a certain person, is void for uncertainty.<sup>30</sup>

K. and S." is sufficiently certain. *Smith v. Outlaw*, 64 Ga. 677.

25. *Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293. See *Phillips v. White*, 66 Ga. 753.

26. Ga.—*Conley v. Redwine*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; *Sears v. Bagwell*, 69 Ga. 429; *Solomon v. Breazeal*, 27 Ga. 200 (where property levied on was a slave). Mass.—*Allen v. Taft*, 6 Gray 552; *Bates v. Willard*, 10 Mete. 62; *Jenks v. Ward*, 4 Mete. 404; *Boylston v. Carver*, 11 Mass. 515. Tex.—*Watson v. McClane*, 18 Tex. Civ. App. 212, 45 S. W. 176, by reference to a commissioner's report in a partition case. Vt.—*Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714.

[a] **Deeds** (1) of record may be referred to (*Allen v. Taft*, 6 Gray [Mass.] 552; *Boylston v. Carver*, 11 Mass. 515), and (2) the levy is sufficient although it is not stated that the deed is on record. *Jenks v. Ward*, 4 Mete. (Mass.) 404.

[b] **A will** recorded in the registry of probate may be referred to for particulars of description. *Allen v. Taft*, 6 Gray (Mass.) 552.

27. *Conley v. Redwin*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; *Gilman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714.

28. In *Wiggins v. Gillette*, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123, it was held that a levy upon designated lots as surveyed and platted by one S. was sufficient although the plat referred to had never been recorded and the description did not mention

the original land lot containing the property.

[a] **But an advertisement** forms no part of the record and cannot be referred to to complete a description. *Taylor's Lessee v. Cozart*, 4 Humph. (Tenn.) 433, 40 Am. Dec. 655.

29. Ga.—*Williams v. Hart*, 65 Ga. 201; *Longworthy v. Featherston*, 65 Ga. 165; *Oatis v. Brown*, 59 Ga. 711. See *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285; *Belk v. Estes & Co.*, 82 Ga. 238, 8 S. E. 867. Md.—*Murphy's Lessee v. Cord*, 12 Gill & J. 182. S. C. *Bratton v. Garrison*, 2 Rich. L. 146.

[a] **Although (1) there is no specification of the number of acres**, the metes and bounds of the lot, or the street upon which it is situated, the description by the name of the owner or resident is sufficient. *Oatis v. Brown*, 59 Ga. 711. (2) But a levy on certain land "lying on R. H. creek a tributary to of the fork of K. river and now occupied by J.," is too vague, inconsistent and uncertain. *Meade v. Wright*, 21 Ky. L. Rep. 1806, 56 S. W. 523.

[b] **An entry upon an execution against two persons of a levy** "on three hundred acres of land, more or less, whereon the defendant's family now lives, adjoining lands of S. G. on the west and others," was held too uncertain in *Anderson v. Lee*, 53 Ga. 189.

30. Ga.—*Walden v. Walden*, 128 Ga. 126, 57 S. E. 323; *Collins v. Dixon*, 72 Ga. 475; *Brown v. Moughon*, 70 Ga. 756; *Osborn v. Elder*, 65 Ga. 360. Ky. *Low v. Skaggs*, 31 Ky. L. Rep. 1292, 105 S. W. 439. S. C.—*Tyler v. Williams*, 53 S. C. 367, 31 S. E. 298. See

(GG.) *By Name of Original Grantee.* — The property may be described by the name of the original grantee of the property.<sup>31</sup>

(HH.) *By Name of Property.* — The property may be described by the name by which it is known.<sup>32</sup>

(II.) *Under Statute.* — Some statutes prescribe the mode of describing the realty,<sup>33</sup> but the very words of the statute need not be used.<sup>34</sup> Any other mode will answer which identifies the land as clearly as the statutory method.<sup>35</sup>

(c.) *Name of County.* — The county in which the property is situated should be stated.<sup>36</sup> But as the officer has no authority to act outside of his county, it will be presumed, when the name of the county is not given in the description, that the land levied upon lies in his county.<sup>37</sup>

(d.) *Stating Who Is in Possession.* — It is sometimes required of the sheriff that he state who is in possession<sup>38</sup> of the real property levied

*Sartor v. McJunkin*, 8 Rich. 451, where the sheriff's deed is sufficiently certain, an entry as in the text is sufficient. *Tenn.*—*Brigance v. Erwin's Lessee*, 1 Swan 375, 57 Am. Dec. 779; *Lafferty v. Conn.*, 3 Sneed 221. But see *Trotter v. Nelson*, 1 Swan 7. *Tex.* *Stipe v. Shirley*, 27 Tex. Civ. App. 97, 64 S. W. 1012, which stated in addition that said land was part of a survey made in the name of B. C.

*Contra*, *Hyskill v. Givin*, 7 Serg. & R. (Pa.) 369.

Compare the sections immediately following.

[a] A description of land as containing \_\_\_\_\_ acres on the S. J. river and having been granted from H. to G. is void for uncertainty. *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280.

[b] A levy "on all of the lands of J. W., lying on Q. creek," is not sufficiently specific. *Huggins v. Ketchum*, 20 N. C. 550. To same effect, *Chasteen v. Phillips*, 49 N. C. 459, 69 Am. Dec. 760.

31. *Focke v. Garcia* (Tex. Civ. App.), 41 S. W. 187.

[a] **By Original Grantee.**—A description of certain real estate as "\_\_\_\_\_ acres in upper S. D. tract, D. county, Texas (original grantee J. F.)." is sufficiently certain. *Focke v. Garcia* (Tex. Civ. App.), 41 S. W. 187.

32. *Ga.*—*Oatis v. Brown*, 59 Ga. 711. *Ky.*—*Sayers v. Hahn*, 5 Ky. L. Rep. 319. *Tex.*—*Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717.

[a] A levy on a tract of land

"known as the home tract containing \_\_\_\_\_ acres, more or less," while not completely identifying the property furnishes the means of identification, and is sufficient. *Elwell v. New England Mort. Co.*, 101 Ga. 496, 28 S. E. 833.

[b] But *Trustees Union Baptist Assn. v. Hunn*, 7 Tex. Civ. App. 249, 26 S. W. 755, holds "insufficient a levy upon the B. University in the town of I., W. county, Texas, together with all its land, buildings, improvements, libraries and apparatus," etc.

[c] A levy on "all the crops on the Ball place" is sufficiently specific. *Crine v. Tufts & Co.*, 65 Ga. 644.

33. *Barnard's Admr. v. Russell*, 19 Vt. 334, by metes and bounds.

34. *Huggins v. Ketchum*, 20 N. C. 550.

35. *Chasteen v. Phillips*, 49 N. C. 459, 69 Am. Dec. 760; *Huggins v. Ketchum*, 20 N. C. 550.

36. *Easley v. McLaren*, 1 Baxt. (Tenn.) 1.

37. *Howard v. Horner*, 11 Humph. (Tenn.) 532; *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280.

[a] **Location Presumed To Be in Venue.** — An indorsement beginning with the name of the state and county, and describing the land as lots of certain numbers in a district of a certain number will be considered to mean that the lots are in the county named in the venue. *Scolly & Co. v. Butler*, 59 Ga. 849.

38. *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Williams & Co. v. Hart*, 65 Ga. 201.



on,<sup>38</sup> but he should not state conclusions of law or fact,<sup>39</sup> as that the person in possession is the agent of the defendant.<sup>40</sup>

(e.) *Construction of Description.*—The words descriptive of the estate and quantity of land levied on must be given the same effect as would be given to them in a conveyance voluntarily executed by the owner or claimant of land.<sup>41</sup> Where doubtful expressions are used they should be construed favorably to the plaintiff in execution to enable him to obtain satisfaction of his debt.<sup>42</sup>

(f.) *Cure of Imperfect Description.*—An imperfect description may be cured by the description in a forthcoming bond,<sup>43</sup> or sheriff's deed,<sup>44</sup> by the description in a claim affidavit and bond,<sup>45</sup> or by amendment;<sup>46</sup> or it may be aided by parol evidence.<sup>47</sup> But a levy void for want of description cannot be cured.<sup>48</sup>

(5.) *Showing Defendant's Interest.*—The extent of the defendant's interest need not be, it has been held, described in the entry of levy,<sup>49</sup> but this is sometimes required by statute.<sup>50</sup> The entry should show that the property is levied on "as the property of" the debtor.<sup>51</sup>

39. *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Williams & Co. v. Hart*, 65 Ga. 206.

40. *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149.

41. *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818. See also *Wilder v. Kent*, 15 Fed. 217.

[a] In a levy of land, an exception of "the buildings" will exclude from the levy not only the buildings but the land under them also with so much adjacent land as may be necessary for their use. *Grover v. Howard*, 31 Me. 546.

[b] If some of the calls are false, they will be rejected and the levy upheld if there are sufficient true particulars given. *Wing v. Burgis*, 13 Me. 111.

42. *Inman v. Kutz*, 10 Watts (Pa.) 90.

43. *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290.

44. *S. C.*—*Sartor v. McJunkin*, 8 Rich. L. 451. *Tenn.*—*Helms v. Alexander*, 10 Humph. 44. *Tex.*—*Fitch v. Boyer*, 51 Tex. 336; *Whitney v. Krapf*, 8 Tex. Civ. App. 304, 27 S. W. 843. *Contra*, *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280; *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

45. *Shelton v. Shelton*, 134 Ga. 681, 68 S. E. 481; *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323; *Drawdy v. Littlefield*, 75 Ga. 215; *Scolly & Co. v.*

*Butler*, 59 Ga. 849. But see *Keaton v. Forrester*, 63 Ga. 206.

[a] This rule applies (1) to levies on realty (*Shelton v. Shelton*, 134 Ga. 681, 68 S. E. 481; *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323), (2) as well as to levies on personalty. *Shelton v. Shelton*, 134 Ga. 681, 68 S. E. 481; *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323.

46. As to amendment of indorsement, see *infra*, II, B, 5, i, (IV), (E).

47. *Chasteen v. Phillips*, 49 N. C. 459, 69 Am. Dec. 760.

48. *Hudspeth v. Scarborough*, 69 Ga. 777; *Johnson v. Rowe*, 1 Ky. L. Rep. 274, 10 Ky. Opin. 682.

49. *Donaldson v. Bank of Danville*, 20 Pa. 245.

As to levy upon defendant's interest, see *supra*, II, B, 4, g, (XI), (G).

50. *Torbit v. Jones* (Ga.), 89 S. E. 696; *Thornton v. Ferguson*, 133 Ga. 825, 67 S. E. 97; *Hawkins v. Johnson*, 131 Ga. 347, 62 S. E. 285; *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716; *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Hudspeth v. Scarborough*, 69 Ga. 777; *Anderson v. Lee*, 53 Ga. 189.

51. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705; *Scolly & Co. v. Butler*, 59 Ga. 849 (omission held cured by claim affidavit).

[a] A levy upon certain realty "as the property" of the defendant means that his entire estate is levied on and

(6.) *Showing Notice of Levy.* — The entry of levy is not required to show that notice of levy has been given.<sup>52</sup>

(7.) *Signature.* — The indorsement should be signed.<sup>53</sup> But it has been held that a failure of the officer to sign the indorsement is not fatal to the levy,<sup>54</sup> particularly if the return, of which the entry is a part, is signed.<sup>55</sup>

(E.) *AMENDMENT.* — An entry or indorsement of levy may be amended,<sup>56</sup> even after the sale has taken place.<sup>57</sup> But if the entry is so defective that it does not amount to a levy, an amendment is not allowed.<sup>58</sup>

*By Whom Made.* — The amendment must be made by the officer who made the entry.<sup>59</sup>

*What May Be Supplied.* — It has been held that any defect in the description of the land levied on may be corrected by amendment of the

his interest is sufficiently set out. *Longworthy v. Featherston*, 65 Ga. 165. And see *Inman v. Kutz*, 10 Watts (Pa.) 90.

[b] But where judgment directs the sale of specific property to satisfy a mortgage debt, an omission to state that the property is levied on as that of the defendant does not render the levy insufficient. *Thornton v. Ferguson*, 133 Ga. 825, 67 S. E. 97.

[c] The omission of this statement does not render the levy void but defective merely. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716; *Oberby v. Hart*, 68 Ga. 493; *Anderson v. Lee*, 53 Ga. 189. See *Drawdy v. Littlefield*, 75 Ga. 215, holding defect cured by claim affidavit.

52. *Keaton v. Farkas*, 136 Ga. 188, 70 S. E. 1110.

53. *Cooney v. Atlanta*, 136 Ga. 118, 70 S. E. 950; *Sharp v. Kennedy*, 50 Ga. 208; *Com. v. Hurt*, 4 Bush (Ky.) 64; *Greer v. Howard*, 4 Ky. L. Rep. 350.

As to who makes the indorsement, see *supra*, II, B, 4, i, (IV), (C).

[a] If a deputy signs the levying officer's name at the latter's direction, and if the officer adopts the signature, the levy is valid. *Cooney v. Atlanta*, 136 Ga. 118, 70 S. E. 950.

[b] *Signature of Deputy.* — In the absence of statute providing otherwise, a deputy may sign his own name with his official designation. He is not required to add the name of his principal. *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73.

54. *Sharp v. Kennedy*, 50 Ga. 208.

55. *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

56. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Hollis v. Rodgers*, 106 Ga. 13, 31 S. E. 783; *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73.

[a] The court may on his own motion in the presence of the jury, suggest a needed amendment by the sheriff. *Hollis v. Rodgers*, 106 Ga. 13, 31 S. E. 783.

[b] Dating the amendment of a previous entry is unnecessary. *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73.

[c] If the officer is no longer in office, an order of court authorizing the amendment is proper. *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705.

57. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *McLeod v. Brooks Lumber Co.*, 98 Ga. 253, 26 S. E. 745; *Williams v. Moore*, 68 Ga. 585 (a statement of no personalty may be added after sale).

58. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705; *Ansley v. Wilson*, 50 Ga. 418, 423.

59. *Hudspeth v. Scarborough*, 69 Ga. 777.

[a] The ex-deputy who made the levy is the proper person to amend the entry although the present sheriff is the same person who was sheriff at the time of the making of the entry and who had appointed the deputy who

indorsement with leave of court.<sup>60</sup> The signature of the officer,<sup>61</sup> and the omission of the indorsement to state that the property was levied on as the property of the defendant,<sup>62</sup> may be supplied by amendment.

j. *Inventory.*<sup>63</sup>—In some jurisdictions it is the duty of the officer to make an inventory of goods levied on,<sup>64</sup> but an inventory is not absolutely necessary to the validity of the levy,<sup>65</sup> at least, in the absence of statute requiring it.<sup>66</sup> Generally the inventory is merely a part of the levy, and not the levy itself.<sup>67</sup>

The inventory may be made and filed at any time until the day the writ is returnable,<sup>68</sup> and it should be signed by the sheriff or his lawful deputy.<sup>69</sup> It vests in the sheriff only such goods as are enumerated therein.<sup>70</sup>

is out of office. *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705.

60. *Donaldson v. Bank of Danville*, 20 Pa. 245. *Compare, supra*, II, B, 4, i, (IV), (D), (4), et seq.

[a] In Georgia, as the entry on the fieri facias is the levy itself, an entry which fails to identify the property levied on cannot be remedied by amendment. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705; *Ansley v. Wilson*, 50 Ga. 418, 423. As to sufficiency of description, see *supra*, II, B, 4, i, (IV), (D), (4).

61. *Sharp v. Kennedy*, 50 Ga. 208.

62. *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705.

[a] Where there are two defendants, an entry which fails to state whose property was levied on may be corrected by amendment. *Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193.

63. As to inventory where claim of exemption is interposed, see 11 STANDARD PROC. 502.

64. Ia.—*Payne v. Billingham*, 10 Iowa 360. Mo.—*State v. Doan*, 39 Mo. 44. N. J.—*Lloyd v. Wyckoff*, 11 N. J. L. 218; *Hustick v. Allen*, 1 N. J. L. 168. N. Y.—*Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Haggerty & Nobles v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321; *Watts v. Cleaveland*, 3 E. D. Smith 553. Pa.—*Weidensaul v. Reynolds*, 49 Pa. 73; *McClelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224. S. C.—*Brian v. Strait*, Dudley 19; *Huger's Admrs. v. Osborne*, 1 Bay 319. Tex.—*Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661.

[a] Whenever the sheriff does not take immediate possession of the goods,

he should take an inventory of them. *Lloyd v. Wyckoff*, 11 N. J. L. 218.

[b] **Numerous Articles.**—When the property levied on consists of so many articles that they cannot be conveniently indorsed on the writ, the officer should make out an inventory and file it with the writ. *Toulmin v. Lesesne*, 2 Ala. 359.

65. Ia.—*Payne v. Billingham*, 10 Iowa 360. Ky.—*Richart v. Goodpaster*, 116 Ky. 637, 76 S. W. 831; *Jones v. Martin*, 5 Ky. L. Rep. 227. Mo.—*State v. Doan*, 39 Mo. 44. N. J.—*Delaney v. Martin*, 51 N. J. L. 148, 16 Atl. 189. N. Y.—*Roth v. Wells*, 29 N. Y. 471; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Haggerty v. Wilber*, 16 Johns. 286, 8 Am. Dec. 321; *Mills v. Thursby*, 11 How. Pr. 121; *Watts v. Cleaveland*, 3 E. D. Smith 553. Ohio.—*Pugh v. Calloway*, 10 Ohio St. 488. Pa.—*Wood v. Vanarsdale*, 3 Rawle 401. Tex.—*Mara v. Branch* (Tex. Civ. App.), 135 S. W. 661.

66. See *Delaney v. Martin*, 51 N. J. L. 148, 16 Atl. 189.

[a] In Hawaii, the statute requiring an inventory is mandatory. *Everett v. Bolles*, 6 Hawaii 153.

67. *Nelson v. Van Gazelle V. Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943 (explaining and qualifying); *Lloyd v. Wyckoff*, 11 N. J. L. 218; *Wintermute v. Hankinson*, 6 N. J. L. 140.

68. *Lloyd v. Wyckoff*, 11 N. J. L. 218.

69. *Huger's Admrs. v. Osborne*, 1 Bay (S. C.) 319.

70. *Farmer's Bank v. Massey*, 1 Har. (Del.) 186; *Lloyd v. Wyckoff*, 11 N. J. L. 218.

[a] **General Description.**—A levy upon certain designated articles "and all other goods and chattels belong-



k. *Notice of Levy*.—(I.) *Necessity for*.<sup>71</sup>—In the absence of a statute requiring it, a notice of levy need not be given.<sup>72</sup> But statutes sometimes require notice to the debtor.<sup>73</sup> In some states notice of the levy is only necessary where the levy is on real estate,<sup>74</sup> or on growing or unharvested crops.<sup>75</sup> In some states it is provided that if the defendant is in actual possession and occupation of land levied on the officer shall, at a designated time, serve him with notice stating the execution is levied on said land, mentioning the time and place of sale.<sup>76</sup>

ing" to the debtor does not include property of which the sheriff has no knowledge. *Olden v. Sassman*, 72 N. J. Eq. 637, 66 Atl. 603.

71. *Where levy is on corporate stock*, a notice is required. See *supra*, II, B, 4, g, (X), (E), (9).

72. *Ky.*—*Jones v. Allen*, 88 Ky. 381, 11 S. W. 289, notice to the owner, of a levy on land made by going to it and indorsing the levy on the writ, is not required. *Md.*—*State v. Boulden*, 57 Md. 314. *Mo.*—*Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575.

73. *La. Code Pr.*, art. 654; *Lapene & Jacks v. McCan*, 28 La. Ann. 749; *Graff v. Moylan*, 28 La. Ann. 75; *Ball v. Crockett*, 9 La. Ann. 293; *Lockhart v. Harrell*, 6 La. Ann. 530; *Lamorandier v. Meyer*, 8 Rob. 152; *Walker v. Allen*, 19 La. 307; *Grant v. Walden*, 6 La. 623.

[a] Although the defendant does not reside in the parish where the property is situated, notice of seizure is required. *Lamorandier v. Meyer*, 8 Rob. (La.) 152.

[b] Notice to the debtor of a debt or credit seized on execution is not required by the Louisiana code. *Labiche v. Lewis*, 12 Rob. (La.) 8.

[c] Where a defendant points out property to be taken on execution, a notice of seizure is not required. *Hewitt v. Stephens*, 5 La. Ann. 640.

[d] The mailing of notice of seizure by the levying officer to the sheriff of the parish in which the owner resides, to be served by the latter, is a reasonable mode of giving notice. *Lamorandier v. Meyer*, 8 Rob. (La.) 152.

[e] Notice on the day of seizure is sufficient. *Tompkins v. Stroud*, 16 La. 274.

74. *Ala.*—Code, 1907, §4104. *Ga. Code*, 1910, §§6031, 6033, 6039; *Estes v. Ivey*, 53 Ga. 52; *Isam v. Hooks*, 46 Ga. 309; *Solomon v. Peters*, 37 Ga.

251, 92 Am. Dec. 69. *Mich.*—*How. St.*, §11,386; *Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951. *Mo.*—*Rev. St.*, 1909, §2199; *St. Louis Brew. Assn. v. Howard*, 150 Mo. 445, 51 S. W. 1046; *Young v. Schofield*, 132 Mo. 650, 663, 34 S. W. 497. *R. I.*—*Goldsworthy v. Coyle*, 19 R. I. 323, 33 Atl. 466.

[a] Actual notice of the sale will not dispense with the notice required by statute. *Johnson v. Daniel*, 25 Tex. Civ. App. 587, 592, 63 S. W. 1032.

[b] *Computing Time for Giving Notice.*—In *Goldsworthy v. Coyle*, 19 R. I. 323, 33 Atl. 466, construing a statute requiring that notice of a levy on realty should be set up for the space of three months, it was held that in computing the time both the day of the levy and the day of sale should be excluded.

[c] In *Missouri*, (1) the statute only requires the sheriff to file notice when the judgment is not already a lien on the property. *St. Louis Brew. Assn. v. Howard*, 150 Mo. 445, 51 S. W. 1046. (2) The statute does not refer to real estate in the county in which the judgment was rendered, nor to real estate under cover of a homestead. *Smith v. Thompson*, 169 Mo. 553, 69 S. W. 1040; *Lohmann v. Stocke*, 94 Mo. 672, 8 S. W. 9; *Harper v. Hopper*, 42 Mo. 124; *Harris v. Chouteau*, 37 Mo. 165.

[d] A wrong description in a recorded notice of levy invalidates the notice as to a bona fide purchaser of the property. *Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951.

75. *Frier v. McNaughton*, 110 Mich. 22, 67 N. W. 978.

76. *Ia.*—*Bennett & Franz v. Burton*, 44 Iowa 550; *Babcock v. Gurney*, 42 Iowa 154; *Fleming v. Maddox*, 30 Iowa 239; *Jensen v. Woodbury*, 16 Iowa 515. See *Ayres v. Campbell*, 9 Iowa 213, 74 Am. Dec. 346. *N. C.*—*Borden v. Smith*,

Where, after levy and notice of levy given, the execution is enjoined, no further notice is necessary on dissolution of the injunction.<sup>77</sup>

**Effect of Failure To Give Notice.**—In some states, the statute providing for the giving of notice is directory merely,<sup>78</sup> and a failure to give notice does not ipso facto render the levy void,<sup>79</sup> vitiate the sale or affect the title of a bona fide purchaser,<sup>80</sup> but other courts hold that the nonobservance of this statutory requirement renders the sale void.<sup>81</sup>

**(II.) To Whom Given.**—It is generally required that notice be given to the judgment debtor,<sup>82</sup> and, in some states, the person in posses-

20 N. C. 27, 34. **Tenn.**—*Hinson v. Hinson*, 5 Sneed 322, 73 Am. Dec. 129; *Lafferty v. Conn*, 3 Sneed 221; *Elliott v. Shultz*, 10 Humph. 234; *Helms v. Alexander*, 10 Humph. 44; *Farquhar v. Toney*, 5 Humph. 502; *Trott & McBroom v. McGavock*, 1 Yerg. 469.

[a] **Possession alone** is insufficient; it must be coupled with actual occupation. *Christian v. Mynatt*, 11 Lea (Tenn.) 615.

[b] **Possession (1) by an agent** (*Bennett & Franz v. Burton*, 44 Iowa 550), (2) or by a tenant (*Babcock v. Gurney*, 42 Iowa 154; *Fleming v. Maddox*, 30 Iowa 239, 243), does not necessitate notice.

[c] **A notice containing a wholly false or mistaken description** of the premises is a nullity. *Helms v. Alexander*, 10 Humph. (Tenn.) 44.

77. *McMicken v. Morgan*, 9 La. Ann. 208.

78. *Cox v. Montford*, 66 Ga. 62; *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69.

79. *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285; *Cox v. Montford*, 66 Ga. 62.

80. *White v. Farley*, 81 Ala. 563, 8 So. 215; *Love & Williams v. Powell*, 5 Ala. 58; *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69.

[a] **Notice of Levy on Growing Crops.**—A statutory provision that the officer making a levy upon crops shall file a notice thereof in the office of the clerk of the township where such crops are at the time of the levy, and that such notice shall be constructive evidence of the interest of the plaintiff in the execution, is for the benefit of third persons, and a failure to file such notice does not, as between the parties, operate to limit the life of the execution to the return day there-

of. *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978.

81. **Ia.**—See *Jensen v. Woodbury*, 16 Iowa 515, holding the failure to give the statutory notice is ground for setting aside the sale. **La.**—*Lapene & Jacks v. McCan*, 28 La. Ann. 749; *Ball v. Crockett, Garland & Co.*, 9 La. Ann. 293; *Mississippi Marine & F. Ins. Co. v. Bank of Louisiana*, 11 Rob. 47; *Lamorandier v. Meyer*, 8 Rob. 152. *Compare*, *Succession of Allan v. Couret*, 24 La. Ann. 24, holding the lack of notice of seizure required by art. 735 of the Code Pr. of Louisiana is an informality which is cured by a lapse of five years. **N. C.**—*Borden v. Smith*, 20 N. C. 27, 34. **Tenn.**—*Hinson v. Hinson*, 5 Sneed 322, 73 Am. Dec. 129; *Lafferty v. Conn*, 3 Sneed 221; *Helms v. Alexander*, 10 Humph. 44; *Mitchell v. Lipe*, 8 Yerg. 179, 29 Am. Dec. 116; *Trott & McBroom v. McGavock*, 1 Yerg. 469.

82. **Ala.**—Code, 1907, §4104. **Ga.** Code, 1910, §§6031, 6033; *DeLoach & Wilcoxson v. Myrick*, 6 Ga. 410. **La.** *Ball v. Crockett, Garland & Co.*, 9 La. Ann. 293; *Lockhart v. Harrell*, 6 La. Ann. 530; *Mississippi Marine & Fire Ins. Co. v. Bank of Louisiana*, 11 Rob. 47. **Tenn.**—*Lafferty v. Conn*, 3 Sneed 221; *Richards v. Meeks*, 11 Humph. 455, 54 Am. Dec. 49.

[a] **A notice to the debtor's partner** who has a power of attorney authorizing him to act as the debtor's agent at final sale is sufficient. *Walker v. Allen*, 19 La. 307.

[b] **A service upon the defendant's attorney** is not sufficient where the defendant is himself within the state. *Ball v. Crockett, Garland & Co.*, 9 La. Ann. 293; *Lockhart v. Harrell*, 6 La. Ann. 530.

[c] **Leaving notice with a tenant** and with a woman with whom the sheriff is informed the defendant had

sion.<sup>83</sup> In others, the notice is required to be recorded.<sup>84</sup>

(III.) Waiver. — The statutory notice may be waived.<sup>85</sup>

(IV.) Presumption of Notice. — It will sometimes be presumed that the required notice was given.<sup>86</sup>

1. *Certificate of Levy*. — In some jurisdictions a sheriff, levying on realty a writ issued from another county, is required to file a certificate of levy in his own county.<sup>87</sup>

m. *Successive Levies*. — Although one levy has been made under an execution, the sheriff has power to make such further levies, during the life of the writ, as are necessary to satisfy it,<sup>88</sup> as where the property taken fails, at the sale, to bring a sufficient amount,<sup>89</sup> or

been living, is not a compliance with the Tennessee statute. *Lafferty v. Conn*, 3 Sneed (Tenn.) 221.

83. Ga. Code, 1910, §§6031, 6039; *Keaton v. Farkas*, 136 Ga. 188, 70 S. E. 1110; *Cox v. Montford*, 66 Ga. 62; *Isam v. Hooks*, 46 Ga. 309; *Deloach & Wilcoxson v. Myrick*, 6 Ga. 410.

[a] Notice to the tenants of a levy on realty is not required. *Lambeth v. Sentell*, 38 La. Ann. 691.

84. Ky.—*Donacher v. Tafferty*, 147 Ky. 337, 144 S. W. 13; *Park v. McReynolds*, 111 Ky. 651, 64 S. W. 517 (a notice in the language of the statute is sufficient, and it need not describe the property levied on); *Donacher v. Tafferty*, 147 Ky. 337, 144 S. W. 13. Mich.—*Savidge v. Seager*, 175 Mich. 47, 140 N. W. 951. Mo.—*Rev. St.*, 1909, §2199.

85. Ky.—*Williams v. Smith*, 4 Bush. 540. La.—*McDonogh v. Garland*, 7 La. Ann. 143; *Lockhart v. Harrell*, 6 La. Ann. 530; *Walker v. Allen*, 19 La. 307. N. C.—*Borden v. Smith*, 20 N. C. 27, 34. Tenn.—*Richards v. Meeks*, 11 Humph. 455, 54 Am. Dec. 49; *Carney v. Carney*, 10 Yerg. 491, 31 Am. Dec. 590; *Mitchell v. Liipe*, 8 Yerg. 179, 29 Am. Dec. 116; *Noe's Lessee v. Purchapile*, 5 Yerg. 215.

[a] Giving of bond by the claimants is deemed a waiver of the notice required by a statute making it the duty of an officer, when levying upon joint property to satisfy a debt of one of the owners, first to notify the other joint owners. *Williams v. Smith*, 4 Bush. (Ky.) 540.

[b] By Appearance at Sale.—Where the debtor appears at the time when the sale is to take place and makes no objection to the sheriff proceeding, and himself bids for the property, he is

held to have waived any objections to the notice. *Walker v. Allen*, 19 La. 307.

86. *Simmons v. McKissick*, 6 Humph. (Tenn.) 259.

[a] From Recitals of Sheriff's Deed. *Burnett v. Austin*, 10 Lea (Tenn.) 564; *Simmons v. McKissick*, 6 Humph. (Tenn.) 259; *Rogers v. Jennings*, 3 Yerg. (Tenn.) 308.

87. *Victor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 349; *People v. Finch*, 19 Colo. App. 512, 76 Pac. 1120; *Thomas v. Hebenstreit*, 68 Ill. 115.

88. Ala.—*Governor v. Powell*, 9 Ala. 83. Ga.—*Wyatt v. Chapman*, 66 Ga. 727; *Ayers v. Lamb*, 65 Ga. 627; *Marshall v. Morris*, 13 Ga. 185; *Lynch v. Pressley*, 8 Ga. 327. Ill.—*Everingham v. National City Bank*, 124 Ill. 527, 17 N. E. 26; *Montgomery v. Wayne*, 14 Ill. 373. Ind.—*Indiana Cent. Ry. Co. v. Bradley*, 15 Ind. 23. Ky.—*Morrow v. Hart*, 1 A. K. Marsh. 291. La. *Dabbs v. Hemken*, 3 Rob. 123. Me. *Bingham v. Smith*, 64 Me. 450. Mo. *Lillard v. Shannon*, 60 Mo. 522; *Hombs v. Corbin*, 20 Mo. App. 497. Neb. *Pitkin v. Burnham*, 62 Neb. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280. N. J.—*Van Waggoner v. Moses*, 26 N. J. L. 570; *Moses v. Thomas*, 26 N. J. L. 124. N. Y.—*Denvrey v. Fox*, 22 Barb. 522. N. D.—*Rev. Code*, 1905, §7110. Ohio.—*Pugh v. Calloway*, 10 Ohio St. 488. Okla.—*Comp. Laws*, 1909, §5976. Pa.—*Rudy v. Com.*, 35 Pa. 166, 78 Am. Dec. 330. Vt.—*Pierson v. Hovey*, 1 D. Chip. 51.

89. Ill.—*Montgomery v. Wayne*, 14 Ill. 373. Ind.—*Lindley v. Kelley*, 42 Ind. 294, 306. Mo.—*Moss v. Craft*, 10 Mo. 720. Pa.—*Rudy v. Com.*, 35 Pa. 166, 78 Am. Dec. 330.



where the property levied on has been restored to the defendant,<sup>90</sup> or a third party claim has been made,<sup>91</sup> or the levy fails because of some defect in it.<sup>92</sup> But he cannot make a subsequent levy after the return day.<sup>93</sup> And if he has seized property apparently sufficient to pay the execution, he cannot make another levy under it, until the property levied on has been legally disposed of and is insufficiency shown by an actual sale.<sup>94</sup>

**n. Abandonment and Release of Levy.**—(I.) By Act of Plaintiff.—

(A.) IN GENERAL.—The plaintiff may voluntarily abandon or release a levy which has been made,<sup>95</sup> though it has been held that he cannot do so when it would result in injury to third persons.<sup>96</sup> The creditor

90. *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Morrow v. Hart*, 1 A. K. Marsh. (Ky.) 291; *Ferriday v. Selcer*, Freem. Ch. (Miss.) 258.

91. *Wyatt v. Chapman*, 66 Ga. 727 (before the papers have been returned to court the creditor may have a new levy on other property of the defendant without an order of court); *Branch v. Riley*, 19 Ga. 161; *Lynch v. Pressley*, 8 Ga. 327. See *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539.

[a] Where a *feri facias* has been levied on land and a claim interposed and dismissed and the *feri facias* ordered to proceed, a levy may be made on other realty and the *feri facias* is not required to proceed on the first levy first. *Overby v. Hart*, 68 Ga. 493.

92. *Bingham v. Smith*, 64 Me. 450; *East Greenwich Inst. v. Allen*, 22 R. I. 337, 47 Atl. 885.

93. *Canfield v. Browning*, 65 N. J. L. 553, 55 Atl. 101.

As to time of levy, see *supra*, II, B, 4, f.

94. Ala.—*Rapier v. Gulf, etc. Co.*, 69 Ala. 476; *Cobb v. Cage*, 7 Ala. 619. Ark.—*Whiting & Slark v. Beebe*, 12 Ark. 421, 539. Ga.—*Marshall v. Morris*, 13 Ga. 185; *Dougherty v. Marsh*, 11 Ga. 277. Ind.—*Harmon v. State*, 82 Ind. 197; *Lindley v. Kelley*, 42 Ind. 294, 306; *Miller v. Ashton*, 7 Blackf. 29. Ia.—*Sioux City & I. F. Town Lot & Land Co. v. Walker*, 78 Iowa 476, 43 N. W. 294. Ky.—*Morrow v. Hart*, 1 A. K. Marsh. 291. Mass.—*Adams v. Drake*, 11 Cush. 504. Miss.—*McGehe v. Handley*, 5 How. 625, 629; *Ferriday v. Selcer*, Freem. Ch. 258. N. Y.—*Hoyt v. Hudson*, 12 Johns. 207. E. I.—*East Greenwich Inst. v. Allen*, 22 R. I. 337, 47 Atl. 885. S. D.—*Wood v. Conrad*,

2 S. D. 405, 50 N. W. 903. Tenn. *Hunn v. Hough*, 5 Heisk. 708.

[a] But see *Denvrey v. Fox*, 22 Barb. (N. Y.) 522, where the court says: "There is no restriction upon the officer as to the amount of property he shall take, nor is he required to levy upon the property at the same time. It would be extremely dangerous to hold that when the officer had once levied upon sufficient property to satisfy the execution, his power to levy upon more was gone. How is he to know when he has made a sufficient levy? This cannot usually be ascertained with certainty until the sale."

[b] Where the officer takes a bond or other security for the release of property levied on, he cannot hold the execution and use it afterwards to enforce payment. *Reed v. Pruynt*, 7 Johns. (N. Y.) 426, 5 Am. Dec. 287. See also *Hoyt v. Hudson*, 12 Johns. (N. Y.) 207.

As to the amount of property to be levied on, and what shall be considered in determining the amount, see *supra*, II, B, 4, h.

A levy as a satisfaction, see the title "Judgments, Satisfaction of."

95. Ind.—*Starry v. Johnson*, 32 Ind. 438. La.—*Sevey v. Chappuis* Co., 116 La. 759, 41 So. 62. N. D.—Rev. Codes, 1905, §7136. Tenn.—*Evans v. Barnes*, 2 Swan 292.

[a] With the consent of the defendants this may always be done, but where a principal and his sureties are the defendants and the property of the latter has been levied upon their consent to the release of the levy is necessary. *Walker v. Com.*, 13 Gratt. (59 Va.) 13, 45, 98 Am. Dec. 631.

[b] By oral or written order. *Dorance's Admrs. v. Com.*, 13 Pa. 160.

96. Ga.—*Ayers v. Lamb*, 65 Ga.

may abandon a levy upon property not subject to levy or which does not belong to the judgment debtor.<sup>97</sup> But when a plaintiff has elected on what property to levy and has made his levy, he cannot release the levy and seize other property unless the defendant consents.<sup>98</sup> A plaintiff who orders the sheriff to suspend proceedings,<sup>99</sup> files a petition to have the debtor adjudged a bankrupt,<sup>1</sup> or consents to a change in the nature of the property,<sup>2</sup> or does some other act inconsistent with the continuance of the levy,<sup>3</sup> is held to have abandoned the levy. An abandonment of a valid regular levy is not presumed from a subsequent irregular levy,<sup>4</sup> or by a second levy upon the same property clearly intended to be in aid of the first.<sup>5</sup>

(B.) BY DELAY. — A mere delay in making the sale does not operate as an abandonment of the levy,<sup>6</sup> but an unreasonable delay in enforcing

627. **Md.**—McCabe *v.* Goodwine, 65 Ind. 288; *Starry v. Johnson*, 32 Ind. 438. **S. C.**—Mayson *v.* Irby, 1 Rich. L. 435.

97. **Ark.**—Black *v.* Nettles, 25 Ark. 606. **N. Y.**—Blivin *v.* Bleakley, 23 How. Pr. 124. **Tenn.**—Bank of Tennessee *v.* Turney, 7 Humph. 271; Glenn *v.* Maguire, 3 Cooper's Ch. 695; Love *v.* Allison, 2 Cooper's Ch. 111.

[a] Where the sheriff levies upon land not owned by defendants, or makes an excessive levy, the plaintiff may release part of the property from the levy. Black *v.* Nettles, 25 Ark. 606.

[b] If one defendant in the execution cause a levy to be made upon the supposed personal property of a co-defendant, the plaintiff may disaffirm the act and abandon the levy, although the defendant tender the sheriff an indemnity bond. Bank of Tennessee *v.* Turney, 7 Humph. (Tenn.) 271.

98. Smith *v.* Hughes, 24 Ill. 270; Colburn *v.* Barton, 17 Ill. App. 391.

[a] The judgment creditor of two joint debtors cannot abandon a levy upon sufficient property of one of the debtors for the express purpose of levying for the whole debt, under a second execution upon the property of the other. McChain *v.* McKeon & Duffy, 2 Duer (N. Y.) 645.

99. Hickok *v.* Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632; Excelsior Needle Co. *v.* Globe Cycle Wks., 48 App. Div. 304, 62 N. Y. Supp. 538; Kauffelt's Appeal, 9 Watts (Pa.) 334.

1. *In re Sheehan*, 21 Fed. Cas. No. 12,737.

[a] Filing a creditor's bill to remove a cloud upon the property is not

an abandonment of the execution. Amick *v.* Young, 69 Ill. 542.

2. Patton, Malone & Co. *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

[a] If an engine and boiler, after being levied on under an execution, are with the consent of the execution-creditor attached to a mill by the owner, who is the debtor, with the intent that they shall become a part of the realty, the lien of the execution is thereby released. Patton, Malone & Co. *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

3. Blotcky Bros. *v.* O'Neill, 83 Iowa 574, 49 N. W. 1029.

[a] Where the execution plaintiff acquires the rights of a mortgagee of the chattels and demands immediate possession, he is deemed to have abandoned or released his levy. Blotcky Bros. *v.* O'Neill, 83 Iowa 574, 49 N. W. 1029.

[b] But a direction not to sell certain of the property levied on is not a release of the levy, at least where the property not sold was improperly levied on. Richardson *v.* Rardin, 88 Ill. 124.

4. Weldon *v.* Rogers, 157 Cal. 410, 108 Pac. 266; Davis *v.* Netterville, 68 Miss. 429, 10 So. 32.

As to right to make successive levies, see *supra*, II, B, 4, m.

5. Hawkins *v.* Johnson, 131 Ga. 347, 62 S. E. 285.

6. **Cal.**—Weldon *v.* Rogers, 157 Cal. 410, 108 Pac. 266; Lean *v.* Givens, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79. **Ga.**—Terry *v.* Bank of America, 77 Ga. 528, 3 S. E. 154, delay of one year. **Ill.**—Logsdon *v.* Spivey, 54 Ill. 104. **Ky.**—Park *v.* McReynolds,

the execution will amount to an abandonment of the levy and loss of its lien,<sup>7</sup> or an indefinite postponement of the levy.

(C.) BY DIRECTING RETURN. — An execution creditor who directs a return of the execution unsatisfied is held to have abandoned his levy.<sup>8</sup>

(D.) BY ISSUING SECOND EXECUTION. — According to some decisions the issuance of a second writ does not constitute an abandonment of a prior levy.<sup>9</sup> But others hold either that the issuance of a second

111 Ky. 651, 64 S. 517; *Locke v. Coleman*, 2 Mon. 12, 15 Am. Dec. 118; *Greer v. Simrall*, 22 Ky. L. Rep. 1037, 59 S. W. 759. **Ohio.**—*Cook v. Dinsmore*, 5 Ohio Cir. Ct. 385, 3 Ohio Cir. Dec. 189. **Pa.**—*Gillespie v. Keating*, 180 Pa. 150, 36 Atl. 641, 57 Am. St. Rep. 622; *Connell v. O'Neil*, 154 Pa. 582, 26 Atl. 607; *McLaughlin v. McLaughlin*, 85 Pa. 317. **Va.**—*Walker v. Com.*, 18 Gratt. (59 Va.) 13; Governor, to use of Fisher v. Vanmeter, 9 Leigh (36 Va.) 18, 33 Am. Dec. 221.

**Loss of priority** by instruction to postpone proceedings, see *supra*, II, B, 4, c.

[a] A delay of sixteen months after levy before instituting proceedings to sell the property does not establish the fact that the levy was abandoned. *Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79.

7. **Ga.**—*Smith v. Dickson*, 9 Ga. 400. **Ill.**—*Baldwin v. Freyendall*, 10 Ill. App. 106. **Ky.**—*Park v. McReynolds*, 111 Ky. 651, 64 S. W. 517; *Cook v. Clemens*, 87 Ky. 566, 9 S. W. 820 (two years); *Deposit Bank v. Berry's Admr.*, 2 Bush 236. **Miss.**—*Allen v. Levy*, 59 Miss. 613. **N. J.**—*Schneider v. Schmitt* (N. J. Eq.), 98 Atl. 418. **N. Y.**—*Platt v. Burckle*, 1 How. Pr. 226, delay of five years.

[a] But see *Baldwin v. Talbot*, 46 Mich. 19, 8 N. W. 565, holding that the court is not prepared to say that a failure of the officer for an unreasonable time to give notice of sale will release the property levied on.

[b] A levy may be left to sleep till it becomes stale and an estoppel or some equity arises against the enforcement of the lien or the right to keep it uncanceled. *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808. See also *Glazier v. Sawyer, Manning & Co.*, 1 Pa. Dist. 36.

[c] A third party may presume that a levy has been abandoned, where its enforcement has been delayed an un-

reasonable time. *Cook v. Clemens*, 87 Ky. 566, 9 S. W. 820.

**Leaving the property with the defendant an unreasonable time as evidence of fraud**, see *infra*, II, B, 4, t, (II).

8. **Ala.**—*Carlisle & Jones v. Godwin*, 68 Ala. 137. **Ark.**—*Slocumb, Richards & Co. v. Blackburn*, 18 Ark. 309; *State Bank v. Etter*, 15 Ark. 268. **Colo.**—*Speelman v. Chaffee*, 5 Colo. 247. **Ky.**—*May v. Ball*, 108 Ky. 180, 56 S. W. 7, 21 Ky. L. Rep. 1180, 54 S. W. 851; *Ashland B. & Sav. Assn. v. Jones & Denton*, 19 Ky. L. Rep. 615, 41 S. W. 437. **Neb.**—*Richards v. Cunningham*, 10 Neb. 417, 6 N. W. 475. **Va.**—Governor, to use of Fisher v. Vanmeter, 9 Leigh (36 Va.) 18, 33 Am. Dec. 221.

[a] But an indorsement that the sheriff returns the execution at the command of the plaintiff is not an abandonment of a previous levy. *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808.

[b] A dismissal of a levy and a withdrawal of a *feri facias* to make another levy are quite different; the former dismisses and ends the only suit, the latter multiplies suits. *Ayers v. Lamb*, 65 Ga. 627.

9. **Cal.**—*Weldon v. Rogers*, 157 Cal. 410, 108 Pac. 266; *Water Supply Co. v. Sarnow*, 6 Cal. App. 586, 92 Pac. 667. **Ill.**—*Wilson v. Gilbert*, 161 Ill. 49, 43 N. E. 792. *Contra*, *Adams v. Connelly*, 118 Ill. App. 441. **Ia.**—*Dunham v. Bentley*, 103 Iowa 136, 72 N. W. 437; *West v. St. John*, 63 Iowa 287, 19 N. W. 238. **La.**—*Elliot v. Cox*, 5 Mart. (N. S.) 285. **Ohio.**—*Mason v. Hull*, 55 Ohio St. 256, 45 N. E. 632; *Bouton v. Lord & Hathaway*, 10 Ohio 453. **Pa.**—*Menge v. Wiley*, 100 Pa. 617; In the Matter of The Glen Iron Wks., 17 Phila. 551. See *Ingham v. Snyder*, 1 Whart. 116, holding there is no abandonment where the alias *feri facias* is withdrawn before any proceedings under it are had.

[a] Alias to one county no abandon-



execution constitutes an abandonment of the levy,<sup>10</sup> or that it may be evidence tending to show an abandonment.<sup>11</sup> But the issuance of a void alias writ will not vitiate proceedings under the first writ.<sup>12</sup>

(II.) **By Act of Officer.**—(A.) **RIGHT TO ABANDON.**—An officer who has made a levy has a general right to abandon it.<sup>13</sup> When the property levied on is claimed by a stranger, the officer may abandon the levy,<sup>14</sup> or restrict the levy to the defendant's interest,<sup>15</sup> and he may release the property taken in excess of the amount required.<sup>16</sup> But it has been held that the officer making a levy cannot of his own motion release a levy and seize other property,<sup>17</sup> but such a release may be made by agreement with the debtor.<sup>18</sup>

(B.) **WHAT AMOUNTS TO ABANDONMENT.**—Acts of the officer pursuant

ment of levy in another county. *Hicks v. Ellis*, 65 Mo. 176.

10. **N. C.**—*Pasour v. Rhyne*, 82 N. C. 149; *James v. West*, 76 N. C. 290; *Martin v. Meredith*, 71 N. C. 214; *Ross v. Alexander*, 65 N. C. 576; *Yarborough v. State Bank*, 12 N. C. 23; *Scott's Exr. v. Hill*, 6 N. C. 143. See *Doe ex dem. Brazier v. Thomas*, 44 N. C. 28, holds a levy under the second execution constitutes a waiver of the first levy. **Pa.**—*Missimer v. Ebersole*, 87 Pa. 109 (the alias *feri facias* and the levy under it amount to an abandonment of the original levy); *Knelly v. Bachert*, 28 Pa. Co. Ct. 446. **Tenn.** *Alley v. Carroll*, 3 Sneed 110. But see *Evans v. Barnes*, 2 Swan 292. **Va.** *Eckhols v. Graham*, 1 Call. (5 Va.) 492.

11. *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978, not conclusive.

12. *Ewing v. Hatfield*, 17 Ind. 513.

13. **Me.**—*Fuller v. Loring*, 42 Me. 481. **Mich.**—*Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978. See *Vanosdall v. Hamilton*, 118 Mich. 533, 77 N. W. 9. **Pa.**—*Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683.

[a] It is a question of fact whether or not the sheriff abandoned possession. *Bagshawes Ltd. v. Deacon*, 2 Q. B. 173, 46 W. Rep. 618, 78 L. T. Rep. N. S. 776, 67 L. J. Q. B. 658.

[b] **Notice to Creditor Necessary.**

(1) An officer who in good faith has a reasonable doubt as to the liability of the property levied on to the execution has no right to release the levy without reasonable notice to the creditor that he would not sell without an indemnifying bond. *Powell v. Barley*, 2 Ky. Opin. 622. (2) A notice

given at twelve o'clock of the day of sale is not a sufficient notice. *Powell v. Barley*, 2 Ky. Opin. 622.

[c] But where the receptor of attached property turns out other property to the sheriff to an amount sufficient to satisfy the execution, and the sheriff levies thereon, he cannot voluntarily abandon his levy, give up the property and make the receptor liable for the amount of the execution unless the property was afterwards claimed by other persons. *Bowman v. Conant*, 41 Vt. 479.

14. *Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683.

As to third party claims, see *infra*, II, B, 6.

15. *Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683.

16. *Black v. Nettles*, 25 Ark. 606.

[a] A withdrawal from the premises is not an abandonment of a levy upon the leasehold. *Steers v. Daniel*, 4 Fed. 585. To same effect, see *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. ed. 441; *Dawson v. Daniel*, 2 Flip. 305, 7 Fed. Cas. No. 3,669.

17. *Smith v. Hughes*, 24 Ill. 270; *Colburn v. Barton*, 17 Ill. App. 391; *Miller v. Ashton*, 7 Blackf. (Ind.) 29.

[a] But if the debtor were to repossess himself of the property after levy and prevent the officer from applying it to the satisfaction of the execution, the officer would have the right to release the levy and seize other property. *Smith v. Hughes*, 24 Ill. 270.

18. *Smith v. Hughes*, 24 Ill. 270. See *Colburn v. Barton*, 17 Ill. App. 391.

to an order of court to stay proceedings will not be deemed an abandonment,<sup>19</sup> neither will the fact that he permits another officer to sell the property under a subsequent execution and levy.<sup>20</sup>

**Leaving Property With Debtor.**—A levy is not to be deemed abandoned by leaving the property with the defendant,<sup>21</sup> or by leaving the property with a keeper in a building to which the defendant has access.<sup>22</sup> But if property actually seized is unconditionally re-delivered to the defendant, the levy is abandoned.<sup>23</sup>

**(III.) Setting Aside Judgment and Execution.**—The reversal of the judgment,<sup>24</sup> or the setting aside of the execution,<sup>25</sup> operates as a release of the levy.

**(IV.) Effect of Abandonment.**—When an execution has once been abandoned, it is absolutely discharged, and no effect can afterwards

19. *Bond v. Willett*, 31 N. Y. 102. See *Chamberlin & Tapp v. Brewer*, 3 Bush (Ky.) 561 (holding a stay of levy does not discharge it); *Walker v. Com.*, 18 Gratt. (59 Va.) 13, 50, 98 Am. Dec. 631, holding mere suspension of proceedings on a levied execution does not constitute an abandonment.

20. *Miller v. Getz*, 135 Pa. 558, 19 Atl. 955, 20 Am. St. Rep. 887.

21. **U. S.**—*Vance v. Royal Clay Mfg. Co.*, 82 Fed. 251. **Ind.**—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. **Ky.**—*Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **Neb.**—*Meyer v. Michaels*, 69 Neb. 138, 95 N. W. 63, 97 N. W. 817. **Pa.**—*Smith v. Nicola Bros. Co.*, 193 Pa. 562, 44 Atl. 574; *McGinnis v. Prieson*, 85 Pa. 111; *Weir v. Hale*, 3 Watts & S. 285. See *In re Schuylkill County's Appeal*, 30 Pa. 358, referring to English practice. **S. C.** *Moss v. Moore*, 3 Hill 276. **Tenn.** *Etheridge v. Edwards*, 1 Swan 426. **Can.**—*Patterson v. McKellar*, 4 Ont. 407; *Huxtable v. Conn*, 14 Manitoba 713, where the officer attached notices to the piles of wood. See *Reid v. Creighton*, 27 Nova Scotia 90, it may be doubted whether there is an abandonment where the sheriff leaves no one in charge and makes no arrangement with those in possession to hold the property for him.

[a] But in *Roberts v. Scales*, 1 Ired. L. (N. C.) 88, the court holds that a sheriff, who after seizure of goods leaves them on the premises not separated from other goods of the debtor and for the use of the debtor, prima facie loses his property in them on the grounds of presumptive fraud or abandonment.

[b] After seizing cattle, leaving them in the inclosure until an additional levy can be made on the yearlings, does not amount to a release of the levy. *Burch v. Mounts* (Tex. Civ. App.), 185 S. W. 889.

**Leaving property with the defendant as bailee or keeper**, see *infra*, II, B, 4, t, (II).

22. *Ames v. Taylor*, 49 Me. 381.

23. **Me.**—*Plaisted v. Hoar*, 45 Me. 380. **Neb.**—*France v. Larkin*, 96 Neb. 365, 148 N. W. 86. **Ohio.**—*Ford v. Comrs. Geauga Co.*, 7 Ohio 148. **Pa.** *Schuylkill County's Appeal*, 30 Pa. 358; *Guardians of the Poor v. Lawrence*, 4 Yeates 194. **Eng.**—*Bagshawes Ltd. v. Deacon*, 2 Q. B. 173, 46 W. Rep. 618, 78 L. T. Rep. N. S. 776, 67 L. J. Q. B. 658.

But see *Howard v. Bennett*, 72 Ill. 297.

[a] Where a sheriff executing a writ lays his hand on a table and says, "I take this table," and then locks his warrant in the table drawer, takes the key and goes away without leaving anyone in possession, he abandons possession and cannot maintain trespass for the table. *Blades v. Arundale*, 1 Maule & S. 711, 105 Eng. Reprint 265.

[b] If the sheriff misconstrues the instructions received from the plaintiff in execution and relinquishes the property levied on, he may retake the property after return day. *Colton v. Camp*, 1 Wend. (N. Y.) 365.

24. *Humerton v. Hay*, 65 N. Y. 380. See *Mosely v. Gainer*, 10 Tex. 393.

25. *May v. Cooper*, 24 Hun (N. Y.) 7.

be given to it, under any circumstances.<sup>26</sup> An abandonment or release of a levy has the effect of releasing the lien of the levy,<sup>27</sup> discharging the property from the custody of the law,<sup>28</sup> and it carries with it all third oppositions.<sup>29</sup> The officer loses his special property and right of possession,<sup>30</sup> and he cannot maintain an action founded upon a right acquired by the levy.<sup>31</sup> A release of a levy rebuts the presumption of satisfaction of judgment arising from a levy upon sufficient property to satisfy it,<sup>32</sup> and a new levy may be made<sup>33</sup> unless the writ has expired.<sup>34</sup>

*o. Right To Object to.*—The debtor is the only person who can take advantage of irregularities in the levy.<sup>35</sup> The sufficiency of a levy, unless it be actually void, cannot be questioned in a collateral proceeding.<sup>36</sup>

*Waiver and Estoppel.*<sup>37</sup>—The judgment debtor may waive,<sup>38</sup> or be estopped from objecting to,<sup>39</sup> irregularities in the levy. Where the debtor furnishes a list of property to be taken in execution, or by any other act assents to the levy as having been legally made, he will not thereafter be heard to object that there was some omission or informality in the levy.<sup>40</sup> A judgment debtor who has given a forthcoming bond for the possession of the property, is thereby

26. *Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683; *Alley v. Carroll*, 3 Sneed (Tenn.) 110.

[a] "The dismissal of a levy puts an end to the case." *Ayers v. Lamb*, 65 Ga. 627.

27. *Bloteky Bros. v. O'Neill*, 83 Iowa 574, 49 N. W. 1029; *McConnell v. Denham*, 72 Iowa 494, 34 N. W. 298; *France v. Larkin*, 96 Neb. 365, 148 N. W. 86.

[a] A reservation of lien is of no effect where the levy is released. *McConnell v. Denham*, 72 Iowa 494, 34 N. W. 298.

28. *Patterson v. McKellar*, 4 Ont. (Canada) 407, 437.

29. *Sevey v. Chappuis Co.*, 116 La. 759, 41 So. 62.

30. *Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450.

31. *Marsh v. White*, 3 Barb. (N. Y.) 518.

32. *First Nat. Bank v. Rogers*, 15 Minn. 381; *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309.

*Levy as a satisfaction of judgment, see the title "Judgments, Satisfaction of."*

33. *Ferriday v. Selcer*, Freem. Ch. (Miss.) 258.

34. *Patterson v. McKellar*, 4 Ont. (Can.) 407, 437; *Castle v. Ruttan*, 4 U. C. C. P. (Can.) 252.

35. *Jewett v. Guyer*, 38 Vt. 209. See *infra*, IV, C.

[a] A stranger to the record has no right to move to quash. *Hitchcock v. Roney*, 17 Ill. 231; *Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174.

*Right of third person whose property has been levied on, to move to set aside the levy, see infra*, IV, C.

36. *Bennett v. Gamble*, 1 Tex. 124. As to collateral attack see generally the title "Judgments."

37. *Waiver of notice of levy*, see *supra*, II, B, 4, k, (III).

38. *Ia.*—*George W. Cable Co. v. Israel*, 159 N. W. 241. *Pa.*—*Philadelphia Loan Co. v. Amies*, 2 Miles 292. *Tex.* *Wilson v. Smith*, 50 Tex. 365; *Alexander v. Miller's Exrs.*, 18 Tex. 893, 70 Am. Dec. 314. *Wis.*—*Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

As to waiver of right to have personal property levied on first, see *supra*, II, B, 4, g, (VII), (B), (4).

39. *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201. See *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716.

40. *Ala.*—*Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290; *Cawthorn v. McCraw*, 9 Ala. 519. *Ga.*—*Roebuck v. Thornton*, 19 Ga. 149. *Ill.*—*McGirr v. Hunter*, 13 Ill. App. 195. *Md.*—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104. *Miss.*—*Jayne v. Dillon*, 28 Miss. 283.



estopped from denying the sufficiency of the levy,<sup>41</sup> but he may contest the validity of the writ of execution,<sup>42</sup> and the authority of the officer to make the levy.<sup>43</sup> A person is held to waive any objection as to the manner of levy by filing a claimant's bond and asserting his right to the property levied on in the summary manner provided by statute,<sup>44</sup> or by replevying the property.<sup>45</sup>

p. *Relief From Informal or Invalid Levies.*—This matter is fully discussed in a subsequent section of this article.<sup>46</sup>

q. *Presumptions.*—The statutory provisions regulating proceedings upon execution are duties which the ministerial officer of the court executing its process is required to perform; and all reasonable presumptions are to be indulged in favor of the regularity of the acts of the officer.<sup>47</sup> Where a stranger is the purchaser of the property, he has a right to presume that all the acts of the officer under the writ prior to the sale were in compliance with the law.<sup>48</sup> In the absence of a contrary showing, it will be presumed that the officer did not exceed his authority,<sup>49</sup> that he has the writ in his custody and with him until the return day,<sup>50</sup> and that the property levied on is in his

N. J.—*Avon-by-the-Sea, etc. Co. v. McDowell*, 71 N. J. Eq. 116, 62 Atl. 865; *Dean v. Thatcher*, 32 N. J. L. 470; *Caldwell v. Fifield & Matthews*, 24 N. J. L. 150. N. Y.—*Dresser v. Ainsworth*, 9 Barb. 619. Tenn.—*Ballard v. Dibrell*, 94 Tenn. 229, 28 S. W. 1087. Tex.—*Wilson v. Smith*, 50 Tex. 365. Vt.—*Clark v. Lyman*, 8 Vt. 290.

41. *Stroud v. Hancock*, 116 Ga. 332, 336, 42 S. E. 496; *Roebuck v. Thornton*, 19 Ga. 149; *Hartshorn v. Bank of Gough*, 15 Ga. App. 167, 82 S. E. 805; *Smith v. Davis*, 3 Ga. App. 419, 60 S. E. 199.

42. *Hartshorn v. Bank of Gough*, 15 Ga. App. 167, 82 S. E. 805.

43. *Hartshorn v. Bank of Gough*, 15 Ga. App. 167, 82 S. W. 805.

44. *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63.

45. *Miller v. Clements*, 54 Tex. 351.

46. See *infra*, IV, C.

47. Cal.—*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441. Colo.—*Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. Conn.—*Maples & Monroe v. Peck*, 1 Root 140. Ga.—*Booker & Prince v. Bass*, 127 Ga. 133, 56 S. E. 283; *Benson & Coleman v. Dyer*, 69 Ga. 190; *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69. Ind.—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. Ky. *Scott v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423; *White v. Laurel Land Co.*, 26 Ky. L. Rep. 775, 82 S. W. 571; *Holcomb v. Hays*, 23 Ky. L. Rep.

352, 62 S. W. 1028; *Greer v. Howard*, 4 Ky. L. Rep. 350. La.—*Hefner v. Hesse & Vergez*, 29 La. Ann. 149. Mich.—*Blair v. Compton*, 33 Mich. 414. Minn.—*Galde v. Forsyth*, 72 Minn. 248, 75 N. W. 219. N. Y.—*Cornell v. Cook*, 7 Cow. 310. S. C.—*Maddox v. Sullivan*, 2 Rich. Eq. 4, 44 Am. Dec. 234. Tenn. *Rogers v. Jennings' Lessee*, 3 Yerg. 308. Wis.—*Vilas v. Reynolds*, 6 Wis. 214.

[a] Where an officer returns that he made a levy, it is presumed that he did what was necessary for that purpose unless the contrary appears. *Hill v. Harris*, 10 B. Mon. (Ky.) 120, 50 Am. Dec. 542.

Presumption as to levy, see *supra*, II, B, 4, b, (III).

Presumption as to time of levy, see *supra*, II, B, 4, f, (IV).

Presumption as to order in which property is levied on, see *supra*, II, B, 4, g, (VII), (B), (6).

As to presumption of satisfaction of an execution from a sufficient levy, see "Judgments, Satisfaction of."

48. *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70.

49. *Booker & Prince v. Bass*, 127 Ga. 133, 56 S. E. 283.

[a] Officer Presumed To Be of the County in Which He Acted.—*Young v. Germania Sav. Bank*, 132 Ga. 490, 64 S. E. 552.

50. *Bilby v. Hartman*, 29 Mo. App. 125.

custody.<sup>51</sup> It will not be presumed from the mere fact that property has been levied upon, that its value is sufficiently great to satisfy the execution.<sup>52</sup>

r. *Questions of Law and Fact.*—What constitutes a levy is a matter of law,<sup>53</sup> but whether the necessary action has been taken is a question of fact.<sup>54</sup>

s. *Effect of Levy of an Execution.*—(I.) *Places Property in Custodia Legis.*—The seizure of property upon execution places it at once within the custody of the law.<sup>55</sup>

(II.) *Effect on the Title and Possession.*—(A.) *OF PERSONALTY.*—(1.) *As to the Debtor.*—A levy of execution upon personal property does not deprive the judgment debtor of his general title thereto,<sup>56</sup> but it divests him of his title to the extent of the title acquired by the

51. *Cummins v. Webb*, 4 Ark. 229; *Cumberland Bank v. Hann*, 19 N. J. L. 166.

52. *Lindley v. Kelley*, 42 Ind. 294, 308. *Contra*, *Ford v. Bigger*, 80 Ark. 300, 97 S. W. 65; *Cummins v. Webb*, 4 Ark. 229.

53. *Tyler v. Williams*, 53 S. C. 367, 381, 31 S. E. 298.

54. *Sevey v. Chappuis Co.*, 116 La. 759, 41 So. 62; *Quackenbush v. Henry*, 42 Mich. 75, 3 N. W. 262.

55. **U. S.**—*Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470. **Ala.**—*Atwood v. Pierson*, 9 Ala. 656. **Ark.**—*State Bank v. Etter*, 15 Ark. 268. **Ill.**—*Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Field v. Macullar*, 20 Ill. App. 392; *Gates v. People*, 6 Ill. App. 383. **Ind.**—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. **La.**—*Smith v. Berwick*, 12 Rob. 20. **Md.**—*Boyd & Hance v. Harris*, 1 Md. Ch. 466. **Mo.**—*Bilby v. Hartman*, 29 Mo. App. 125, 140. **Neb.**—*Pitkin v. Burnham*, 62 Neb. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280. **N. H.**—*Mitchell v. Roberts*, 50 N. H. 486. **N. Y.**—*People v. Hopson*, 1 Denio 574; *Smith v. Reeves*, 33 How. Pr. 183. **N. C.**—*Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38. **Ohio.**—*Tyler, Davidson & Co. v. Kuhn*, 1 Disney 405, 12 Ohio Dec. 699. **Pa.**—*Connell v. O'Neil*, 154 Pa. 582, 26 Atl. 607. **Tenn.**—*Beaumont v. Eason*, 12 Heisk. 417; *Bradley v. Kesse*, 5 Coldw. 223; *Lester's Case*, 4 Humph. 383; *Malone v. Abbott*, 3 Humph. 532; *Tyler v. Dunton*, 1 Tenn. Ch. 361. **Tex.**—*Borden v. McRae*, 46 Tex. 396; *Donald v. Carpenter*, 8 Tex. Civ. App. 321, 27 S. W. 1053. **Va.**—*Walker v. Com.*, 18

*Gratt.* (59 Va.) 13, 98 Am. Dec. 631; *Fisher v. Vanmeter*, 9 Leigh (36 Va.) 18. **W. Va.**—*August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

56. **Ala.**—*Atwood v. Pierson*, 9 Ala. 656. **Ark.**—*State Bank v. Etter*, 15 Ark. 268; *Whiting & Slark v. Beebe*, 12 Ark. 421, 539. **Ind.**—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. **La.**—*Labiche v. Lewis*, 12 Rob. 8; *Sheldon v. New Orleans C. & B. Co.*, 11 Rob. 181. **Me.**—*Plaisted v. Hoar*, 45 Me. 380; *Fuller v. Loring*, 42 Me. 481. **Minn.**—*Banker v. Caldwell*, 3 Minn. 94 (46). **N. H.**—*Folsom v. Chesley*, 2 N. H. 432; *Churchill v. Warren*, 2 N. H. 298, 9 Am. Dec. 73. **N. J.**—*Pedrick v. Kuemmel*, 74 N. J. L. 379, 65 Atl. 846. **N. Y.**—*Mumper v. Rushmore*, 79 N. Y. 19; *Green v. Burke*, 23 Wend. 490; *People v. Hopson*, 1 Denio 574; *Dillenback v. Jerome*, 7 Cow. 294. **N. C.**—*Alexander v. Springs*, 27 N. C. 475; *Popelston v. Skinner*, 20 N. C. 293. **Pa.**—*Robinson v. Hart*, 23 Pa. Super. 299. **S. C.**—*Bates v. Moore*, 2 Bail. 614. **Tenn.**—*Herman v. Katz*, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700; *Tyler v. Dunton*, 1 Tenn. Ch. 361. *Contra*, *Beaumont v. Easton*, 12 Heisk. 417, holding the debtor ceases to have any title in the property; the whole title is in the officer. **Va.**—*Walker v. Com.*, 18 *Gratt.* (59 Va.) 13, 98 Am. Dec. 631. **Eng.**—*In re Clarke*, 78 L. T. Rep. N. S. 275, 46 W. R. 337, 67 L. J. Ch. 234; *Playfair v. Musgrove*, 14 M. & W. 239, *quoting* *Giles v. Grover*, 9 Bing. 128, 23 Eng. C. L. 217, 2 M. & Scott, 197, 131 Eng. Reprint 563.

[a] The levy on an unpublished book does not deprive a debtor of any rights in it except the immediate pos-

sheriff,<sup>57</sup> and of his right to possession of the property.<sup>58</sup> It is the levy which confers upon the officer his qualified title,<sup>59</sup> rather than the delivery of the writ to him, even where the property is bound from the time of the delivery of the writ.<sup>60</sup> When the execution is satisfied, any goods remaining in the hands of the sheriff are revested in the defendant or any person to whom he may have assigned his right.<sup>61</sup> The debtor may dispose of the property in any way that does not impair the lien.<sup>62</sup> The general owner may maintain an action of trespass or trover for an unlawful intermeddling with the property seized by a stranger,<sup>63</sup> particularly where the property has been left with him as bailee.<sup>64</sup>

(2.) *As to the Officer.*—A levy of an execution upon personal property gives to the levying officer a special or limited title or property.<sup>65</sup>

session. The sheriff is guilty of a flagrant violation of his duty in copying the book and disposing of copies. *Banker v. Caldwell*, 3 Minn. 94 (46).

57. *Popelston v. Skinner*, 20 N. C. 293; *Tyler v. Dunton*, 1 Cooper's Ch. (Tenn.) 361.

See the section following.

58. La.—*Garlick v. Williams M. & Surg. Inst.*, 132 La. 670, 61 So. 732; *Paul v. Hoss*, 28 La. Ann. 852; *Winn v. Elgee*, 2 Rob. 100. Minn.—*Banker v. Caldwell*, 3 Minn. 94 (46). Pa.—*Welsh v. Bell*, 32 Pa. 12.

[a] The seizure of an incorporeal right such as an interest of a litigant in a suit before judgment deprives him of subsequent control over such suit and vests it in the sheriff. *Garlick v. Williams M. & Surg. Inst.*, 132 La. 670, 61 So. 732.

59. Mo.—*Wise v. Darby*, 9 Mo. 131. N. J.—*Wintermute v. Hankinson*, 6 N. J. L. 140. N. Y.—*Marsh v. Lawrence*, 4 Cow. 461. N. C.—*Alexander v. Springs*, 27 N. C. 475.

60. Del.—*Layton v. Steel*, 3 Harr. 512. Mo.—*Wise v. Darby*, 9 Mo. 131. N. J.—*Wintermute v. Hankinson*, 6 N. J. L. 140. N. Y.—*Marsh v. Lawrence*, 4 Cow. 461. N. C.—*Alexander v. Springs*, 27 N. C. 475. Eng.—*Payne v. Drewe*, 4 East 523, 102 Eng. Reprint 931. Can.—*Patterson v. McKellar*, 4 Ont. 407, 433.

61. Cal.—Code Civ. Proc., §691. N. C.—*Love v. Johnston*, 72 N. C. 415. S. C.—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623.

62. Ala.—*Atwood v. Pierson*, 9 Ala. 656. Ind.—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. N. Y.—*Mumper v. Rushmore*, 79 N. Y. 19. N. C.

*Alexander v. Springs*, 27 N. C. 475; *Popelston v. Skinner*, 20 N. C. 293. Pa.—*Robinson v. Hart*, 23 Pa. Super. 299. S. C.—*Bates v. Moore*, 2 Bail. 614.

63. *Marsh v. White*, 3 Barb. (N. Y.) 518.

See generally the titles "Trespass;" "Trover and Conversion."

64. *Browning v. Skillman*, 24 N. J. L. 351. *Contra*, *Smith v. Reeves*, 33 How. Pr. (N. Y.) 183.

65. U. S.—*Berry v. Smith*, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359; *Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. Ala.—*Chaney v. Burford Lumber Co.*, 132 Ala. 315, 31 So. 369; *Atwood v. Pierson*, 9 Ala. 656; *Cobb v. Cage*, 7 Ala. 619; *Higdon v. Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938. Ark.—*Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182; *Whiting & Slark v. Beebe*, 12 Ark. 421, 539. Del.—*Hargadine v. Ford*, 5 Houst. 380, 391; *Polite v. Jefferson*, 5 Harr. 388. Ga.—*Deloach & Wilcoxson v. Myrick*, 6 Ga. 410. Ill.—*Corbin v. Pearce*, 81 Ill. 461; *Pearl v. Wellman*, 8 Ill. 311; *Gates v. People*, 6 Ill. App. 383. Ind.—*Dunkin v. McKee*, 23 Ind. 447; *Walpole v. Smith*, 4 Blackf. 304; *Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. Ky.—*Huston v. Duncan*, 1 Bush 205; *Rogers v. Darnaby*, 4 B. Mon. 238; *Richardson & Letcher v. Bartley*, 2 B. Mon. 328. Me.—*Fuller v. Loring*, 42 Me. 481. Mass.—*Field v. Fletcher*, 191 Mass. 494, 78 N. E. 107; *Caldwell v. Eaton*, 5 Mass. 399. Miss.—*Cahn v. Person*, 56 Miss. 360; *Parker v. Dean*, 45 Miss. 408 (the officer has a qualified property as bailee of the law); *Wade v. Watt*, *Noble & Mobley*, 41 Miss. 243.



Many cases state broadly that by a levy the title to personalty passes to the sheriff, but it has been said that a careful review of these cases would probably show that this statement is used interchangeably with the statement that the sheriff by a levy acquires a special or limited property.<sup>66</sup>

The interest or property acquired is such as is deemed necessary to the special purpose of satisfying the execution debt,<sup>67</sup> and is some-

Mo.—Hobbs *v.* Williams, 175 Mo. App. 409, 162 S. W. 334; Hombs *v.* Corbin, 20 Mo. App. 497. Neb.—France *v.* Larkin, 96 Neb. 365, 148 N. W. 86; Pitkin *v.* Burnham, 62 Neb. 385, 87 N. W. 160, 55 L. R. A. 280. N. H. Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73. N. J.—Pedrick *v.* Kuemmel, 74 N. J. L. 379, 65 Atl. 846; Delaney *v.* Martip, 51 N. J. L. 148, 16 Atl. 189; Dean *v.* Thatcher, 32 N. J. L. 470; Browning *v.* Skillman, 24 N. J. L. 351. Compare, Hamilton *v.* Hamilton, 25 N. J. L. 544, holding the legal title is in the sheriff. N. Y.—Marsh *v.* White, 3 Barb. 518; Barker *v.* Mathews, 1 Den. 335; Green *v.* Burke, 23 Wend. 490; Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Catlin *v.* Jackson, 8 Johns. 520, 548; Dillenback *v.* Jerome, 7 Cow. 294. N. C.—Clifton *v.* Owens, 170 N. C. 607, 87 S. E. 502; Penland *v.* Leatherwood, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38; Love *v.* Johnston, 72 N. C. 415; Bland *v.* Whitfield, 46 N. C. 122; Alexander *v.* Springs, 27 N. C. 475; Seawell *v.* Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722; Sanderson *v.* Rogers, 14 N. C. 38; Doe *ex dem.* Barden *v.* McKinne, 11 N. C. 279, 15 Am. Dec. 519. Ohio.—Pugh *v.* Calloway, 10 Ohio St. 488. Pa.—Hunt *v.* Breeding, 12 Serg. & R. 37, 14 Am. Dec. 665. S. C. Mayson *v.* Irby, 1 Rich. L. 435; Bates *v.* Moore, 2 Bailey 614; Weatherby *v.* Covington, 3 Strobb. 27, 49 Am. Dec. 623. Tenn.—Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700; Fry *v.* Manlove, 1 Baxt. 256, 25 Am. Rep. 775; Evans *v.* Higdon, 1 Baxt. 245; Evans *v.* Barnes, 2 Swan 292; Bradley *v.* Kesee, 5 Coldw. 223, 94 Am. Dec. 246; Brown *v.* Allen, 3 Head 429; Lester's Case, 4 Humph. 383. Tex.—Young *v.* Smith, 23 Tex. 598, 76 Am. Dec. 81. Va.—Walker *v.* Com., 18 Gratt. (59 Va.) 13, 98 Am. Dec. 631. Eng.—Playfair *v.* Musgrove, 14 Mees. & W. 239.

paid subscription acquires no greater rights against the stockholder than the company has. Robertson *v.* Sibley, 10 Minn. 323 (253).

66. Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700. But compare, Beaumont *v.* Eason, 12 Heisk. (Tenn.) 417.

67. Popelston *v.* Skinner, 20 N. C. 293.

#### [a] Nature of Sheriff's Property.

When the sheriff makes a levy, "the law gives him the property to enable him to raise the money he is commanded to make; and the property is given as far as it is necessary for that purpose, but no farther. As far as it is vested in the sheriff, it is divested out of the defendant; but of course no farther. This interest in the sheriff is called the special property; that is to say, such a right and possession as is deemed necessary to the special purpose of satisfying the execution debt; which enables the sheriff to make a sale of it, to defend his possession and to bring an action against one who disturbs his possession before the execution has been satisfied. But it results from the very terms 'special property' that, subject to the raising of the debt, the general property is in the former owner. . . . Upon payment of the debt to the sheriff, the general and unqualified property is ipso facto in the defendant; and the sheriff loses his property without having made a sale, and without any farther or other act by him and even against his will. Again, if the sheriff make a sale for a larger sum than is due on the execution, the excess belongs to the debtor and may be recovered in an action for money had and received. . . . The interest of the sheriff is therefore limited by the purpose for which it was created; which is the creditor's satisfaction." Popelston *v.* Skinner, 20 N. C. 293. To same effect Tyler *v.* Dunton, 1 Cooper's Ch. (Tenn.) 361.

[a] A sheriff levying upon an un-

what analogous to that of an ordinary bailee of goods for the purpose of custody and sale.<sup>68</sup>

This title in the sheriff is not divested by the return of the writ,<sup>69</sup> but continues so long as the property is needed to satisfy the writ.<sup>70</sup> It does not depend upon the removal of the property from the possession of the defendant.<sup>71</sup> But if the possession of the goods is left with the defendant an unreasonable time, the officer may lose his title.<sup>72</sup>

**Right of Possession.**—Where the property and the debtor's interest therein is of such a nature that there may be an actual seizure thereof, a levy gives to the officer the right to immediate and exclusive possession.<sup>73</sup> The officer, however, acquires no greater right to the possession of the property than the debtor has.<sup>74</sup>

68. *Browning v. Hanford*, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

[a] "He is very nearly in the case of a factor del credere, the keeper and seller of goods without obligation to guaranty the sale and a lien on the proceeds to secure his compensation." *Browning v. Hanford*, 5 Hill (N. Y.) 588, 40 Am. Dec. 369.

69. *Hombs v. Corbin*, 20 Mo. App. 497; *Lester's Case*, 4 Humph. (Tenn.) 383; *Malone v. Abbott*, 3 Humph. (Tenn.) 532.

[a] It continues after the return of the execution so that he may sell without a venditioni exponas. *Malone v. Abbott*, 3 Humph. (Tenn.) 532.

As to right to make sale after the return of the writ, see *infra*, II, B, 7.

70. *Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450.

71. *Polite v. Jefferson*, 5 Harr. (Del.) 388; *Brown v. Allen*, 3 Head (Tenn.) 429.

72. *Brown v. Allen*, 3 Head (Tenn.) 429.

As to abandonment of levy, see II, B, 4, n.

As to custody of the property, see II, B, 4, t.

73. *Ala.*—*Chaney v. Burford Lumber Co.*, 132 Ala. 315, 31 So. 369. *Del.* *Davis v. White*, 1 Houst. 228. *Ind.* *Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450. *Ky.*—*Addison v. Crow*, 5 Dana 271; *McBurnie v. Overstreet*, 8 B. Mon. 300; *Rogers v. Darnaby*, 4 B. Mon. 238; *Huston v. Duncan*, 1 Bush 205. *La.*—*Garlick v. Williams M. & Surg. Inst.*, 132 La. 670, 61 So. 732; *Paul v. Hoss*, 28 La. Ann. 852; *Winn v. Elgee*, 6 Rob. 100. *Md.*—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104.

*Minn.*—*Barber v. Amundson*, 52 Minn. 358, 54 N. W. 733; *Banker v. Caldwell*, 3 Minn. 94 (46). *Miss.*—*Parker v. Dean*, 45 Miss. 408. *Neb.*—*France v. Larkin*, 96 Neb. 365, 148 N. W. 86. *N. J.*—*Dean v. Thatcher*, 32 N. J. L. 470. *N. Y.*—*Hill v. Haynes*, 54 N. Y. 153; *Dillenback v. Jerome*, 7 Cow. 294; *Lockwood v. Bull*, 1 Cow. 322, 13 Am. Dec. 539; *Catlin v. Jackson*, 8 Johns. 520, 548. *Pa.*—*Welsh v. Bell*, 32 Pa. 12; *Lewis v. Carsaw*, 15 Pa. 31. *Tenn.* *Beaumont v. Eason*, 12 Heisk. 417; *Fry v. Manlove*, 1 Baxt. 256, 25 Am. Rep. 775; *Brown v. Allen*, 3 Head 429; *Tyler v. Dunton*, 1 Cooper's Ch. 361. *Tex.* *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319; *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81; *White v. Graves*, 15 Tex. 183.

As to necessity of taking possession as part of the levy, see *supra*, II, B, 4, g, (X), (C), (5).

As to custody of property after levy, see *infra*, II, B, 5, t.

[a] **The Sheriff Has No Personal Right of Possession.**—His possession is that of the law, whose agent he is, and he has no right to use the property, or profit by its possession in any way whatever. *Banker v. Caldwell*, 3 Minn. 94 (46).

[b] **Possession of Officer as That of Creditor.**—The actual possession of the officer is not the constructive possession of the creditor, although the execution in the officer's hands was levied upon the property by his direction. *Mitchell v. Roberts*, 50 N. H. 486.

74. *Rankine v. Greer*, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751. But see *supra*, II, B, 4, g, (X), (C), (5); II, B, 4, g, (X), (E).

(3.) *As to the Creditor.*—The execution creditor does not acquire any title whatever to the property levied on,<sup>75</sup> or any right to its custody;<sup>76</sup> he obtains at best a right to have the property sold and to be paid by preference out of the proceeds of sale.<sup>77</sup> By the levy generally he can acquire no greater interest than the debtor has.<sup>78</sup>

The plaintiff in execution cannot maintain an action against a person for conversion of the property levied on;<sup>79</sup> whatever remedy he may have is against the sheriff.<sup>80</sup>

(B.) OF REALTY. — Generally a levy of an execution upon the real estate of a judgment debtor does not deprive him of his title and right of possession,<sup>81</sup> though it seems that in some states a levy upon

75. **Ga.**—*Cargle v. Knox*, 143 Ga. 597, 85 S. E. 764. **La.**—*Labiche v. Lewis*, 12 Rob. 8; *Sheldon v. New Orleans C. & B. Co.*, 11 Rob. 181. **N. H.**—*Mitchell v. Roberts*, 50 N. H. 486. **N. Y.**—*Barker v. Mathews*, 1 Denio 335. **Pa.**—*Taylor v. Manderson*, 1 Ashm. 130. **Va.**—*Walker v. Com.*, 18 Gratt. (59 Va.) 13, 98 Am. Dec. 637.

[a] If the execution creditor acquires any interest in the property levied on at all, it is merely an equitable one. *Frangé v. Larkin*, 96 Neb. 365, 148 N. W. 86.

76. **Ga.**—*Cargle v. Knox*, 143 Ga. 597, 85 S. E. 764. **Neb.**—*France v. Larkin*, 96 Neb. 365, 148 N. W. 86. **N. H.**—*Mitchell v. Roberts*, 50 N. H. 486. **N. J.**—*Tuttle v. Jackson*, 4 N. J. L. 115. **Pa.**—*Taylor v. Manderson*, 1 Ashm. 130.

77. **Ill.**—*Pearl v. Wellman*, 8 Ill. 311, 321. **La.**—*Labiche v. Lewis*, 12 Rob. 8; *Sheldon v. New Orleans C. & B. Co.*, 11 Rob. 181. **N. H.**—*Mitchell v. Roberts*, 50 N. H. 486. **Eng.**—*In re Clarke*, 78 L. T. Rep. N. S. 275, 46 W. R. 337, 67 L. J. Ch. 234. **Can.**—*Galt v. Saskatchewan Coal Co.*, 4 Manitoba 304, holding execution creditors entitled to the money on sale.

[a] After seizure and before sale, the execution creditor is, as regards the goods seized, in the position of a secured creditor. *In re Clarke*, 78 L. T. Rep. N. S. 275, 46 W. R. 337, 67 L. J. Ch. 234.

78. **Ala.**—*Jones v. Chenault*, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211. **Mich.**—*French v. De Bow*, 38 Mich. 708. **Minn.**—*Henry v. Traynor*, 42 Minn. 234, 44 N. W. 11. **Tenn.**—*Renshaw v. First Nat. Bank*, 63 S. W. 194.

79. **Neb.**—*France v. Larkin*, 96 Neb. 365, 148 N. W. 86. **N. J.**—*Tuttle v.*

*Jackson*, 4 N. J. L. 115. **N. Y.**—*Ansonia Brass, etc. Co. v. Pratt*, 10 Hun 443; *Barker v. Mathews*, 1 Denio 335; *Cohen v. Sobel*, 114 N. Y. Supp. 774. But see *Marsh v. White*, 3 Barb. 518, holding that the execution plaintiff may sue for consequential damage caused by the taking of the property, if he alleges that by reason thereof there was no sufficient property left to satisfy the levy. **Pa.**—*Gilfillan v. King*, 239 Pa. 395, 86 Atl. 925; *Taylor v. Manderson*, 1 Ashm. 130.

80. *Cohen v. Sobel*, 114 N. Y. Supp. 774.

81. **Ala.**—*Fry v. Branch Bank*, 16 Ala. 282. **Ark.**—*Whiting & Slark v. Beebe*, 12 Ark. 421, 539. **Cal.**—*Clark v. Sawyer*, 48 Cal. 133. **Colo.**—*Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. **Ky.**—*McBurnie & Overstreet*, 8 B. Mon. 300; *Addison v. Crow*, 5 Dana 271; *Huston v. Duncan*, 1 Bush 205. **La.**—*United States v. Hawkins' Heirs*, 4 Mart. N. S. 317. **Miss.**—*Butler v. Lee*, 54 Miss. 476. **N. Y.**—*Shepard v. Rowe & Peters*, 14 Wend. 260; *Catlin v. Jackson*, 8 Johns. 520. **N. C.**—*Seawell v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722; *Doe ex dem. Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519. **Tex.**—*Cavanaugh v. Peterson*, 47 Tex. 197; *White v. Graves*, 15 Tex. 183.

[a] "The only effect of the levy of an execution upon real estate is to make the actual interest of the defendant therein liable to be taken and sold to satisfy the writ, and to make the title deraigned through such sale paramount to all conveyances and incumbrances made subsequent to the levy." *Bank of British Columbia v. Page*, 7 Ore. 454.

[b] The owner's dominion is unim-



realty is a statutory conveyance vesting the title and seizin in the creditor without other conveyance.<sup>82</sup>

The sheriff acquires no interest or title in the land;<sup>83</sup> he is not entitled to its possession,<sup>84</sup> or the rents and profits;<sup>85</sup> and he cannot transfer title to a third person before sale;<sup>86</sup> he acquires only a right to enter for the purposes of sale.<sup>87</sup> The debtor may bring an action

paired except as to the *jus disponendi*. *Doe ex dem. Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519.

[c] **The death of the owner of land** after the levy, and before sale, passes the whole title to his heirs, and, without a revivor against them there is no title subject to sale by the levying officer, who could not, if he sell, pass any title to the purchaser. *Ala.*—*Fry v. Branch Bank*, 16 Ala. 282. *Ky.* *Huston v. Duncan*, 1 Bush 205. *Tenn.* *Harman v. Hann*, 6 Baxt. 90. As to revivor of judgments see the title "**Judgments and Decrees, Revival of.**"

82. *Jones v. Buck*, 54 Me. 301; *Jewett v. Whitney*, 51 Me. 233, 243; *Howe v. Willis*, 51 Me. 226; *Swanton v. Crooker*, 49 Me. 455; *Bryant v. Tucker*, 19 Me. 383; *Bartlett v. Perkins*, 13 Me. 87; *Allen v. Taft*, 6 Gray (Mass.) 552; *Cushman v. Carpenter*, 8 Cush. (Mass.) 388; *Munroe v. Luke*, 1 Met. 459; *Bartlet v. Harlow*, 12 Mass. 347; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182.

[a] **A valid levy divests the debtor** of all his interest in the estate save only a right of redemption (*Allen v. Taft*, 6 Gray [Mass.] 552), and he cannot maintain trespass for a wrong done after levy. *Allen v. Thayer*, 17 Mass. 299.

[b] **The creditor may exercise all the rights and powers incident to actual ownership and possession** and he may maintain an action of trespass or a real action against the former owner or any other person. *Munroe v. Luke*, 1 Met. (Mass.) 459; *Langdon v. Potter*, 3 Mass. 215.

[c] **In determining what passes with the levy**, the levy is construed as having the same effect as a conveyance by deed. *Waterhouse v. Gibson*, 4 Greenl. (Me.) 230.

[d] **A levy of an execution upon an equity of redemption** (1) gives to the levying creditor an irredeemable estate, discharges the debt and annihilates the relation between the parties

as debtor and creditor to the extent of the amount taken by the execution under the statute of Connecticut. *Allyn v. Burbank*, 9 Conn. 151; *Punder-son v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53. (2) In Massachusetts it divests the tenant of the equity and leaves in him only the right to redeem from the levy. *Lunt v. Cook*, 175 Mass. 1, 55 N. E. 468, 78 Am. St. Rep. 472.

[e] **The extent of an execution upon land of a stranger** gives no seisin to the creditor without an actual entry. *Larcom v. Cheever*, 16 Pick. (Mass.) 260.

83. *Ala.*—*Fry v. Branch Bank*, 16 Ala. 282. *Cal.*—*Clark v. Sawyer*, 48 Cal. 133. *Ga.*—*DeLoach & Wilcoxson v. Myrick*, 6 Ga. 410. *Ky.*—*Huston v. Duncan*, 1 Bush 205. *N. C.*—*Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502; *Doe ex dem. Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519. *Tenn.* *Harman v. Hann*, 6 Baxt. 90; *Evans v. Barnes*, 2 Swan 292. *Tex.*—*Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

84. *Ala.*—*Fry v. Branch Bank*, 16 Ala. 282. *Cal.*—*Clark v. Sawyer*, 48 Cal. 133. *Ky.*—*Addison v. Crow*, 5 Dana 271; *Huston v. Duncan*, 1 Bush 205. *N. Y.*—*Catlin v. Jackson*, 8 Johns. 520, 548. *N. C.*—*Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502; *Doe ex dem. Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519. *Tex.*—*Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319; *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81.

[a] **In Louisiana**, the sheriff may lease the premises and sue for rent. *State v. Skinner*, 33 La. Ann. 146.

85. *Fry v. Branch Bank*, 16 Ala. 282. *Contra*, *Anderson v. Comeau*, 33 La. Ann. 1119; *State v. Skinner*, 33 La. Ann. 146.

86. *Addison v. Crow*, 5 Dana (Ky.) 271.

87. *Doe ex dem. Barden v. McKinne*, 11 N. C. 279, 15 Am. Dec. 519; *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319; *Young v. Smith*, 23 Tex. 598, 76

for its recovery,<sup>88</sup> or for any injury to it,<sup>89</sup> and he may convey it subject to the lien created by the levy.<sup>90</sup>

(III.) As a Lien. — Where the judgment itself creates a lien upon property of the debtor, the levy of execution upon such property neither extends the existing lien,<sup>91</sup> nor creates a new lien;<sup>92</sup> it serves only to designate the particular property sold or to be sold.<sup>93</sup> But where the receipt of the writ by the officer creates a lien, the levy perfects the lien and renders it more specific.<sup>94</sup> If a lien has not previously accrued by virtue of the judgment or delivery of the writ, the levy has the effect of creating a lien upon the property levied on.<sup>95</sup>

(IV.) As a Satisfaction of Judgment. — The effect of levy as a satisfaction of judgment will be treated elsewhere in this work.<sup>96</sup>

(V.) As a Trespass. — The levy of a valid execution in accordance with the direction of the writ is not a trespass.<sup>97</sup>

Am. Dec. 81. See *Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502, he acquies only a naked authority to sell.

88. *Addison v. Crow*, 5 Dana (Ky.) 271.

89. *Addison v. Crow*, 5 Dana (Ky.) 271.

90. *Schenck v. Sithoff*, 75 Ind. 485; *Addison v. Crow*, 5 Dana (Ky.) 271, *disapproving* contrary dicta in *Butts v. Chinn*, 4 J. J. Marsh. 641, and *Lock v. Coleman*, 4 T. B. Mon. (Ky.) 316.

91. *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167; *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; *Bagley v. Ward*, 37 Cal. 121, 138, 99 Am. Dec. 256.

92. *Bagley v. Ward*, 37 Cal. 121, 138, 99 Am. Dec. 256.

93. *Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

94. *Ark.*—*Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182. *Ky.*—*Couchman's Admr. v. Maupin*, 78 Ky. 33; *Addison v. Crow*, 5 Dana 271. *Va.* *Walker v. Com.*, 18 Gratt. (59 Va.) 13, 98 Am. Dec. 631.

[a] The levy completes the authority of the officer to sell and gives continuance both to the authority and the lien which would otherwise expire with the return of the writ. *Addison v. Crow*, 5 Dana (Ky.) 271.

95. *U. S.*—*United States v. Drennen*, *Hempst.* 320, 25 Fed. Cas. No. 14,992; *Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. *Ala.* *Chaney v. Burford Lumber Co.*, 132 Ala. 315, 31 So. 369. *Cal.*—*Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79, *explaining* *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21

Am. St. Rep. 26; *Barrett v. Sims*, 59 Cal. 615 (on homestead); *Clark v. Sawyer*, 48 Cal. 133; *Low v. Adams*, 6 Cal. 277. *Ill.*—*Pearl v. Wellman*, 8 Ill. 311, 321; *Garner v. Willis*, 1 Ill. 368. *Ky.* *Payne v. Pollard*, 3 Bush 127; *Glazebrook & Bro. v. Brandon*, 3 Ky. L. Rep. 466. *Mich.*—*Bliss v. Slater*, 144 Mich. 648, 108 N. W. 86. *Minn.*—*Knox v. Randall*, 24 Minn. 479, 496; *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *Tullis v. Brawley*, 3 Minn. 277. *Miss.* *Cahn v. Person*, 56 Miss. 360. *Mo.* *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497. *N. Y.*—*People v. Hopson*, 1 Denio 574. *N. C.*—*Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38. *Okla.*—*Moore v. Calvert*, 8 Okla. 358, 58 Pac. 627. *Tenn.* *Martin v. Hann*, 6 Baxt. 90. *Tex.* *Braden v. Gose*, 57 Tex. 37; *Cundiff v. Teague*, 46 Tex. 475; *Borden v. McRae*, 46 Tex. 396.

[a] Lien on Equity of Redemption. Where a levy on land does not create a lien upon the owner's equity of redemption, a second levy is necessary therefor. *Glazebrook & Bro. v. Brandon*, 3 Ky. L. Rep. 466. *Compare supra*, II, B, 4, g, (XI), (J), (1).

[b] A levy on a debt due the execution debtor creates a lien in the sense that the creditor acquires a right to have the debt applied on his judgment, and in effect makes the debtor of the execution debtor a trustee of the amount so due. *Lindskog v. Schouweiler*, 12 S. D. 176, 80 N. W. 190.

96. See the title "Judgments, Satisfaction of."

97. *Wing v. Hussey*, 71 Me. 185; *Mikeska v. Leon*, 63 Tex. 44.

t. *Custody of Property Levied on.*—(I.) In General. —From the time of seizure, the officer should keep possession of the property.<sup>93</sup> He may retain possession either by himself,<sup>99</sup> or he may leave the property with some third person,<sup>1</sup> a receiptor,<sup>2</sup> or even with the debtor himself,<sup>3</sup> which act constitutes such person the agent,<sup>4</sup> servant,<sup>5</sup> bailiff or bailee<sup>6</sup> of the sheriff. If property is left in its place,

Necessity that officer levying on personalty do acts which would render him a trespasser but for the writ, see *supra*, II, B, 4, g, (X), (B).

98. **Ga.**—Sheffield *v.* Key, 14 Ga. 528. **Ill.**—Gaines *v.* Becker, 7 Ill. App. 315. **Ky.**—Com. *v.* Taylor, 8 Ky. Opin. 105. **N. Y.**—Beekman *v.* Lansing, 3 Wend. 446, 20 Am. Dec. 707; In the Matter of Pond, 21 Misc. 114, 46 N. Y. Supp. 999. **Pa.**—Trovillo *v.* Tilford, 6 Watts 468, 31 Am. Dec. 484. **S. C.**—Collins *v.* Montgomery, 2 Nott & McC. 392; Moss *v.* Moore, 3 Hill 276.

[a] "The officer must maintain his possession and control to such an extent that the property could not probably be taken from his custody without his knowing it." Caffery *v.* Choctaw Coal & M. Co., 95 Mo. App. 174, 68 S. W. 1049.

[b] The failure to keep a watchman in charge of the property and prevent the debtor from resuming possession does not of itself render a levy void. Sullivan *v.* Franklin Bank, 6 Ohio Cir. Ct. N. S. 468, 28 Ohio Cir. Ct. 813.

As to degree of care requisite, see *infra*, II, B, 4, t, (III).

99. **Ga.**—Sheffield *v.* Key, 14 Ga. 528, 529. **Ill.**—Smith *v.* Hughes, 24 Ill. 270. **Ind.**—State *ex rel.* Bennett *v.* Nelson, 1 Ind. 522. **Pa.**—Trovillo *v.* Tilford, 6 Watts 468, 471, 31 Am. Dec. 484; McHugh *v.* Malony, 4 Phila. 59. **S. C.**—Moss *v.* Moore, 3 Hill 276. **Tenn.** Etheridge *v.* Edwards, 1 Swan 426.

1. **U. S.**—Very *v.* Watkins, 23 How. 469, 16 L. ed. 522. **Conn.**—Fowler *v.* Bishop, 31 Conn. 560. **Ga.**—Sheffield *v.* Key, 14 Ga. 528, 529; James *v.* Pepper, 10 Ga. App. 266, 73 S. E. 407. **Ill.**—Smith *v.* Hughes, 24 Ill. 270. **Ind.**—Hadley *v.* Hadley, 82 Ind. 95; Cooley *v.* Harper, 4 Ind. 454. **Ky.**—McBurnie *v.* Overstreet, 8 B. Mon. 300; Richardson & Letcher *v.* Bartley, 2 B. Mon. 328; Com. *v.* Taylor, 8 Ky. Opin. 105. **Me.**—Ames *v.* Taylor, 49 Me. 381. **Mich.**—Vanosdall *v.* Hamilton, 118 Mich. 533, 77 N. W. 9; Stilson *v.* Gibbs, 46 Mich. 215, 9 N. W. 254. **Minn.**—Horgan *v.*

Lyons, 59 Minn. 217, 60 N. W. 1099. **N. H.**—Waitt *v.* Thompson, 43 N. H. 161, 80 Am. Dec. 136. **N. Y.**—Beekman *v.* Lansing, 3 Wend. 446, 20 Am. Dec. 707. **Pa.**—Dorrance's Admrs. *v.* Com., 13 Pa. 160; Trovillo *v.* Tilford, 6 Watts 468, 31 Am. Dec. 484; McHugh *v.* Malony, 4 Phila. 59. **R. I.**—Hartshorn *v.* Ives, 4 R. I. 471. **S. C.**—Moss *v.* Moore, 3 Hill 276. **Tenn.**—Brown *v.* Allen, 3 Head 429; Evans *v.* Higdon, 1 Baxt. 245; Tyler *v.* Dunton, 1 Cooper's Ch. 361. **Vt.**—Flanagan *v.* Hoyt, 36 Vt. 565, 86 Am. Dec. 675. **Va.**—Bullitt's Exrs. *v.* Winstons, 1 Munf. (15 Va.) 269.

2. Horgan *v.* Lyons, 59 Minn. 217, 60 N. W. 1099.

[a] The receipt is not required to set forth in detail or describe minutely and with particularity the parties, the court and other facts appearing in full on the execution. Burk *v.* Webb, 32 Mich. 173.

[b] A mistake in the receipt in the name of the township where the farm lay which does not mislead the parties will not release the receiptor. Burk *v.* Webb, 32 Mich. 173.

As to rights and liabilities of a receiptor, see *infra*, II, B, 4, t, (VI).

As to forthcoming bonds, see the title "Forthcoming Bonds."

3. See *infra*, II, B, 4, t, (II).

4. **Ga.**—James *v.* Pepper, 10 Ga. App. 266, 73 S. E. 407. **Ind.**—Hadley *v.* Hadley, 82 Ind. 95. **Minn.**—Horgan *v.* Lyons, 59 Minn. 217, 60 N. W. 1099. **N. J.**—Hamilton *v.* Hamilton, 25 N. J. L. 544; Cumberland Bank *v.* Hann, 19 N. J. L. 166; Cashier *v.* Peterson, 4 N. J. L. 317. **N. Y.**—Smith *v.* Reeves, 33 How. Pr. 183. **S. C.**—Huger's Admrs. *v.* Osborne, 1 Bay 319.

5. **Ga.**—James *v.* Pepper, 10 Ga. App. 266, 73 S. E. 407. **N. Y.**—Smith *v.* Reeves, 33 How. Pr. 183. **Pa.**—Trovillo *v.* Tilford, 6 Watts 468, 31 Am. Dec. 484.

6. **Ala.**—McCullough *v.* McClintock, 88 Ala. 567, 7 So. 149; Easley *v.* Walker, 10 Ala. 671. **Ind.**—Hadley *v.* Hadley, 82 Ind. 95; Davis *v.* Crow, 7 Blackf.



the officer should either remain with it, or place some one over it as his deputy or bailee.<sup>7</sup> He has a right to leave the property in the hands of any person he might select as custodian.<sup>8</sup> Although the defendant or the third person, as the case may be, may have the custody, the possession of the property is deemed to be in the sheriff.<sup>9</sup>

(II.) Leaving Property With Defendant.—An officer who has levied an execution may leave the property levied on with the debtor as his agent or bailee.<sup>10</sup> The officer may leave the property with the defendant and take a forthcoming bond,<sup>11</sup> or he may leave it with him

129. **Ky.**—*McBurnie v. Overstreet*, 8 B. Mon. 300; *Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **N. J.**—*Hamilton v. Hamilton*, 25 N. J. L. 544; *Browning v. Skillman*, 24 N. J. L. 351; *Cumberland Bank v. Hann*, 19 N. J. L. 166. **N. Y.**—*Dezell v. Odell*, 3 Hill 215, 38 Am. Dec. 628. **Ohio.**—*Pugh v. Calloway*, 10 Ohio St. 488. **Pa.**—*Trovillo v. Tilford*, 6 Watts 468, 31 Am. Dec. 484. **S. C.**—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623.
- [a] *Bailee at Will.*—*Haywood v. Sledge*, 14 N. C. 338.
7. *Bilby v. Hartman*, 29 Mo. App. 125.
8. *People v. National Mut. Ins. Co.*, 19 App. Div. 247, 46 N. Y. Supp. 102.
- [a] *Wife of Debtor.*—The sheriff may leave the property with the wife of the debtor without the consent of the husband debtor. *McCullough v. McClintock*, 88 Ala. 567, 7 So. 149.
9. **Ala.**—*Easley v. Walker*, 10 Ala. 671. **Ga.**—*James v. Pepper*, 10 Ga. App. 266, 73 S. E. 407. **Ind.**—*Hadley v. Hadley*, 82 Ind. 95. **Ky.**—*Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **La.**—*Smith v. Berwick*, 12 Rob. 20. **N. J.**—*Browning v. Skillman*, 24 N. J. L. 351; *Cumberland Bank v. Hann*, 19 N. J. L. 166. **Tenn.**—*Etheridge v. Edwards*, 1 Swan 426.
10. **Ala.**—*McCullough v. McClintock*, 88 Ala. 567, 7 So. 149. **Ark.**—*Tucker v. Bond*, 23 Ark. 268. **Del.**—*Polite v. Jefferson*, 5 Harr. 388. **Ga.**—*Corniff v. Cook*, 95 Ga. 61, 67, 22 S. E. 47; *Roebuck v. Thornton*, 19 Ga. 149. **Ill.**—*Logsdon v. Spivey*, 54 Ill. 104. **Ind.**—*Cooley v. Harper*, 4 Ind. 454. **Ky.**—*Herman Goepper & Co. v. Phoenix Brew. Co.*, 115 Ky. 708, 74 S. W. 726; *McBurnie v. Overstreet*, 8 B. Mon. 300; *Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **La.**—*Paul v. Hoss*, 28 La. Ann. 852; *Smith v. Berwick*, 12 Rob. 20. **Md.**—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104. **Minn.**—*Horgan v. Lyons*, 59 Minn. 217, 60 N. W. 1099. *Compare, Wilson v. Powers*, 21 Minn. 193. **Neb.**—*Meyer v. Michaels*, 69 Neb. 138, 95 N. W. 63, 97 N. W. 817; *Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. **N. J.**—*Dean v. Thatcher*, 32 N. J. L. 470; *Caldwell v. Fifield & Matthews*, 24 N. J. L. 150; *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547; *Cumberland Bank v. Hann*, 19 N. J. L. 166; *Wintermute v. Hankinson*, 6 N. J. L. 140; *Cliver v. Applegate*, 5 N. J. L. 479; *Casher v. Peterson*, 4 N. J. L. 317. **N. Y.**—*Cornell v. Dakin*, 38 N. Y. 253; *Bond v. Willett*, 31 N. Y. 102; *Roth v. Wells*, 29 N. Y. 471; *Butler v. Maynard*, 11 Wend. 548, 27 Am. Dec. 100; *Beekman v. Lansing*, 3 Wend. 446, 20 Am. Dec. 707; *Mills v. Thursby*, 11 How. Pr. 121. **N. C.**—*Gilkey v. Dickerson*, 10 N. C. 293. **Ohio.**—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85; *Pugh v. Calloway*, 10 Ohio St. 488. **Pa.**—*Braden's Estate*, 165 Pa. 184, 30 Atl. 746; *Dixon v. White S. M. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659; *Wood v. Vanarsdale*, 3 Rawle 401; *Trovillo v. Tilford*, 6 Watts 468, 31 Am. Dec. 484. **S. C.**—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623; *Huger's Admrs. v. Osborne*, 1 Bay 319. **Tenn.**—*Brown v. Allen*, 3 Head 429; *Etheridge v. Edwards*, 1 Swan 426; *Tyler v. Dunton*, 1 Tenn. Ch. 361. **Va.**—*Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269.
- But see *Field v. Fletcher*, 191 Mass. 494, 78 N. E. 107.
- [a] Where the plaintiff, on delivering the writ to the sheriff directs him not to proceed to sale without further orders, the sheriff may leave the goods in possession of the defendant. *Cumberland Bank v. Hann*, 19 N. J. L. 166.
- As to right of defendant to maintain action for conversion of the property, see II, B, 4, s, (II), (A), (1).
11. **Ga.**—*Roebuck v. Thornton*, 19

without any bond,<sup>12</sup> at the risk of the plaintiff or of the sheriff, or on obtaining a receiptor for their delivery on demand.<sup>13</sup>

The mere fact that goods taken on execution are left with the defendant until sale will not vitiate the levy,<sup>14</sup> but it may render the levy fraudulent and void as to subsequent execution creditors.<sup>15</sup> This would not follow, however, if the character of the property seized is such that it cannot be removed.<sup>16</sup> According to some decisions, permitting the property levied on to remain with the debtor an unreasonable time is deemed fraudulent or at least evidence of fraud as against creditors and purchasers.<sup>17</sup> But it has been held that gen-

Ga. 149. **Ill.**—*Smith v. Hughes*, 24 Ill. 270. **Ind.**—*State v. Nelson*, 1 Ind. 522. **Ky.**—*Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **N. Y.**—*Ray v. Harcourt*, 19 Wend. 495. **N. C.**—*Bland v. Whitfield*, 46 N. C. 122. **Tenn.**—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736.

As to forthcoming bonds, see the title "Forthcoming Bonds."

12. **Ky.**—*Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **N. J.**—*Cumberland Bank v. Hann*, 19 N. J. L. 166. **N. Y.**—*Ray v. Harcourt*, 19 Wend. 495. **N. C.**—*Bland v. Whitfield*, 46 N. C. 122. **Tenn.**—*Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; *Brown v. Allen*, 3 Head 429.

[a] **Statute Is Directory.**—The statute authorizing a delivery bond when the property is left with the defendant is directory. *Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736.

13. *Browning v. Hanford*, 5 Hill (N. Y.) 588, 40 Am. Dec. 369; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446.

14. **Ark.**—*Tucker v. Bond*, 23 Ark. 268. **Ill.**—*Logsdon v. Spivey*, 54 Ill. 104. **N. J.**—*Caldwell v. Fifield & Matthews*, 24 N. J. L. 150; *Cumberland Bank v. Hann*, 19 N. J. L. 166; *Casher v. Peterson*, 4 N. J. L. 317. **N. Y.**—*Russell v. Gibbs*, 5 Cow. 390. **N. C.**—*Sawyer v. Bray*, 102 N. C. 79, 8 S. E. 885, 11 Am. St. Rep. 713, explaining *Roberts v. Scales*, 23 N. C. 88; *Harding v. Spivey*, 30 N. C. 63. **Ohio.**—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85. **Pa.**—*Com. v. Strenbach*, 3 Rawle 341, 24 Am. Dec. 351. **Tenn.**—*Etheridge v. Edwards*, 1 Swan 426; *Tyler v. Duntun*, 1 Tenn. Ch. 361.

15. **U. S.**—*Fields v. Crawford*, 2 Hayw. & H. 256, 30 Fed. Cas. No. 18,

296; *Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. **Ill.**—*Logsdon v. Spivey*, 54 Ill. 104; *Davidson v. Waldron*, 31 Ill. 120, 135, 83 Am. Dec. 206. **Ind.**—*Zug v. Laughlin*, 23 Ind. 170. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218. **N. C.**—*Sawyer v. Bray*, 102 N. C. 79, 8 S. E. 885, 11 Am. St. Rep. 713; *Roberts v. Scales*, 23 N. C. 88; *Mangum v. Hamlet*, 30 N. C. 44. **Pa.**—*Schuylkill County's Appeal*, 30 Pa. 358, referring to English practice.

[a] An agreement dispensing with an actual seizure although binding the sheriff and the debtor is not sufficient to keep off other creditors. *Lowry v. Coulter*, 9 Pa. 349. To same effect, see *Ray v. Harcourt*, 19 Wend. (N. Y.) 495.

16. *Rew v. Barber*, 3 Cow. (N. Y.) 272, 278; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442.

[a] In the case of a growing crop, there is no presumption of fraud arising from leaving the crop where it was found. *Whipple v. Root*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442.

17. **U. S.**—*Berry v. Smith*, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359. **Ala.**—*Easley v. Walker*, 10 Ala. 671; *Cobb v. Cage*, 7 Ala. 619. **Haw.**—*Ferry v. Hakalau Plantation Co.*, 21 Hawaii 745. **Ill.**—*Windmiller v. Chapman*, 139 Ill. 163, 28 N. E. 979; *Logsdon v. Spivey*, 54 Ill. 104; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Minor v. Herriford*, 25 Ill. 344. **Ky.**—*Richardson & Letcher v. Bartley*, 2 B. Mon. 328. **Mass.**—*Field v. Fletcher*, 191 Mass. 494, 78 N. E. 107, six weeks. **N. J.**—*Cumberland Bank v. Hann*, 19 N. J. L. 166. **Ohio.**—*Murphy & Bro. v. Swadener*, 33 Ohio St. 85. **Pa.**—*Dixon v. White Sewing Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683; *Schuylkill County's Appeal*, 30 Pa. 358; *Wood v.*

erally this conduct must be connected with the plaintiff;<sup>18</sup> as where he, desiring to favor the debtor, instructs the sheriff to delay and not proceed with the execution and the goods are left in the debtor's possession and use.<sup>19</sup> A reasonable indulgence to the debtor to enable him to raise money to save the property from sacrifice would not have this effect, however.<sup>20</sup> There may be cases, undoubtedly, where an unreasonable delay, or an omission to urge the sheriff to do his

Vanarsdale, 3 Rawle 401; *Com. v. Stremback*, 3 Rawle 341, 24 Am. Dec. 351 (fourteen months); *Glazier v. Sawyer*, 11 Pa. Co. Ct. 34 (fifteen months); *McHugh v. Malony*, 4 Phila. 59. **Tenn.** *Anderson v. Talbot*, 1 Heisk. 407; *Etheridge v. Edwards*, 1 Swan 426.

But see *Berry v. Smith*, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359, rejecting the expressions of the judges as in the text as loose and unsatisfactory.

[a] As to subsequent creditors and purchasers, it is indispensable that the officer reduce the property to such possession that he can receive it or place it in charge of a custodian within a reasonable time. *Logsdon v. Spivey*, 54 Ill. 104.

[b] The officer must follow up a levy within a reasonable time by taking possession in such manner as to apprise everybody of its having been so taken in execution. *Samuel v. Knight & Co.*, 9 Pa. Super. 352.

[c] **It Is Evidence of Fraud Only.** Leaving the goods with the defendant for an unreasonable time will not per se postpone the execution in favor of a subsequent execution but will be evidence more or less strong that the execution is kept on foot for fraudulent purposes. *Caldwell v. Fifield & Matthews*, 24 N. J. L. 150.

[d] **A delay of a day or night is not unreasonable** where the officer remains on the premises with them. *Rives v. Porter*, 29 N. C. 74.

[e] **Unless the debtor shall tender a delivery bond, to constitute a valid levy on personalty, as against creditors, the officer must take possession of the property within a reasonable time after levy.** *Logsdon v. Spivey*, 54 Ill. 104. See the title "**Forthcoming Bonds.**"

18. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390; *Rew v. Barber*, 3 Cow. (N. Y.) 272, 278; *Doty v. Turner*, 8 Johns. (N. Y.) 20. *Compare*, *Castle v. Ruttan*, 4 U. C. C. P. (Can.) 252, holding the effect of the sheriff's conduct as re-

spects third persons and other creditors is the same whether it is directed by the plaintiff or spontaneous with the sheriff.

[a] Where the plaintiff directed the sheriff to levy, but told the officer he did not wish to distress the defendant and that if the sheriff permitted the property to remain he would not consider the sheriff responsible if it was squandered, there are no instructions to delay the proceedings after seizure, the sheriff only inferred a consent to the delay and the levy is not fraudulent as against a subsequent execution. *Doty v. Turner*, 8 Johns. (N. Y.) 20.

19. **U. S.**—*In re Ferguson*, 95 Fed. 429; *Berry v. Smith*, 3 Wash. C. C. 60, 3 Fed. Cas. No. 1,359. **Ark.**—*Tucker v. Bond*, 23 Ark. 268. **Miss.**—*Jayne v. Dillon*, 28 Miss. 283. **N. Y.**—*Rew v. Barber*, 3 Cow. 272, 278; *Kellogg v. Griffin*, 17 Johns. 274; *Storm v. Woods*, 11 Johns. 110; *Doty v. Turner*, 8 Johns. 20; *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; *Excelsior Needle Co. v. Globe Cycle Wks.*, 48 App. Div. 304, 62 N. Y. Supp. 538. **Pa.**—*Appeal of Larzelere Co.*, 9 Sad. 538, 13 Atl. 85; *Corlies v. Stanbridge*, 5 Rawle 286; *Com. v. Stremback*, 3 Rawle 341, 24 Am. Dec. 351; *Dunham, Buckley & Co. v. Rundle*, 4 Pa. Super. 174. **Tenn.** *Anderson v. Talbot*, 1 Heisk. 407; *Etheridge v. Edwards*, 1 Swan 426. **Eng.**—*Bradley v. Wyndham*, 1 Wils. K. B. 44, 95 Eng. Reprint 483; *Rice v. Serjeant*, 7 Mod. 37, 87 Eng. Reprint 1078; *Edwards v. Harben*, 2 T. R. 587, 596, 100 Eng. Reprint 315.

*Compare*, *James v. Burnet*, 20 N. J. L. 635, holding an agreement to stay proceedings made in good faith for the relief of the defendant without design to prejudice other creditors is not fraudulent as against bona fide purchasers.

20. *Daugherty v. Daugherty*, 13 Pa. Dist. 531.



duty will be construed into a consent of the creditor to the delay.<sup>21</sup> Where the property is left in the defendant's exclusive possession to be used by him in the same way as it was used previously the levy is fraudulent and void against subsequent executions,<sup>22</sup> or there is, at least, evidence of fraud.<sup>23</sup>

(III.) **Care of Property.** — In reference to the care and management of property levied on, much is left to the judgment of the officer.<sup>24</sup> But in the exercise of his authority he should proceed cautiously and prudently, for he is liable to be called to account.<sup>25</sup> The officer has power to make necessary expenditures for the preservation of the property seized, but the rule is not uniform as to his right to work or hire out the live stock to cover the expense of their custody.<sup>26</sup>

Where the officer levies upon promissory notes he may maintain an action upon them and collect them.<sup>27</sup>

(IV.) **Offspring of Animals.** — The offspring of an animal in the cus-

21. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390; *Doty v. Turner*, 8 Johns. (N. Y.) 20. And see *Farrington v. Sinclair*, 15 Johns. (N. Y.) 428.

[a] **An indulgence of six months** when no other creditor is pressing, is not evidence of a fraudulent intent to use the levy as security. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

22. **U. S.**—*Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. **Ark.**—*Tucker v. Bond*, 23 Ark. 268. **Pa.**—*Truitt Bros. & Co. v. Ludwig, Kneeder & Co.*, 25 Pa. 145; *Morrison & Steele's Appeal*, 1 Pa. 13; *Dunham, Buckley & Co. v. Rundel*, 4 Pa. Super. 174.

[a] Where the goods are permitted to remain with the defendant so as to give him a false credit, the creditor loses his lien. *Knox v. Summers*, 4 Yeates (Pa.) 477.

23. *Farrington v. Sinclair*, 15 Johns. (N. Y.) 428; *Caldwell v. Fifield & Matthews*, 24 N. J. L. 150 (*reexamining* *Cumberland Bank v. Hann*, 19 N. J. L. 166, and holding the levy is not in such case per se fraudulent but the fact that the defendant is permitted to use the property as his own may afford strong evidence of a fraudulent intent sufficient to postpone the execution); *Casher v. Peterson*, 4 N. J. L. 317.

24. *Ladd v. Newell*, 34 Minn. 107, 24 N. W. 366.

[a] **The officer seizing a crop of ripening fruit** should provide for the picking, packing or selling of such

fruit or permit the defendant to do so. *Wilson v. Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849.

25. *Ladd v. Newell*, 34 Minn. 107, 24 N. W. 366.

[a] **The threshing of grain** levied on in the stack is not such an abuse of the officer's authority as to render him a trespasser ab initio. *Ladd v. Newell*, 34 Minn. 107, 24 N. W. 366; *Galbraith v. Fortune*, 10 U. C. C. P. 109 (where the officer was allowed his expenses in threshing the wheat). But in *Stilson v. Gibbs*, 40 Mich. 42, it was held that an officer has no authority to thresh wheat he has levied upon in the mow, before selling it.

26. See the following: **Ala.**—Civ. Code, 1907, §4103. **Ill.**—Rev. St., 1909, ch. 77, §40. **La.**—Code Prac., arts. 661, 662. **Mass.**—Rev. Laws, 1902, p. 1599. **Miss.**—Code, 1906, §3972. **N. C.**—Rev., 1905, §§637, 638. **Vt.**—St., 1894, §1797. **W. Va.**—Code, 1906, §1315.

[a] **A constable has no authority to work animals** which he has taken on an execution, to pay the expense of keeping them. *Bushey v. Rath*, 45 Mich. 181, 7 N. W. 802.

27. *Mower v. Stickney*, 5 Minn. 397; *Rohrer v. Turrill*, 4 Minn. 407.

[a] **Duty To Prosecute Action Seized.**—Where the interest of a plaintiff in a pending suit is seized, although the code does not impose upon the sheriff the duty to prosecute the suit, it might be his duty to do so where delay might prejudice the rights of the debtor. *Garlick v. Williams M. & Surg. Inst.*, 132 La. 670, 61 So. 732.

tody of the officer is as much in the officer's possession as the mother.<sup>28</sup>

(V.) **Actions Concerning the Property.**<sup>29</sup>—By a levy on property the officer acquires a qualified property right in it that he may protect by means of an appropriate action,<sup>30</sup> such as an action of trespass,<sup>31</sup>

28. *Talbot v. Magee*, 59 Mo. App. 347; *Blum v. Light*, 81 Tex. 414, 16 S. W. 1090.

[a] Although calves born of cattle the separate property of the wife are community property and subject to the claims of the husband's creditors, calves born after a levy of an execution against the husband upon the wife's cattle, are not subject to the execution lien. There was no lien on the cows, and therefore no lien could attach to the progeny, although after birth they may be subject to the execution. *Blum v. Light*, 81 Tex. 414, 16 S. W. 1090.

29. **Right of creditor to sue for the property**, see *supra*, II, B, 4, s, (II), (A), (3).

**Right of debtor to sue**, see *supra*, II, B, 4, s, (II), (A), (1).

**Right of receptor to sue**, see *infra*, II, B, 4, t, (VI).

30. **Del.**—*Hargadine v. Ford*, 5 Houst. 380, 391. **Ill.**—*Mulheisen v. Lane*, 82 Ill. 117; *Gates v. People*, 6 Ill. App. 383. **Ind.**—*Dunkin v. McKee*, 23 Ind. 447. **Ky.**—*Addison v. Crow*, 5 Dana 271. **Md.**—*Horsey v. Knowles*, 74 Md. 602. 22 Atl. 1104. **Mass.**—*Field v. Fletcher*, 191 Mass. 494, 78 N. E. 107. **Mich.**—*Vanosdall v. Hamilton*, 118 Mich. 533, 77 N. W. 9. **Minn.**—*Horgan v. Lyons*, 59 Minn. 217, 60 N. W. 1099. **Miss.**—*Parker v. Dean*, 45 Miss. 408. **N. J.**—*Browning v. Skillman*, 24 N. J. L. 351; *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547; *Casher v. Peterson*, 4 N. J. L. 317; *Tuttle v. Jackson*, 4 N. J. L. 115; *Brink v. Decker*, 3 N. J. L. 902. **N. Y.**—*Clearwater v. Brill*, 4 Hun 728; *Barker v. Mathews*, 1 Denio 335; *Earl v. Camp*, 16 Wend. 562; *People v. Church*, 2 Wend. 262; *Hotchkiss v. M'Vickar*, 12 Johns. 403; *Dickinson v. Oliver*, 112 App. Div. 806, 99 N. Y. Supp. 432; *Cohen v. Sobel*, 114 N. Y. Supp. 774. **N. C.**—*Rives v. Porter*, 29 N. C. 74; *Popelston v. Skinner*, 20 N. C. 293; *Seawell v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722. **Ohio.**—*Pugh v. Calloway*, 10 Ohio St. 488; *Wadsworth v. Parsons*, 6 Ohio 449; *Wright v. Lep-*

*per*, 2 Ohio 297; *Massie's Heirs v. Long*, 2 Ohio 287. **Pa.**—*Gilfillan v. King*, 239 Pa. 395, 86 Atl. 925; *Welsh v. Bell*, 32 Pa. 12. **S. C.**—*Weatherby v. Covington*, 3 Strobb. 27, 49 Am. Dec. 623. **Tenn.**—*Tyler v. Dunton*, 1 Cooper's Ch. 361. **Vt.**—*Sewell v. Harrington*, 11 Vt. 141; *Whitney v. Ladd*, 10 Vt. 165.

See generally the title "Sheriffs, Constables and Marshals."

[a] **Where Writ Is Void.**—The right of an officer to bring an action for goods levied upon by him depends upon his special property and liability over; if the process be void, he cannot maintain an action for the taking of the goods. *Earl v. Camp*, 16 Wend. (N. Y.) 562.

[b] **Effect of Instructions Not To Sell.**—The fact that the plaintiff in execution, after a levy has been made upon property, and after it has been wrongfully taken and converted by the defendant, gave the officer instructions not to sell certain other property levied upon, especially where it is shown that such other property was improperly levied upon, does not deprive the officer of his right to maintain trover against the defendant, or have the effect to release the levy. *Richardson v. Rardin*, 88 Ill. 124.

[c] **Where a levy is invalid in part** because some of the property was not subject to the execution, it is invalid to that extent only, and its subsequent release as to such property cannot affect the right of the officer to recover for the property rightfully levied upon and improperly converted by another. *Richardson v. Rardin*, 88 Ill. 124.

[d] **The process under which the seizure was made**, need not be set forth in the complaint. *Penland v. Leatherwood*, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

[e] **Attachment is not the proper remedy against a defendant who repossesses himself of his property after levy.** *Gates v. People*, 6 Ill. App. 383; *People v. Church*, 2 Wend. (N. Y.) 262.

31. **Ala.**—*Whitsett v. Womack*, 8

detinue,<sup>32</sup> replevin,<sup>33</sup> or trover.<sup>34</sup> This is true although he may have delivered the actual custody to the defendant or a third person.<sup>35</sup> If the person in whose custody the goods are placed wrongfully refuses to deliver the property to the officer, the latter may bring an action of replevin,<sup>36</sup> trover,<sup>37</sup> trespass,<sup>38</sup> or assumpsit.<sup>39</sup> In Louisiana the sheriff may maintain ejectment in a proper case.<sup>40</sup>

(VI.) Rights and Liabilities of Receptor. — When a sheriff delivers the

Ala. 466; Cobb v. Cage, 7 Ala. 619; Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 So. 938. **Ill.**—Garner v. Willis, 1 Ill. 368; Gates v. People, 6 Ill. App. 383. **Ky.**—Rogers v. Darnaby, 4 B. Mon. 238; Richardson & Letcher v. Bartley, 2 B. Mon. 328. **La.**—Paul v. Hoss, 28 La. Ann. 852; Winn v. Elgee, 6 Rob. 100. **Mass.** Gibbs v. Chase, 10 Mass. 125. **Miss.** Parker v. Dean, 45 Miss. 408. **N. J.** Browning v. Skillman, 24 N. J. L. 351; James v. Burnet, 20 N. J. L. 635; Lloyd v. Wyckoff, 11 N. J. L. 218; Casher v. Peterson, 4 N. J. L. 317. **N. Y.**—Marsh v. White, 3 Barb. 518; Lockwood v. Bull, 1 Cow. 322, 13 Am. Dec. 539; Catlin v. Jackson, 8 Johns. 520, 548. **N. C.**—Bland v. Whitfield, 46 N. C. 122. **Pa.**—Welsh v. Bell, 32 Pa. 12; Taylor v. Manderson, 1 Ashm. 130. **S. C.**—Huger's Admrs. v. Osborne, 1 Bay 319. **Tenn.**—Malone v. Abbott, 3 Humph. 532. **Wis.**—Gallagher v. Bishop, 15 Wis. 276.

See generally the title "Trespass."

[a] Where the sheriff delivers the property to a receptor for a specified time, he is not entitled to possession and cannot maintain trespass for the property. Lewis v. Carsaw, 15 Pa. 31.

32. Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 So. 938; Parker v. Dean, 45 Miss. 408.

33. **Del.**—Polite v. Jefferson, 5 Harr. 388. **Ill.**—Gates v. People, 6 Ill. App. 383. **Ind.**—Dunkin v. McKee, 23 Ind. 447. **Mass.**—Field v. Fletcher, 191 Mass. 494, 78 N. E. 107. **Miss.**—Parker v. Dean, 45 Miss. 408. **Mo.**—Hobbs v. Williams, 175 Mo. App. 409, 162 S. W. 334. **Neb.**—France v. Larkin, 96 Neb. 365, 148 N. W. 86. **N. J.**—Dean v. Thatcher, 32 N. J. L. 470. **Wis.** Gallagher v. Bishop, 15 Wis. 276.

34. **Ala.**—Whitsett v. Womack, 8 Ala. 466; Cobb v. Cage, 7 Ala. 619; Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 S. 938. **Del.**—Hargadine v. Ford, 5 Houst. 380, 391. **Ill.**

Richardson v. Rardin, 88 Ill. 124; Garner v. Willis, 1 Ill. 368; Gates v. People, 6 Ill. App. 383. **Ky.**—Rogers v. Darnaby, 4 B. Mon. 238; Richardson & Letcher v. Bartley, 2 B. Mon. 328. **Mich.**—Vanosdall v. Hamilton, 118 Mich. 533, 77 N. W. 9. **N. J.**—Hamilton v. Hamilton, 25 N. J. L. 544; James v. Burnet, 20 N. J. L. 635; Brewster v. Vail, 20 N. J. L. 56; Lloyd v. Wyckoff, 11 N. J. L. 218; Casher v. Peterson, 4 N. J. L. 317; Brink v. Decker, 3 N. J. L. 902. **N. Y.**—Marsh v. White, 3 Barb. 518; Dezell v. Odell, 3 Hill 215, 38 Am. Dec. 628; Lockwood v. Bull, 1 Cow. 322, 13 Am. Dec. 539; Catlin v. Jackson, 8 Johns. 520, 548. **Pa.**—Taylor v. Manderson, 1 Ashm. 130. **S. C.**—Huger's Admrs. v. Osborne, 1 Bay 319. **Tenn.**—Malone v. Abbott, 3 Humph. 532.

35. **Del.**—Polite v. Jefferson, 5 Harr. 388. **N. J.**—Browning v. Skillman, 24 N. J. L. 351. **N. Y.**—Dezell v. Odell, 3 Hill 215, 38 Am. Dec. 628.

36. Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.

37. **Ala.**—Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 So. 938. **Ga.**—James v. Pepper, 10 Ga. App. 266, 73 S. E. 407. **N. Y.**—Dezell v. Odell, 3 Hill 215, 38 Am. Dec. 628; Lockwood v. Bull, 1 Cow. 322, 13 Am. Dec. 539.

38. Trovillo v. Tilford, 6 Watts 468, 31 Am. Dec. 484, trespass vi et armis.

39. **Ala.**—Higdon v. Warrant Warehouse Co., 10 Ala. App. 496, 63 So. 938. **Conn.**—Maples & Munroe v. Peck, 1 Root 140. **N. Y.**—Dezell v. Odell, 3 Hill 215, 38 Am. Dec. 628; Lockwood v. Bull, 1 Cow. 322, 13 Am. Dec. 539.

[a] An averment that the judgment and execution remain unpaid and unreversed is not necessary in such an action. Maples & Munroe v. Peck, 1 Root (Conn.) 140; Hartshorn v. Halsey, 1 Root (Conn.) 92.

40. State v. Skinner, 33 La. Ann. 146.



property to a receiptor, he does not wholly part with his lien.<sup>41</sup> Some cases hold that the receiptor is the mere agent or servant of the sheriff, without any special interest or rights in the property, and that he cannot maintain an action for conversion of or injury to the property.<sup>42</sup> But others hold he has a sufficient interest to enable him to maintain an action against the wrongdoer.<sup>43</sup> It is the duty of the receiptor to deliver up the property on demand.<sup>44</sup> In some states the receiptor's obligation is not absolute,<sup>45</sup> and he is not bound by the receipt if the officer is not liable to any one for a failure to hold or sell the property on the writ.<sup>46</sup> He may assert title to the property himself,<sup>47</sup> or show that he delivered the property to the true owner,<sup>48</sup> or that the property is exempt.<sup>49</sup> But in other jurisdictions he is estopped to deny his liability to the officer for the property covered by the receipt,<sup>50</sup> and cannot question the want of a sufficient legal execution or judgment,<sup>51</sup> or deny a delivery to him of the property.<sup>52</sup> His liability, in any event, will depend somewhat upon the provisions of his contract.<sup>53</sup> Where he is bound to deliver

41. *Pierson v. Hovey*, 1 D. Chip. (Vt.) 51.

42. Ga.—*James v. Pepper*, 10 Ga. App. 266, 73 S. E. 407. Mass.—*Warren v. Leland*, 9 Mass. 265; *Ludden v. Leavitt*, 9 Mass. 104, 6 Am. Dec. 45. N. Y.—*Smith v. Reeves*, 33 How. Pr. 183; *Dillenback v. Jerome*, 7 Cow. 294.

43. *Davis v. Crow*, 7 Blackf. (Ind.) 129; *Burk v. Webb*, 32 Mich. 173.

44. *Burk v. Webb*, 32 Mich. 173; *Pierson v. Hovey*, 1 D. Chip. (Vt.) 51.

[a] **Demand After Return Day.** Where the statute authorizes the sheriff who has begun the service of an execution before return day to complete it afterwards, he may make a demand for the property of the receiptor after return day. *Burk v. Webb*, 32 Mich. 173.

45. *Stephens v. Vaughan*, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216; *Perry v. Williams*, 39 Wis. 339.

46. *Stevens v. Curtiss*, 3 Conn. 260; *Perry v. Williams*, 39 Wis. 339; *Main v. Bell*, 27 Wis. 517. See *Reed v. Tousley*, 1 Root (Conn.) 374.

[a] **The officer can enforce the agreement to deliver the property, or recover damages for a breach of it, only when that is necessary to enable him to answer his obligations to some party having an interest in such seizure.** *Perry v. Williams*, 39 Wis. 339; *Main v. Bell*, 27 Wis. 517.

47. *Perry v. Williams*, 39 Wis. 339.

48. *Stephens v. Vaughan*, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216; *Perry v. Williams*, 39 Wis. 339.

49. But see *Stephens v. Vaughan*, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216.

50. Neb.—See *Bloedorn v. Jewell*, 34 Neb. 649, 52 N. W. 367. N. J.—*Hamp-ton v. Swisher*, 4 N. J. L. 66. N. Y.—*Cornell v. Dakin*, 38 N. Y. 253; *People ex rel. Knapp v. Reeder*, 25 N. Y. 302; *Dezell v. Odell*, 3 Hill 215, 38 Am. Dec. 628.

51. *Burk v. Webb*, 32 Mich. 173.

52. *Burk v. Webb*, 32 Mich. 173.

53. *Mason v. Aldrich*, 36 Minn. 283, 30 N. W. 884.

[a] "Much of the apparent conflict among the authorities upon the subject of the nature and extent of the liability of receiptors of property to officers, has arisen from a failure to discriminate between contracts which, although coming under the general denomination of 'accountable receipts,' are yet clearly distinguishable from each other." If the receiptor's contract be a contract of indemnity, the receiptor will not be allowed to prove title in a third person, because for a valuable consideration (the release of the property) he had made an absolute agreement either to deliver on demand certain property, which he agreed to be the debtor's, or, in default, to pay a stipulated sum. On the other hand if the contract be one of bailment merely, he may always excuse himself for nondelivery by showing the goods were not the property of the debtor, but of a third person, into

the property and does not do so on demand, the sheriff has a remedy against him by an action at law.<sup>54</sup>

whose possession they have gone. Mason v. Aldrich, 36 Minn. 283, 36 N. W. 884. 54. Burk v. Webb, 32 Mich. 173; Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.	[a] The declaration in trover against a receiptor need not allege that the execution is in full force and ef- fect at time of making demand for the property. Burk v. Webb, 32 Mich. 173.
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